



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 1227 OF 2013

HESBON K. LIMISI.....APPLICANT

VERSUS

DELILAH ACHIENG MATHEWS..... 1ST RESPONDENT

ARGWINGS KODHEK OCHIELY2ND RESPONDENT

THE CHIEF LANDS REGISTRAR, NAIROBI.....3RD RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 11th October 2013 in which the Plaintiff/Applicant seeks for an injunction restraining the Defendants from transferring and/or registering any dealing with Flat No. F situated on Block No. MF 32 in Madaraka Estate within L. R. No. 25980 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit and that the Defendants/Respondents do bear the costs of this Application.

The Application is premised upon the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Hesbon K. Limisi, sworn on 11th October 2013 in which he averred that sometime around 3rd February 2010, he entered into a sale agreement with the 1st Defendant/Respondent to purchase the suit property at a purchase price of Kshs. 4.4 million for which he made payments to the National Housing Corporation as well as directly to the 1st Defendant/Respondent until payment in full. He explained that the 1st Defendant/Respondent has purchased the suit property from the National Housing Corporation and still owed some money to that institution which was yet to transfer the suit property into her name after which she would transfer the same to the Plaintiff. Further, he averred that he took over possession of the suit property but upon the 1st Defendant’s request to continue occupying the same as his tenant, he conceded and they entered into a Tenancy agreement effective 1st July 2010. Further, he averred that they continued extending the tenancy agreements upon the 1st Defendant’s request and he conceded because she was paying rent promptly. He further averred that he was in any event waiting for the 1st Defendant/Respondent to transfer the house to him. He further stated that he recently came to learn that there was a 3rd Party in the suit property and upon investigation came to learn that the 1st Defendant/Respondent had fraudulently signed a second sale agreement between her and the 2nd Defendant/Respondent selling to him the suit property. He then stated that it was with this

background that he is seeking for an injunction order forbidding any dealing, transfer and/or registration of the suit property to any third party pending the hearing and determination of this suit.

The Application is supported by the 1st Defendant/Respondent who filed her Replying Affidavit sworn on 24th October 2013 wherein she admitted that she owes the 2nd Defendant/Respondent Kshs. 5.5 million based on a purported agreement with him to refund him the money and he in turn forfeits any claim to the suit property. She stated that she would pay back that sum within 90 days. She further stated that she would surrender the suit property and the title deed thereto to the Plaintiff/Applicant based on the prior agreement she had with him.

The Application is contested. The 2nd Defendant/Respondent filed his Replying Affidavit sworn on 11th November 2013 in which he averred that he came to know the 1st Defendant/Respondent through a newspaper advertisement that had been placed wherein a three bedroomed apartment was offered for sale at Madaraka for Kshs. 6.3 million. He confirmed having responded thereto and called the number displayed whereupon he came into contact with a man by the name John M. Okoth who introduced him to the 1st Defendant/Respondent. He further confirmed that after negotiations with the 1st Defendant/Respondent, they agreed upon a purchase price of Kshs. 5.5 million for the suit property. He further averred that he entered into a sale agreement to purchase the suit property on 10th May 2013 and has to date paid the whole purchase price to the 1st Defendant/Respondent. He confirmed that thereafter the 1st Defendant/Respondent executed a transfer in his favour which is awaiting execution by the Lessor and the Management Company. He confirmed having taken possession of the suit property in July 2013 and has spent some money to renovate the same before renting it out. He contested the Plaintiff's claim to the suit property and stated that there is no harm that the Plaintiff will suffer if the orders sought herein are not granted since he is not in possession of the suit property.

In response thereto, the Plaintiff/Applicant filed his Further Affidavit sworn on 19th November 2013 in which he averred that he was in possession of the suit property with the 1st Defendant/Respondent as his tenant. He further buttressed his argument that he could not get a direct transfer of the suit property from the Lessor National Housing Corporation but had to wait for the transfer to the 1st Defendant/Respondent who would in turn transfer the same to him.

Both the Plaintiff and the 2nd Defendant/Respondent filed their written submissions which have been read and taken into account in this ruling.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The case before this court pits the Plaintiff against the 2nd Defendant who have rival claims to the suit

property. The Plaintiff has laid claim to the suit property for which he swore he paid the total purchase price of Kshs. 4.4 million to the 1st Defendant/Respondent. The 2nd Defendant/Respondent has made a similar rival claim over the suit property, claiming that he paid the total purchase price of Kshs. 5.5 million to the 1st Defendant/Respondent for the suit property. Even the issue of who is in possession has been strongly contested with the Plaintiff claiming to be in possession after conceding to renting the same to the 1st Defendant/Respondent while the 2nd Defendant/Respondent claims to have rented the suit property out to a tenant. The 1st Defendant/Respondent does not admit it directly but she tacitly acknowledges the Plaintiff's claim to the suit property by averring that when she refunds the 2nd Defendant/Respondent all the money he paid her for the suit property, she will then hand over the house and the title deed thereto to the Plaintiff. This case being the Plaintiff's, the onus is on him to show this court that he has a "right" which has apparently been infringed and which calls for an explanation or rebuttal. My observation is that to this stage, none of the parties to this suit have demonstrated their ownership to the suit property by exhibiting a title document. The 1st Defendant/Respondent, who is at the centre of this dispute, has been in possession of the suit property as a tenant of the National Housing Corporation. While there is an argument that she has now paid off the entire purchase price to the National Housing Corporation for the suit property, she has not exhibited any title document over the suit property to this court. It follows therefore that neither the Plaintiff nor the 2nd Defendant/Respondent have exhibited any title documents to the suit property. Both the Plaintiff/Applicant and the 2nd Defendant/Respondent have exhibited sale agreements as well as evidence of payment of the purchase price for the suit property. To that extent therefore, I am of the view that at this interlocutory stage of these proceedings, the Plaintiff/Applicant has not established a prima facie case with a probability of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

"The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied..."

In light of the foregoing, I hereby dismiss the Plaintiff's Application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 6th DAY OF JUNE 2014

MARY M. GITUMBI

JUDGE