



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.361 OF 2014

MERCELINE AWUOR ABUTO PLAINTIFF

VERSUS

JAMES OMARI NYAKUNDI DEFENDANT

RULING

1. What I have before me is the plaintiff's application that was brought by way of Notice of Motion dated 25th September 2014 under Order 40 rule 1 and order 51 rule 1 of the Civil Procedure Rules seeking; a temporary injunction to restrain the defendant from wasting, damaging, alienating, selling, erecting a building on or in any other manner dealing with all that parcel of land known as **LR No. West Kasipul/Konyango-Kokal/2084** (hereinafter referred to as "**the suit property**") pending the hearing and determination of this suit and, an order of inhibition inhibiting the registration of any dealing with the suit property pending the hearing and determination of this suit. The application was supported by the affidavit of the plaintiff sworn on 25th September 2014 and on the grounds set out on the face of thereof. In her affidavit in support of the application, the plaintiff has contended that she is the administratrix of the estate of her deceased husband one, Walter Abuto Goga (hereinafter referred to only as "**the deceased**") who was at all material times registered as the proprietor of the suit property. The plaintiff has claimed that the defendant fraudulently caused the suit property to be transferred to his name in the year 2002 which transfer he concealed until recently when he came out to lay a claim over the property 12 years after he purportedly acquired the same. The plaintiff has contended that she has been using the suit property over the years on the belief that the same was still registered in the name of her deceased husband. The plaintiff has contended that with a view to perpetuate the fraud, the plaintiff is now in the process of transferring the suit property to a third party who has already moved onto the property to commence development thereon. The plaintiff has contended that in the circumstances, it would only be fair and just that the orders sought do issue to preserve the suit property pending the hearing and determination of this suit.

2. The plaintiff's application was opposed by the defendant through a replying affidavit sworn on 21st October 2014. In his affidavit, the defendant deposed that he acquired the suit property from the deceased for valuable consideration in the year 2002 and all the necessary procedures were followed before the property was transferred to him by the deceased. The defendant has deposed further that he fenced the suit property soon after he purchased the same and that the plaintiff was aware all along that the suit property had been sold to him by the deceased. The defendant has stated further that he has entered into an agreement with a third party to sell the suit property to him and the said third party has already moved to the site to commence development on the property. The defendant has contended that the plaintiff's application herein is misplaced and amounts to an abuse of the process of the court. The defendant annexed to his affidavit as exhibits; a copy of the title deed for the suit property in his name dated 31st May 2002, a copy of application for consent of Land Control Board dated 30th April 2002, letters of

consent dated 2nd May 2002, instrument of transfer of land that was registered on 31st May 2002 and, a cancelled title deed dated 18th March 2002 in the name of the deceased.

3. When the application came up for hearing before me on 26th November 2014, Mr. G. S. Okoth, advocate appeared for the plaintiff while Mr. Omonde Kisera, advocate appeared for the defendant. In his submission in support of the application Mr. Okoth argued that although the defendant has claimed that he purchased the suit property from the deceased in the year 2002, the defendant has never entered or occupied the suit property. Mr. Okoth argued further that it is unbelievable that the deceased who had purchased the suit property at kshs. 40,000/= would re-sell the same to the defendant at ksh. 20,000/=. Counsel submitted that the plaintiff has established a prima facie case of fraud and since the defendant has confirmed that he is in the process of selling the suit property, the plaintiff will no doubt suffer irreparable harm if the orders sought are not granted. Mr. Okoth submitted that the defendant who has never occupied the suit property would suffer no prejudice if the orders sought are granted.

4. In his reply, Mr. Kisera submitted that the plaintiff has not satisfied the conditions for granting a temporary injunction. He submitted that the plaintiff has not established a prima facie case with a probability of success against the defendant. Mr. Kisera submitted that as the registered proprietor of the suit property, the defendant has an absolute right to deal with the property in whatever manner deemed fit. Mr. Kisera submitted that the defendant had taken possession of the suit property and fenced the same with a barbed wire. He dismissed the plaintiff's claim that the defendant has never entered or taken possession of the suit property. Counsel submitted that the fact that the defendant has never developed the suit property does not extinguish his title to the same. Counsel submitted further that inadequacy of consideration is not a ground for nullification of a contract and that, want or insufficiency of consideration cannot be used as evidence of fraud. Counsel maintained that the defendant acquired the suit property lawfully and that the plaintiff has not demonstrated that she will suffer irreparable harm unless the orders sought are granted.

