



REPUBLIC OF KENYA



KENYA LAW
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**Mwakavi v Ngovi (Environment & Land Case E001 of 2022)
[2023] KEELC 19181 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E001 OF 2022
CA OCHIENG, J
JULY 27, 2023**

BETWEEN

JAPHETH MUKINYI MWAKAVI PLAINTIFF

AND

LAWRENCE NZAU NGOVI DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 10th January, 2022 where he seeks the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. That a temporary injunction do issue forthwith restraining the Defendant from transferring Mavoko Town Block 3/43223 or any part thereof in any way interfering thereon pending the hearing and determination of arbitral proceedings between the parties herein in terms of Clause 14(d) of the Sale Agreement dated 10th July, 2017 between the parties herein.
 5. That costs be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Japheth Mukinyi Mwakavi where he deposes that vide Sale Agreement dated the 10th July, 2017, the Defendant sold him 6.5 acres to be hived from Mavoko Town Block 3/43223 (mother title) at a price of Kshs. 21,450,000. He confirms that on execution of the Sale Agreement he paid a sum of Kshs. 2,000,000. Further, that he has so far paid Kshs. 18,000,000 yet he has not received any completion documents.



He claims the Defendant has denied the existence of the Sale Agreement and receipt of purchase price. He is apprehensive that the Defendant might deal with the mother title to his detriment. Further, that attempts to lodge a caution has failed and the Registrar did not provide any cogent reason. He explains that the Sale Agreement at Clause 14(d) provided that a party may seek interim conservatory orders from a court of competent jurisdiction pending arbitration and will rely on the said provision to safeguard his interest in the mother title. He reiterates that he has invested heavily on the property and is likely to suffer immeasurable loss and damage in case the orders sought are not granted.

3. The Defendant opposed the instant application by filing a Replying Affidavit where he deposes that the said Application is baseless, misplaced, vexatious and otherwise an abuse of the court process and the same should be dismissed with costs. He claims the instant Application is founded on fabricated and misleading evidence coached to suit the Plaintiff's narrative and an attempt to defraud him of his property as well as other third parties who have beneficial claims over the said land. He confirms being the registered owner of Mavoko Town Block 3/43223 hereinafter referred to as the 'suit land'. Further, that on 7th July, 2021 he commenced the process of subdivision of the suit land and relied on the subdivision plan. He explains that in 2014 he entered into a verbal agreement with the Plaintiff to sell to him plot marked 'A' on the subdivision Plan measuring 0.404 Ha. Further, the said plot was to be hived off the suit land herein, upon subdivision. He denies existence of a written Sale Agreement prepared to that effect and states that performance of the transaction was founded on their longstanding relationship and previous land transactions that each party would do their part in good faith. He states that on 22nd May, 2014, he sold Plot 'B' measuring 0.803 Ha to Anne Mugure Kiburi and part of Plot 'C' measuring 1.205 Ha to one Catherine Auma Nyambala. Further, on 21st January, 2015, he sold the remaining part of Plot 'C' to Catherine Auma Nyambala. He was aware that on 27th July, 2021, Catherine Auma Nyambala sold plot 'C' to the Plaintiff for a consideration of Kshs. 10,800,000. Further, that the Plaintiff supplied six (6) cheques to Catherine Auma Nyambala through his company Wincomp Services Limited as payment of the purchase price. He argues that if the Plaintiff indeed purchased the entire suit land from him, then why would he later purchase his own property from Catherine Auma Nyambala. He insists that the Sale Agreement is manufactured as the signatures are forged; it does not have his National Identification Number; actual measurement of the suit land is 2.94 Ha and not 8.8 Ha as indicated therein; payment particulars do not reflect his bank account and the Plaintiff's signature is not certified. He avers that the matter cannot be referred to arbitration and he cannot be bound by the terms of a contract he did not participate in. Further, that the orders sought in the instant application are contrary to his Constitutional rights. He has sought for the annexures to the instant application to be expunged from record. He was aware on 29th September, 2021, the Plaintiff attempted to register a caution on the suit land but the same was rejected.
4. The Plaintiff filed written submissions to canvass the instant Application but the Defendant failed to do so.

