



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO. 787 OF 2013

FRANCIS KARIUKI NGOORO.....PLAINTIFF

VERSUS

BERNARD MWENJE MWANGI.....1ST DEFENDANT

DOMINIC KINYANJUI MWANGI.....2ND DEFENDANT

ARCHDIOCESE OF NAIROBI.....3RD DEFENDANT

LAND REGISTRAR, THIKA DISTRICT.....4TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 28th July 2014 in which the Plaintiff/Applicant seeks for an order of temporary injunction against the Defendants, their agents, servants, employees, assigns and/or family members restraining them from selling, leasing, disposing off, mortgaging, doing survey work, fencing and /or doing anything else that would compromise the Plaintiff's interest in the land known as Kiganjo/Handege/3142 (hereinafter referred to as the "suit property") pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff, Francis Kariuki Ngooro, sworn on 28th July 2014, in which he averred that he bought 1 acre of land from the 1st Defendant. He further averred that he has discovered that the 1st Defendant is attempting to dispose off the whole of the suit property which will render the main suit nugatory even if he is successful. He further stated that the 1st Defendant would not be in a position to compensate him by way of damages as he has no other asset which can be used to offset any damages awarded to him. He annexed a copy of a search on the suit property which indicated the owners thereof as follows:

1. Archdiocese of Nairobi – 0.30 Ha
2. Joseph Marima Chege – 0.61 Ha
3. Bernard Mwenje Mwangi – remaining portion
4. Dominic Kinyanjui Mwangi – remaining portion

The Application is contested. The 3rd Defendant filed the Replying Affidavit of Father Antony Mwituria,

the Procurator of the 3rd Defendant, sworn on 9th February 2015, in which he averred that the 3rd Defendant is one of four joint owners of the suit property. He averred further that the 3rd Defendant's portion is a definite piece of land of the suit property measuring 0.30 Ha, the same having been purchased from the 1st and 2nd Defendants who were the initial joint owners and subsequently, a joint title was issued in the names of the 1st, 2nd and 3rd Defendants. He annexed copies of the title deeds. He further averred that thereafter, there came another person by the name of Joshat Marima Chege who also bought a portion of the suit property measuring 0.61 Ha and thereafter a title deed was also issued in the joint names of the 4 Defendants. He annexed a copy of the title deed. He averred further that the Defendants as joint owners of the suit property have since applied for the partition of the suit property and are currently just awaiting the issuance of the individual title deeds in their respective names. He averred further that it was due to the 3rd Defendant's interest and quest that the 1st Defendant sold to the 3rd Defendant a definite piece of land out of the suit property in compliance with the legally laid down procedure thus making the 3rd Defendant a legal owner of an outright piece of land measuring 0.30 Ha. He added that the 3rd Defendant went ahead and planted boundary features to clearly demarcate and distinguish his portion within the suit property and subsequently thereon when the 1st Defendant attempted to uproot/remove the said boundary features the court issued an order permanently restraining the 1st Defendant from doing so. He stated further that the 3rd Defendant has never seen and is not aware of an existing sale agreement if any between the Plaintiff and the 1st Defendant herein either prior to or subsequent to its purchase of a portion of land out of the suit property until this suit was instituted. He averred that the 1 acre to be purchased by the Plaintiff was not yet specific and it would become specific only upon a survey being carried out with the aid of a surveyor and beacons being planted to as to clearly demarcate it. He added that with that not having been done, the Plaintiff's interest remained floating over the remaining portion of the 1st Defendant within the suit property. He added that if the court was to grant a temporary injunction over the entire suit property as sought by the Plaintiff, then an injustice would be occasioned against the 3rd Defendant who is a bona fide purchaser for value, by denying him enjoyment of the legally obtained proprietary rights during the duration of the temporary injunction pending the determination of the suit. He added that should the court issue the order, it should be directed specifically against the 1st Defendant in relation to his remaining share of the suit property which is more than the 1 acre claimed by the Plaintiff. He further averred that in **Criminal Case No. 126 of 2013 in Gatundu Magistrates Court**, the Plaintiff was refunded Kshs. 450,000/- by the 1st Defendant (the Accused) on 30th January 2014 which was the consideration that the Plaintiff had given towards a promise by the 1st Defendant to sell him 1 acre of the suit property. He annexed a copy of the proceedings in support of this assertion. He stated that in the circumstances, the basis upon which the Plaintiff was seeking an order of temporary injunction having collapsed with the refund of the consideration, it is now apparent that the Plaintiff cannot claim to have a proprietary interest in the suit property as he does not have a prima facie case, will not suffer irreparable injury that cannot be compensated with damages and the balance of convenience tilts in favor of the 3rd Defendant.

I am required to determine whether the Plaintiff/Applicant is entitled to an order of temporary injunction pending the hearing and determination of this suit which he seeks. 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 a 1 acre portion of the suit property. The Plaintiff has failed to demonstrate with an acceptable level of certainty the specific portion he allegedly purchased from the 1st Defendant. Further, he has failed to refute or rebut the information revealed by the 3rd Defendant that he received a refund of the purchase price for the said 1 acre amounting to Kshs. 450,000/- in Criminal Case No. 126 of 2013 in Gatundu Magistrates Court. In light of this, this court finds that the Plaintiff has failed to demonstrate that he has a prima facie case with high chances of success at the main trial.

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 12TH DAY OF FEBRUARY 2016.

MARY M. GITUMBI

JUDGE