



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 340 OF 2013

MORGAN Z. MWITA PLAINTIFF

VERSUS

JOHNES MWITA MASWI

JOROMIN MWITA NYAMANI

MARY MBONE

(ALL SUED AS ADMINISTRATORS OF THE ESTATES OF)

MURIMI MBUSIRO, MARWA MBUSIRO & MWITA CHANA 1ST DEFENDANT

JOHN MACHAGE MATIKO 2ND DEFENDANT

LAND REGISTRAR KEHANCHA 3RD DEFENDANT

RULING

1. Sometimes in the year 1994, the plaintiff entered an agreement for sale of land with one Maswi Murimi Mbusiro, deceased. Pursuant to the said agreement, Maswi Murimi Mbusiro (hereinafter referred to only as “**Maswi**”) agreed to sell and the plaintiff agreed to purchase from Maswi a parcel of land measuring 2 acres at a consideration of kshs. 20,000/=. The plaintiff has contended that the parcel of land that was sold to him by Maswi was a portion of **LR No. Bugumbe/Mabera/121** (hereinafter referred to only as “**Plot No. 121**”). Plot No. 121 was registered in the names of Maswe Mbusiro (“**Maswi**”), Maroa Mbusiro, and Mwitā Chana who are all deceased. Due to the demise of Maswi, the parcel of land measuring 2 acres that he sold to the plaintiff was not transferred to the plaintiff. Plot No. 121 measured 13.2 hectares and the registered owners thereof who are all deceased had sold portions thereof to several people to whom no titles had been issued. Upon the death of the registered owners of Plot No. 121 as aforesaid, the 1st defendants herein were appointed as their legal representatives. The 1st defendants were appointed as legal representatives of the estate of Maswi Mbusiro, Maroa Mbusiro and Mwitā Chana all deceased on 5th April 2005. The said grant of letters of administration was confirmed on 10th July 2007. Upon the confirmation of the said grant of letters of administration, the 1st defendants embarked on the sub-division of Plot No. 121 for the purposes of issuing titles to the persons who had purchased portions thereof from the deceased registered owners. The plaintiff is among those to whom portions of Plot No. 121 was to be transferred. The plaintiff and the other purchasers of Plot No. 121 co-operated with the 1st

defendants in the exercise by contributing money for the survey and sub-division of Plot No. 121. The plaintiff has contended that upon the subdivision of Plot No. 121, the parcel of land that he purchased from Maswi was given land reference No. Bugumbe/Mabera/1464 (hereinafter referred to as (“**the suit property**”)) which measured 0.24ha.

