



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 1110 OF 2013

CALIPH PROPERTIES LIMITED.....APPLICANT

VERSUS

BARBEL SHARMA.....1ST RESPONDENT

LAWRENCE KAMEIWA NJENGA.....2ND RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 2nd December 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants from dealing in any way with the parcel of land known as L.R. No. 1/921 Kasuku Road, Nairobi (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit and further that the Court do issue an order of inhibition restraining any dealings of any nature on the suit property pending the hearing and determination of this suit. The Plaintiff/Applicant further seeks for this court to grant it leave to amend its plaint to include Leonard Kameiwa Njenga as a party (2nd Defendant) in this suit and the amended plaint be deemed to be properly filed.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Ashif Gulam, a Director of the Plaintiff, sworn on 2nd December 2013 in which he averred that the Plaintiff company owns the property adjacent to the suit property being L.R No. 1/922 Kasuku Road Nairobi (hereinafter referred to as the “Adjacent Property”). He then averred that pursuant to a Sale Agreement dated 6th January 2010, the 1st Defendant agreed to sell to the Plaintiff a portion measuring approximately sixty square metres to be excised out of the suit property (hereinafter referred to as the “said portion”). He then stated that despite this, the 1st Defendant has now sold the suit property to the 2nd Defendant without giving the Plaintiff a notice to complete the sale of the said portion. He added that the 1st Defendant totally refused to take any steps at all to facilitate the sale completion and excising of the said portion by failing to assist the Plaintiff to acquire the rates clearance certificate or present the original title documents.

The Application is contested. The 1st Defendant, Barbel Sharma, filed her Replying Affidavit sworn on 20th December 2013 in which she averred that it is true that she entered into a Sale Agreement dated 6th January 2010 with the Plaintiff for the sale of the said portion. She averred further that the Sale Agreement clearly stipulated that the completion date shall be 30 days from the issuance by the

authorities of the documents for the sub-division and amalgamation or extend of the border as the case may be. She further averred that when the Plaintiff was in possession of the aforesaid documents, her Advocates released the completion documents to the Plaintiff's Advocates for use in registering the sub-division. She further averred that it was incumbent upon the Plaintiff at the stage of the transaction to present the sub-division documents for registration in terms of clause 5 of the special conditions of the Sale Agreement. She further stated that though all the completion documents were promptly availed to the Plaintiff, it held them for over a period of 2 years without completing the transaction and that without disclosing any reason why the same were never registered returned the documents in the same condition in which they were given. She further stated that the return of the completion documents to her was a clear indication that the sale had abated due to non-completion and if anything, the Plaintiff is the sole author of its misfortune. She confirmed that in the circumstances, she proceeded to sell the suit property to the 2nd Defendant. She concluded by stating that it was the Plaintiff which was indolent and that equity does not aid such a party.

The Application is further contested by the 2nd Defendant, Dr. Kamenwa Njenga, sworn on 11th March 2014 in which he averred that by an agreement for sale made between the 1st Defendant and himself on the 26th February 2013, the 1st Defendant sold to him her entire interest in the suit property for a consideration of Kshs. 60 million. He further stated that the sale and transfer of the suit property into his name was not subject to any interest that the Plaintiff allegedly has in the suit property. He further stated that the Plaintiff has no actionable interest in the suit property capable of founding the basis of a suit or at all as purported. He further stated that there was no notice on the title to the suit property of the purported Plaintiff's interest because there exists no such interest. He further stated that he is therefore an innocent purchaser for value without notice. He added that the Plaintiff's claim can be remedied by damages and that if the orders sought were granted, he stood to be most disadvantaged considering that the sale was financed and he would suffer exposure to massive losses and adverse action from the financier if he is unable to develop the suit property as planned.

All the parties herein filed their respective submissions which have been read and taken into account in this Ruling.

I am required to determine whether the Plaintiff/Applicant is entitled to an order of temporary injunction which they seek. In deciding whether or not 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 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.”

Does the Plaintiff/Applicant have a ‘genuine and arguable case’? In this case, the Plaintiff lays claim over the said portion while relying on a Sale Agreement dated 6th January 2010 between it and the 1st Defendant. The 1st Defendant conceded this position but contended that though she fulfilled her obligations under the said Sale Agreement by forwarding to the Plaintiff all the completion documents necessary for the transfer of the said portion to the Plaintiff, for an unexplained reason, the Plaintiff

returned back to the 1st Defendant all those completion documents unregistered. The 1st Defendant contends that after the return of the completion documents to her Advocates unregistered, she considered the said Sale Agreement as abated and proceeded to sell the suit property to the 2nd Defendant. I have been particularly curious to know the reason why the Plaintiff returned the completion documents back to the 1st Defendant unregistered only to file this suit claiming the said portion. No explanation whatsoever has been given. In the circumstances, I can do no better than to agree with the decision of the Court of Appeal in **Kenya Breweries Ltd v. Okeyo (2002) 1 EA** where it was stated as follows:

“It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party.”

I further agree with the 1st Defendant’s submissions that an injunction being an equitable remedy, anyone who seeks the same must come with clean hands. In this regard, Njagi, J (as he then was) in his finding in **Kyangaro v. Kenya Commercial Bank Ltd & Another (2004) 1 KLR 126** as cited in **Patrick Waweru Mwangi & Another v. Housing Finance Co. of Kenya Ltd (2013) eKLR** at page 145 stated:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. .. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently he has not done equity.”

In light of these authorities, I am not convinced that the Plaintiff has a genuine and arguable case and by extension a prima facie case. The Plaintiff is to blame for all its misfortunes by failing to fulfill its obligation to present the completion documents for registration for an outrageously long period of 2 years. In the circumstances, I find that the Plaintiff has not shown that it has a prima facie case with high chances of success at the trial. It follows that I will also not grant the order of inhibition sought after by the Plaintiff.

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 this Application with costs to the Defendants.

DELIVERED AND SIGNED IN NAIROBI THIS 10TH DAY OF APRIL 2015.

MARY M. GITUMBI

JUDGE