



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 135 OF 2011

FREDRICK NZIOKI KAMUNZYU.....1ST PLAINTIFF/APPLICANT

LYDIA WANJIRU WARUGURU2ND PLAINTIFF/APPLICANT

VERSUS

MARY MBUVI MAUNDU.....1ST DEFENDANT/RESPONDENT

FRANCISCA SYOMBUA MAUNDU.....2ND DEFENDANT/RESPONDENT

ISAAC MUTHAMA KIMILU3RD DEFENDANT/RESPONDENT

JUDGMENT

1. The Application dated the 10th June, 2011 is brought pursuant to the provisions of **Sections 3, 3A, and 63(e)** of the **Civil Procedure Act** and **Order 40 Rule 1 (a) 2(1) 4(1)** of the **Civil Procedure Rules** .
2. The applicants seek orders that:-
 - i. A temporary injunction to issue restraining the defendants by themselves, jointly or severally or by their collective or several agents or servants from trespassing into, fencing, constructing, farming or in any manner, interfering with the Plaintiff's peaceful use and enjoyment of land parcels number **932**, located at **Aimi Ma Kilungu Ltd Farm** along **Nairobi Mombasa** highway pending hearing and determination of this application.
 - ii. Further, without prejudice to the foregoing, an order of a mandatory injunction to issue to compel the 3rd respondent to remove any fence, fixtures or fitting or crop planted on land parcels Numbers 932 and 353 located at Aimi Ma Kilungu Ltd.
 - iii. The Officer in charge **Salama Police Station, Mukaa District** to ensure compliance of the court order.
3. The application is premised on grounds that:-
 - i. The applicants are the lawful proprietors of Land Parcel Numbers 932 located at the **Aimi Ma Kilungu Ltd Farm** by virtue of an agreement of sale dated 1st August 2007 executed between the 1st plaintiff and the late **Josiah Maundu Munuku**, the previous owner.
 - ii. The 1st and 2nd respondents have fraudulently sold to the applicant's aforementioned parcel of land to the 3rd respondent.

- iii. The 3rd respondent has begun committing acts of destruction of the land. He has cut down trees, fenced the parcels, he is digging trenches in preparation to build permanent structures.
 - iv. The 3rd respondent has denied the applicants access to their land despite warnings from the police and management of **Aimi Ma Kilungu Farm Limited**.
 - v. In support of the application the 1st applicant deposed an affidavit stating that; the 1st and 2nd respondents are the administrators of the Estate of **Josiah Maundu Munuka** who died on 3rd September 2009. Prior to his death he was a member of **Aimi Ma Kilungu Limited Farm, a Company** registered under the **Co-operative Societies Act**. The company confirmed the deceased as the owner of the parcel of land.
 - vi. On the 1st August, 2007, the deceased entered into a written sale agreement with the 1st applicant and sold to him the land at Kshs. 1,000,000/=. The deceased on receipt of the consideration handed over to him the original allotment letters and balloting cards for the two (2) parcels of land.
4. At the time of petitioning for Letters of Administration the 1st and 2nd respondent did not include the parcels of land as assets of the deceased. In disposing the land the 1st and 2nd respondent purported to have lost the Letter of allotment. They promised to refund the 3rd respondent the purchase price if it emerged the premises had been sold to a 3rd party.
 5. In May 2011, the 3rd respondent took over ownership of the parcels of land. The Aimi Ma Kilungu Ltd Farm Management have recognized him (the applicant) as the owner of the land but the 3rd respondent has continued to deny him access to his detriment.
 6. In response thereto the respondents through an affidavit deposed by the 1st respondent stated that the sale agreement entered into by the applicants was not in compliance with the law as it required the stamp duty payment; there was no proof of payment of any consideration which made the sale null and void. The applicants have not caused the property to be transferred to him in the last four (4) years. Family members came across the membership card of the deceased in January 2011 and upon investigations discovered that the land was still not registered in the names of the deceased. They sold the land to the 3rd respondent.
 7. In a further affidavit the applicants stated that it is a legal requirement that the agreements be stamped under the **Stamp Duty Act** but failure to do so does not invalidate the contract as it is admissible testimony of their intentions. He adduced evidence of a bank statement and certified copies of the bank slips to prove payment of the consideration. The transfer was effected by Aimi Ma Kilungu Farm Ltd.
 8. The temporary Injunctive order sought was issued on the 21st June, 2014 and it remains in force to-date.