Analysis and Determination

5. Upon consideration of the Notice of Motion Application dated the 10th January, 2022 including the respective Affidavit, annexures as well as the rivalling submissions, the only issue for determination is whether a temporary injunction should issue restraining the Defendant from transferring or interfering with land parcel number Mavoko Town Block 3/43223 pending the hearing and determination of arbitral proceedings between the parties herein.
6. The Plaintiff in his submissions reiterates his averments as per the Supporting Affidavit and relies on section 109 of the *Evidence Act*.



7. In line with the principles established in the case of *Giella v Cassman Brown & Company* (1973) EA 358 as well as the definition of a *prima facie case* as stated in the case of *Mrao Ltd v First American Bank of Kenya & 2 Others* (2003) KLR 125, I will proceed to decipher whether the Plaintiff has established a *prima facie case* to warrant the orders as sought. The Plaintiff claims he entered into a Sale Agreement dated the 10th July, 2017 with the Defendant for purchase of 6.5 acres to be hived off the suit land. The Plaintiff avers that he has so far paid Kshs. 18,000,000 out of a total of Kshs. 21,450,000 which was the purchase price but the Defendant has declined to forward the completion documents to him. Further, that he attempted to register a caution over the suit land but the same was rejected by the Land Registrar. The Defendant vehemently opposed the instant Application and denied signing the impugned Sale Agreement nor receiving any purchase price. He contended that he had sold the suit land to third parties and the Plaintiff purchased a portion of the said suit land from one of the third parties known as Catherine Auma Nyambala. He insisted that both the Third Parties and himself would suffer irreparable harm if the orders sought are granted.
8. I have had a chance to peruse the various annexures herein and I note there was a Sale Agreement between the Plaintiff and Defendant which is disputed by the Defendant. I note the Plaintiff made various payment in form of cheques to the Defendant which the Defendant has failed to provide an explanation of. Further, from the WhatsApp messages which have been provided, it seems there was a transaction between the Plaintiff and Defendant as there are various payments indicated therein. I note there is also an Agreement between the Plaintiff and Catherine Nyambala. It has also emerged that the Defendant entered into various Sale Agreement with third parties who are not parties to this suit. Two of the aforementioned Sale Agreements are dated 22nd May, 2014 while one is dated 21st January, 2015. I further note there is a Sale Agreement dated the 27th July, 2021 between the Plaintiff and Catherine Auma Nyambala for 1.772 hectares of land as well as payment cheques amounting to Kshs. 4,100,000. From the disputed Sale Agreement, between Plaintiff and Defendant, Clause 14(a) indicates that in case of a dispute, parties can refer the matter to arbitration while Clause 14(d) states that a party can seek injunctive reliefs pending the arbitral proceedings.
9. At this juncture, I find that the Plaintiff has indeed established a prima facie case to warrant the orders of injunction as sought pending the arbitral proceedings. I further find that the Plaintiff will suffer irreparable harm if the suit land is not preserved pending the outcome of this suit. However, since there are third parties whose Sale Agreements have been produced who are not parties to these proceedings, noting that there is no indication if this matter has been referred to arbitration, I opine that it will be in the interest of justice if the obtaining status quo was maintained.
10. In the circumstances, I find that the Plaintiff's Notice of Motion Application dated the 10th January, 2022 is merited and will allow it, in the following terms:
 - a. The Obtaining Status Quo be and is hereby maintained where no party is allowed to transfer land parcel number Mavoko Town Block 3/ 43223 to any third party pending the outcome of the arbitral proceedings.
 - b. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27TH DAY OF JULY, 2023

CHRISTINE OCHIENG
JUDGE

