Hamisi & 2 others v Kanyi & another (Environment & Land Case E025 of 2023) [2024] KEELC 5298 (KLR) (17 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5298 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E025 OF 2023

SM KIBUNJA, J

JULY 17, 2024

BETWEEN

ZIPPORAH ANDIA HAMISI .... 1ST PLAINTIFF

NADZUA MKALA MWAEGA .... 2ND PLAINTIFF

DORCAS NDANU WAMBUA .... 3RD PLAINTIFF

AND

DAVID MUREITHI KANYI .... 1ST DEFENDANT

STANBIC BANK KENYA LIMITED .... 2ND DEFENDANT

(Notice of Motion Dated 15th January 2024)

RULING

1. The plaintiffs moved the court through the amended notice of motion dated January 15, 2024, seeking the following orders:

    1. “Spent.
    2. Spent.
    3. That pending the hearing and determination of this suit there be and is hereby issued an order of injunction to restrain the Defendants either by themselves officers, agents, employees, assigns or any person acting on their behalf from disposing of, leasing, renting or in any manner whatsoever dealing with or interfering with the plaintiffs use, ownership and occupation of all the property known as Sub division 933/IV/MN.
    4. That costs of this application be borne by the Defendants jointly and severally.”

The said application is supported by eleven [11] grounds on its face and supported by the affidavit of Zipporah Andia Hamisi, the 1st plaintiff, sworn on September 22, 2023, in which she *inter alia* deposed they bought maisonette numbers 1 to 4 , at Mtwapa Creek Estate, from the 1st defendant in 2015; that they have not received their title of grants as the 1st defendant claims that the sectional properties registry in the Mombasa lands registry was not yet operational; that the 1st and 2nd defendants houses are on the suit property, but the agreement for sale reads a different property number, and a survey conducted on instructions of their advocates found out that the title number in the agreement for sale and the physical location of the suit properties were different; that she immediately conducted a search on the true title number of LR 993/IV/MN (hereafter the suit property) and found out that the same had been charged to the 2nd defendant to secure a loan of Ksh. 21,000,000 vide a charge dated September 25, 2023; that they (plaintiffs) had not given consent for the suit property to be charged; that the plaintiffs and their families live on the suit property and if the application is not allowed, they may be rendered homeless.

2. The 2nd defendant opposed the application through the replying affidavit of Edna Omangi, Manage Recoveries and Rehabilitation, sworn on February 7, 2024, in which she *inter alia* deposed that the court had no jurisdiction as the dominant issue arose from the 2nd defendant exercise of its statutory power of sale, in respect of a loan facility advanced to the 1st defendant and secured by a legal charge; that the suit property was used together with others to secure a charge of Ksh. 21,000,000 as a first ranking legal charge; that before advancing the loan facility, the 2nd respondent conducted due diligence to confirm ownership and any encumbrances; that the 2nd defendant engaged a valuer who also confirmed that the suit property does not have encumbrances; that the 2nd defendant is a stranger to the plaintiffs and they have no contractual relationship; she concluded that the agreements for sale relied on by the plaintiffs show different title numbers and were executed at different times, and hence could not be a mistake as alleged by the plaintiffs; that since there were no deeds of variation of the said agreements for sale, then it remains that the plaintiffs did not purchase maisonette units on the suit property; that the 1st and 3rd plaintiffs' agreement are clear that they bought units on subdivision No. MN/section 1V/934 and 919 respectively, and not on the suit property; that the sale agreements have not undergone the whole registration process, specifically the seal of the stamp duty; that the plaintiffs did not exhaust the option of first entering cautions or restrictions on the suit property; that they affixed the statutory notice dated June 5, 2023 on the suit property; that as per the completion dates of April 6, 2015, and December 30, 2015 the plaintiffs have been indolent in enforcing their claim; that statutory power of sale is a process which he termed as 90 days notice to redeem, 45 days notice to show intention to sell and finally auctioneer's 45 days notice to redeem, of which the plaintiffs have not demonstrated has served upon the 1st defendant, or even an advertisement in the newspaper dailies; that there being no transfer as required under section 43(2) of the *LRA* Cap 300, the only remedy for the plaintiffs is damages for breach of contract; that the plaintiffs have therefore not established any imminent threat to grant the orders sought being granted.

3. On the February 15, 2024, the court issued directions on the filing and exchanging of submissions. Consequently, the learned counsel for the plaintiffs and 2nd defendant filed their submissions dated the April 22, 2024 and April 24, 2024 respectively, which the court has considered.

4. The issues for the court's determinations are as follows:

   a. Whether the court has jurisdiction in this suit.

   b. Whether the plaintiffs have met the threshold for the injunction order sought to issue at this interlocutory stage.

c. Who pays the costs in the suit?