The issue to be considered at this stage shall therefore be whether a mandatory injunctive order sought should issue?

9. A mandatory injunction when issued definitely imposes same inconveniences to the respondent, be it hardship or expense that is additional to the prevailing circumstances. Such an order is likely to influence the trial Judicial Officer in the exercise of his/her ultimate discretion at the conclusion of the matter. As a result it has been stated now and again that such a jurisdiction should be exercised sparingly and with caution.
10. Principles upon which the court may grant such an injunction were stated in the case of *Locabil International Finance Ltd versus Agro Export and others (the Sea Hawk) [1986]1 ALLER 901* where the court stated that:-

“a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel high degree of

assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard then, was required for prohibitory injunction.”

Given that the suit premises were sold in 2007 at Kshs, 1,000,000/=, the market value of the land has most definitely amplified to a substantial amount to–date which would cause the applicant irreparable damage if the orders are granted.

11. Deep down my mind I must interrogate whether there is a fair and bonafide question to be tried in the matter that can have no remedy in damages such that the balance of convenience favours nothing else but the grant of the injunction sought.
12. According to facts presented by affidavit evidence, it is not in dispute that the subject land originally belonged to the deceased, who died intestate on the 3rd September, 2009. There is a sale agreement that was made between the deceased and the applicants which signify that the subject land was sold to the applicants. The respondents in challenging the agreement for sale on the other hand argue that there are several alterations and it lacks the requisite stamp duty that legalizes the agreement. The respondents are however not specific about the actual alteration. The applicants on the other hand point out the alteration in the agreements in the purchase prices, which they further attest that the same was rectified by their advocate and authenticated, hence legal. A perusal of the same clearly shows that the purchase price which is also written in words is correctly written and the only error is in numerical term that necessitated the correction which is procedurally authenticated. This should not be in dispute.
13. The 1st and 2nd respondents have not denied the fact that when they petitioned for letters of administration intestate for the estate of the deceased they did not enlist the subject land herein as part of the estate of the deceased. At the point of drafting the agreements of sale with the 3rd respondent the 1st and 2nd respondents acknowledge the fact that they had no letter of allotment and further included clause 13(b) which reads that:-

“In event that the previous owner had sold the land, the seller undertakes to refund the 1st buyer as... per the contract of sale”.

14. This is a suggestion that the 1st and 2nd respondent knew that the subject land had been sold to a third party.
15. Although the applicants did not adduce in evidence the letter of allotment and the ballot card, the existence of those documents is verified by the Aimi Ma Kilungu Farm Limited Management who have stated in their letter dated 13th May, 2011, that the applicant is in possession of the cards and the original letter of allotment. An affidavit deponed by **Katumbi Isika Advocate** confirms that the payment was made in her presence and the original membership card and allotment letter surrendered to the 1st applicant by the deceased who was of sound mind in her presence.
16. It is contended that the agreement for sale is void for lack of stamp duty per the requirement of the stamp duty Act. The agreement is indeed not stamped. **Section 19** of the **Act** provides remedies to be taken in case of such an omission. The applicants would be required to be penalized. As a penalty the applicants would be required to make payment of a stipulated sum after expiration of the time within which the agreement should have been stamped. This can therefore not be a basis for abatement of the transaction or suit. This was well stated in the case of **Westlands Residential Resort Limited versus Kawakanja Limited and 2 Others[2013] e KLR**, the Court stated thus:-

“Regarding the contention ,the agreement for sale was inadmissible under Section 19 of the Stamp Duty Act; Sub-section 3 of Section 19 stipulates the procedure of handling such a document. Section 19(3) provides for steps to be taken by the court which has received an unstamped instrument”.

17. From the foregoing it is apparent that there is a fair question to be tried and as aforesaid granting a mandatory injunction at this stage may have a onerous and potentially costly implication. It may also give the applicant victory at trial without succeeding at trial. A temporary injunction would

have been ideal since the quest was not to have it granted pending hearing and determination of the suit. Therefore, I hereby order that *status quo* that prevailed following the order granted to preserve the situation on the ground be maintained.

18.The applicants are directed to act positively by having the matter heard on a priority basis.

19.It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of JANUARY, 2015.

L.N. MUTENDE

JUDGE