



IN THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC NO. 639 OF 2017

VICTOR NDEGWA MBURU.....1ST PLAINTIFF

ROSALINE MUTHONI KARIUKI.....2ND PLAINTIFF

-VS-

RACHEAL WANJIRU KAMATU.....DEFENDANT

RULING

1. The Plaintiffs/Applicants filed a Notice of Motion dated 6th October 2017 in which they sought for the following reliefs:-

1) Spent

2) Spent

3) That pending hearing and determination of this suit a temporary injunction be and is hereby issued restraining the defendant/respondent, her servants employees and or agents from trespassing onto, appropriating ,constructing upon, using and or in any other way interfering with plot LR NO.27903/256 Embakasi.

4) That the OCS Embakasi Police Station be ordered to ensure enforcement and compliance with the above orders.

5) That the costs of this application be in the cause.

2. The applicants contend that on 30th June 2014 they purchased LR No.27903/256 (suit property) from Benson Riitho Muriithi. They paid the purchase price of Kshs.2,500,000/=and were granted possession. The vendor signed a conveyance in their favour but the same has not been registered as third parties have obtained court orders in respect of the mother title.

3. In January 2016, the respondent moved into the suit property and attempted to excavate the same. The applicants' advocate wrote a demand letter to the respondent but the respondent never bothered to respond. The first applicant made a complaint at Embakasi Police Station. The respondent was summoned but could not produce any documents in support of her claim but only said that she bought the suit property from one Stephen Maingi Muriithi.

4. The said Stephen Maingi Muriithi who is said to have sold the suit property to the respondent swore an affidavit stating that he never sold the suit property to the respondent. Benson Riitho Muriithi also swore an affidavit stating that he has never sold the suit property to the respondent. The respondent has now begun constructing on the disputed property but the construction has since been stopped through the orders of this court.

5. The respondent has opposed the applicant's application through replying affidavit sworn on 25th October 2017 and a further affidavit sworn on 7th November 2017. The respondent contends that in 2010, she was interested in purchasing a property in Embakasi area where she intended to construct a commercial building to assist her in her retirement. She was introduced to Benson Riitho Muriithi by an Estate agent called Joseph Wambugu Kimatu. The respondent was informed that the suit property belonged to Stephen Maingi Muriithi but that any sale could only be completed by Benson Riitho Muriithi who was the administrator of the estate of his late father Joseph Muriithi .

6. The respondent was further informed that all transactions relating to the Estate of the late Joseph Muriithi were being done at the firm of Manyarkiy & Co. Advocates. Before she could go to the firm of the Manyarkiy & Co. Advocates she negotiated the purchase price with Stephen Maingi Muriithi. Stephen Maingi Muriithi initially agreed to sell the suit property at Kshs.1,000,000 but he later changed and demanded an additional one hundred thousand.

7. The respondent agreed to pay the Kshs.1,100,000/=. She asked one Dianah Macharia to deposit Kshs.800,000/= into the account of Joseph Wambugu Kimatu for onward transmission to Stephen Maingi Muriithi. The said Joseph Wambugu Kimatu transferred Kshs.700,000 to the account of Stephen Maingi Muriithi through RTGS . The respondent later cleared the balance. An agreement was executed before the firm of Manyarkiy & Co. Advocates. A conveyance was also signed by Benson Riitho Muriithi.

8. The respondent contends that she purchased the suit property and that Stephen Maingi Muriithi and his brother Benson Riitho Muriithi are only denouncing the transaction because the applicants paid them more money. That she has caused the signatures of the two to be examined by the Directorate of Criminal Investigations who have confirmed that the signatures of the two including the advocate before whom they appeared were made by them. She now prays that the applicants' application be dismissed as she is incurring losses due to the orders which the applicants had obtained stopping the project which she had started.

9. This being an application for injunction I have to examine whether the applicants have meet the threshold set out in the case of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358**. First an applicant has to demonstrate that he/she has a prima facie case with probability of success. Secondly an injunction will not normally be granted unless otherwise the applicant will suffer loss which will not be compensated in damages. Thirdly if the Court is in doubt it will decide the application on a balance of convenience.

10. A prima facie case was described in the case of **Mrao –Vs- First American Bank of Kenya Limited and 2 others (2003) KLR 125** as follows:-

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

11. In the instant case both the applicant and the respondent are claiming to have bought the suit property from the same parties. What differs is the mode of payment of the purchase price. The respondent chose to make payments through Joseph Wambugu Kimatu an estate agent. The applicants on the other hand paid the purchase price to Benson Riitho Muriithi . The persons who are said to have dealt with the respondent have stated that they never dealt with her. They have sworn affidavits to that effect. Though their signatures have been subjected to a document examiner, it is not for this court to make any conclusive findings on that as to do so would amount to the court making a decision as to who is entitled to the suit property. That is not allowed at interlocutory stage. Close examination of documents is not

allowed at this stage.

12. What the Court is expected to do at this stage is to examine whether the applicants have disclosed that they have a prima facie case. In the case of **Nguruman Limited Vs Jan Bonde Nelson & 2 others Civil Appeal No 77 of 2012**, the Court of Appeal had this to say regarding a prima facie case;-

“ We reiterate that in considering whether or not a prima facie case has been established , the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been violated or threatened with violation. Positions of the parties are not to be proved in such a manner to give a final decision in discharging a prima facie case. The applicant need not establish title; it is enough if he can show that he has a fair and bonafide question to raise as to the existence of right which he alleges. The standard of proof of that prima facie case is on a balance or as otherwise put on a preponderance of probabilities”.

13. In applying the principles in the three cases cited hereinabove. I find that the applicants have demonstrated that they have a prima facie with probability of success. Even on consideration of irreparable loss, if the construction which has just began was let to go on before the issues in contention are addressed; it will render the applicant’s suit useless. The applicants had identified the suit property as the ideal one and if the court were to say that they can be compensated, no two properties are exactly the same and even if one were to be compensated he/she might not find a property in the same area with same characteristics. The purpose of an injunction is to preserve the suit property until the dispute on ownership is resolved.

14. There is need to preserve the suit property particularly given the conflicting facts. As was held in **Ougo & another Vs Otieno (1987) KLR 364** the general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided in a trial. In the instant case, the respondent had just started laying the foundation on the disputed property when the court stopped the construction. That position has to remain and to achieve that purpose, I will allow the applicants application in terms of prayer three (3). As proposed by the applicants, the costs of this application shall be in the cause.

Dated, Signed and delivered at **Nairobi** on this **19th** day of **December 2017**.

E.O.OBAGA

JUDGE

In the presence of;-

Mr Kiarie for Mr Kimani for applicant

Court Assistant: Hilda

E.O.OBAGA

JUDGE