5. The court has after considering the grounds on the notice of motion, affidavit evidence by the parties, submissions by the two learned counsel, superior courts decisions cited thereon, come to the following determinations:

   a. The court has to satisfy itself as to its jurisdiction in this matter as the 2nd defendant has raised the issue, and alleges that this claim is founded on the 2nd defendant's exercise of statutory power of sale and hence out of this court's jurisdiction. In the famous case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989) the court held:

      > "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

   b. I have carefully perused the plaint herein dated September 22, 2023 and the prayers, that are for *inter alia* a declaration that the 1st defendant is in breach of the various agreements of sale; an order of specific performance of the said agreements resulting in issuances of sub leases; and a permanent injunction against the defendants from interfering with the suit in any manner. According to the plaintiffs they bought maisonettes from the 1st defendant and have lived in them for several years. That they later discovered the maisonettes in their agreements for sale were on a different parcel from the ones they were living in. Further, that the property the houses they were living in had already been charged by 1st defendant to the 2nd defendant. It follows therefore, that the plaintiffs claim is not based on the 2nd defendant's statutory power of sale under the charge it has with the 1st defendant. What the plaintiffs want is for their agreements of sale that they entered with the 1st defendant to be enforced, which is essentially a claim of, and an issue of ownership of land. Section 13 (2) (d) of the *Environment and Land Court Act* No. 19 of 2011 states as follows:

      > "(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and.... "

      The court therefore, has jurisdiction to hear and determine the claim as framed by the plaintiffs in their pleadings.

   c. With regards to temporary injunctions, Order 40 rule 1 of the *Civil Procedure Rules* provides as follows:

      > "Where in any suit it is proved by affidavit or otherwise—
      >
      > (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
      >
      > (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the

> plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

The principles that guide the court in temporary injunction are already well settled by the superior courts like in the case of *Giella versus Cassman Brown* (1973) EA 358. In the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR the Court of Appeal held that;

> " in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

d. With respect to a *prima facie case* the Court of Appeal in *Mrao Ltd versus First American Bank of Kenya Ltd* (2003) eKLR the court stated that:

> " ... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

In this case, there are three agreements for sale between the 1st defendant and the three plaintiffs, executed on December 4, 2014 and November 28, 2014. They reportedly paid full purchase price and even moved into their respective maisonette units, The property where their units are located is now under threat of statutory power of sale, as the 1st defendant charged it for Kshs.21 million to the 2nd defendant, without their knowledge or consent. The 2nd defendant blames the plaintiffs for not conducting due diligence when purchasing their properties from the 1st defendant. The 1st defendant has to date neither responded to the plaint nor the instant application.

e. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR the court stated as follows about irreparable injury;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a *prima facie case* is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

The plaintiffs claim that they live on the maisonette units with their families. That the said units have become their matrimonial homes and they are at risk of being rendered homes due

to the acts of the 1st defendant of using a different plot reference in the agreements from the one their units are located, which he then proceeded to charge to the 2nd defendant without their consent. That is an issue that needs to be addressed, as it is likely to expose the plaintiffs to irreparable loss of losing their homes.

f. In the case of *Stanley Kipruto Bommet v National Bank of Kenya & Another* (2017) eKLR, the court held that the potential loss of the applicant's matrimonial home before determination of the suit, should the respondent be allowed to exercise their statutory power of sale amounted to irreparable injury, as it extinguishes the plaintiff's rights to use , occupation and quiet enjoyment to the suit property, while the plaintiffs stayed in the said property even before it was charged by the defendants. That is exactly the position in this suit. The charge transactions between the defendants evidently occurred after the sale transactions between the plaintiffs and 1st defendant, and after the plaintiffs had taken possession. Even if the predominant issue in this matter was the 2nd defendant's exercise of statutory power of sale, which it is not, there would still be reasonable grounds for the court to consider issuing the injunction order. I therefore find that the plaintiffs will likely suffer irreparable injury, if the order sought is not granted.

g. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR the court defined the concept of balance of convenience as:

> "The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

In this matter, the balance of inconvenience tilts more in favour of the plaintiffs, than for the 2nd defendant, for the reason that the plaintiffs have shown they have families on the houses that are on the suit property. This finding will not pose any prejudice or injustice to any of the defendants, as the 2nd defendant had deposed that it is yet to complete the process of issuing of notices that preceeds a sale.

h. According to Section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya, the costs always follow the event unless where is a good reason to depart from the general rule. In this instance, I am of the view that costs abide the outcome of the suit.

6. Flowing from the foregoing determinations, the court finds and orders as follows:

a. That the amended notice of motion dated January 15, 2024 is with merit.

b. The said amended notice of motion is allowed in terms of prayer 3.

c. The costs in the application to abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA

In the presence of:

Plaintiffs : M/s Nabwana

Defendants : Mr. Nafula for 2nd Defendant

Leakey – Court Assistant.