5. I have considered the plaintiff's application together with the affidavit in support thereof. I have also considered the replying affidavit filed by the defendant in opposition to the application. Finally, I have considered the submissions that were made before me by the advocates for the parties. The principles upon which this court proceeds on applications for temporary injunction are now well settled. As was stated in the case of **Giella –vs- Casman Brown & Co. Ltd [1973] E. A 358**, an applicant for a temporary injunction must demonstrate that he has a prima facie case with a probability of success against the respondent and that unless the injunction is granted, he stands to suffer irreparable harm that cannot be compensated in damages. If the court is in doubt, the application would be determined on a balance of convenience. The plaintiff's claim against the defendant is based on fraud. In her plaint dated 22nd September 2014, the plaintiff has contended that through acts of forgery the plaintiff fraudulently caused the suit property to be transferred to his name from the name of the deceased on 30th April 2002. The onus was upon the plaintiff to prove on a prima facie basis the fraud alleged against the defendant.

6. The defendant has denied any wrong doing in the acquisition of the suit property. He has placed before the court; a copy of the instrument of transfer that is said to have been executed in his favour by the deceased before an advocate in respect of the suit property, a copy of application for consent of the Land Control Board that is said to have been executed by the deceased and him and a copy of the consent that was issued by Kasipul Land Control Board on 2nd May 2002 authorizing the transaction. The plaintiff has not challenged these documents in any material respect. The plaintiff has not claimed that the signatures of the deceased on the application for consent and in the transfer are forgeries. The plaintiff has not claimed that the deceased did not appear before the Land Control Board for the consent that was issued on 2nd May 2002. The defendant has also produced a copy of the title deed that has been issued to the deceased and which was surrendered to the land registrar for cancellation when the suit property was transferred to the defendant. The plaintiff has not raised any issue with the title deed. Infact, she has not claimed that she is still having in her possession the original title deed for the suit property in the name of the deceased. The plaintiff has claimed that the transfer of the suit property is fraudulent because the deceased had purchased the suit property for kshs. 40,000/= while the documents produced by the defendant show that he purchased the suit property from the deceased for kshs. 20,000/=. This disparity

or inconsistency in the price at which the deceased is said to have sold the suit property to the defendant according to the plaintiff is evidence of fraud. The other evidence of fraud according to the plaintiff is the fact that the defendant has never taken possession of the suit property since the same was transferred to him in the year 2002. The plaintiff has claimed that the defendant only appeared recently when he wanted to sell the suit property to a third party. I am not satisfied that the plaintiff has established a case of fraud against the defendant.

7. In the case of **Virani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Company Ltd. [2004] 2 KLR 269**, it was held that:-

“Fraud is a serious quasi criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.

I am in agreement with the submission by the defendant’s advocate that the mere fact that the defendant purchased the suit property for an amount less than what the deceased had paid for it cannot be evidence of fraud. The same applies to the defendant’s alleged failure to take possession or to develop the suit property for over 12 years from the date the same was transferred to his name. For the foregoing reasons, I am not satisfied that the plaintiff has established a prima facie case with a probability of success against the defendant. Having reached that conclusion, I am not under an obligation to consider whether the plaintiff stands to suffer irreparable injury if the orders sought are not granted. In addition to the prayer for injunction, the plaintiff had sought an order of inhibition to inhibit any dealing with the suit property pending the hearing and determination of this suit. Under section 68 (1) of the Land Registration Act, 2012, the court has power to make an order of inhibition inhibiting until further orders the registration of any dealing with any land.

8. The section has not provided for the grounds upon which the court can make such order. However, I am of the opinion that since such order would limit or restrict the rights of a proprietor of land, the order can only be granted for good cause. It cannot be granted as a matter of course at the instance of anyone who comes forward seeking the same. The order is discretionary. The discretion as is the norm must be exercised judicially having regard to the circumstances of each case. The plaintiff herein as I have stated above has claimed that the defendant acquired the suit property fraudulently. I have considered the plaintiff’s claim in light of the principles that apply to applications for injunction and have come to the conclusion that the claim has not met the threshold for granting interlocutory injunction. This however is only an interlocutory application. The case will have to be set down for plenary hearing. The plaintiff may as well be able to prove her claim against the defendant at the trial. The plaintiff has claimed that the defendant is in the process of selling the suit property. The defendant has admitted this fact in his replying affidavit. If the property is sold while the suit is pending, the substratum of the plaintiff’s claim herein would have been lost and the claim as pleaded would be rendered nugatory. I am of the opinion that in the circumstances of this case, justice would be served if the order of inhibition sought is granted for the purpose of preserving the subject matter of this suit pending the hearing and determination of this suit.

9. The upshot of the foregoing is that the plaintiff’s application dated 25th September 2014 succeeds only in part. The same is allowed in terms of prayer 2 thereof. The costs of the application shall be in the cause.

Delivered, signed and dated at KISII this 13th day of February, 2015.

S. OKONG’O

JUDGE

In the presence of:-

Mr. Bigogo h/b for G. S Okoth

for the plaintiff

N/A

for the defendant

Mr. Mobisa

Court Clerk

S. OKONG'O

JUDGE