2. The plaintiff has contended that the 1st defendants had agreed and made arrangements to transfer the suit property to him together with the other purchasers of portions of Plot No. 121 only that a hitch arose at the Land Control Board. The plaintiff’s name as it appeared in the agreement for sale that he entered into with Maswi was found to be different from the name that was in the application for the land control board consent. In the circumstances, the Land Control Board deferred the plaintiff’s application for consent to the next board meeting. While waiting for the next board meeting as aforesaid, the plaintiff learnt that Joromin Mwita Nyamani (hereinafter referred to only as “**Joromin**”) who is one of the administrators of the estate of the registered owners of Plot No. 121 had fraudulently and without the permission or consent of the other administrators caused the suit property which belonged to the plaintiff to be transferred to the 2nd defendant. It is on account of this development that the plaintiff was compelled to file this suit against the defendants for a permanent injunction to restrain them alienating the suit property or dealing with it in any way. The plaintiff has also sought an order for specific performance of the agreement that he entered into with Maswi.
3. Together with the plaint, the plaintiff has filed an application by way of Notice of Motion dated 17th July 2013 for a temporary injunction to restrain the defendants from alienating, transferring and/or sub-dividing the suit property pending the hearing and determination of this suit. In his affidavit in support of the application, the plaintiff reiterated what I have set out above on how he acquired the suit property from Maswi. The plaintiff has contended that the suit property was transferred to the 2nd defendant by Joromin using falsified documents. The plaintiff has contended that it will serve the interest of justice if the suit property is preserved pending the hearing and determination of this suit. The plaintiff’s application was supported by two of the administrators of the estate of the deceased persons who were the registered owners of Plot No. 121 namely, Johnes Mwita Maswi and Mary Mbone. The two have agreed with the plaintiff that he is the owner of the suit property and that he was entitled to have the suit property transferred to his name. The two administrators have contended further that the transfer of the suit property to the 2nd defendant was undertaken by Joromin unilaterally without involving them. They have urged the court to grant the prayers sought by the plaintiff.
4. The plaintiff’s application was however opposed by Joromin and the 2nd defendant. Joromin contended that the suit property was part of his share of the estate of Mwita Chana and that he sold the same lawfully to the 2nd defendant. Joromin has contended that the transfer of the suit property in favour of the 2nd defendant was executed by all the three (3) administrators of the deceased persons who owned Plot No. 121. Joromin denied that the plaintiff has any interest in the suit property. The 2nd defendant opposed the plaintiff’s application through a replying affidavit sworn on 2nd September, 2013. The 2nd defendant contended that he was informed by Joromin sometimes in March, 2013 that he had land he wanted to sell. The said parcel of land is the suit property. He carried out a search on the title of the suit property and confirmed that Joromin had an interest in the suit property. They agreed on a purchase price of ksh. 700,000/= which he paid in full to Joromin. The suit property was thereafter transferred to him by the registered owners thereof and he was duly issued with a title deed in respect thereof. The 2nd defendant contended that he acquired the suit property lawfully and he is in occupation of the same. The 2nd defendant contended that the agreement for sale on the basis of which the plaintiff has brought this suit is null and void the plaintiff having failed to obtain a consent of the land control board in respect thereof.
5. On 20th May 2014, I directed that the plaintiff’s application be heard by way of written submissions. Joromin, the 2nd defendant and the plaintiff filed their submissions on 20th August 2014, 25th September 2014 and 21st October 2014 respectively. I have considered the plaintiff’s application together with the affidavits filed in support thereof. I have also considered the affidavits sworn by Mary Mbone and Johnes Mwita Maswi on 18th October 2013 in support of the application. I have further considered the affidavits filed by Joromin and the 2nd defendant in

opposition to the application. Finally, I have considered the written submissions filed by the respective advocates for the parties and the authorities cited in support thereof. In the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, it was held that the principles for granting an interlocutory injunction are as follows:-

- a. **The applicant must show a prima facie case with a probability of success;**
 - b. **An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.**
 - c. **If the court is in doubt, it will decide the application on a balance of convenience.**
6. The plaintiff's case is that he purchased the suit property from Maswi whose estate is being administered by the 1st defendants herein. Maswi died before transferring the suit property to him. The 1st defendants agreed to transfer the suit property to him. Before the transfer was effected, one of the 1st defendants, Joromin fraudulently caused the suit property to be transferred to the 2nd defendant. Two (2) of the 1st defendants, Johnes Mwitwa Maswi and Mary Mbone who are the administrators of the estate of Maswi have agreed with the plaintiff that the suit property was transferred to the 2nd defendant fraudulently. They have denied that they executed a transfer in favour of the 2nd defendant in respect of the suit property. The plaintiff has contended that he is entitled to specific performance of the agreement that he entered into with Maswi. Both Joromin and the 2nd defendant have contended that the plaintiff's agreement with Maswi did not refer to Plot No. 121 or the suit property and that in any event the said agreement has been rendered void for want of consent. There is no doubt from the material before me that the plaintiff had purchased a portion of Plot No. 121 measuring 2 acres from Maswi.
7. It is also clear from the material before me that the administrators of the estate of Maswi had agreed to perform the agreement that the plaintiff had entered into with Maswi by transferring the said parcel of land to the plaintiff. It is not clear from the material on record whether the administrators of Maswi had entered into a new agreement for sale with the plaintiff. If the transfer that was intended and which the plaintiff wishes to enforce herein by way of specific performance is based on the agreement which the plaintiff entered into with Maswi in the year 1994 then I am in agreement with the submission by Joromin and the 2nd defendant that the said agreement may not be enforced by the court for want of consent of the land control board. On the plaintiff's contention that the suit property was transferred to the 2nd defendant fraudulently, I have noted from the affidavit of the 2nd defendant sworn on 2nd September 2013 that the agreement for sale was made between the 2nd defendant and Joromin only and that the property was sold for kshs. 700,000/=. When this agreement for sale was being executed, a grant of letters of administration had already been issued in respect of the estate of the deceased registered owners of Plot No. 121. The grant was issued to three (3) people who are grouped together in this suit as 1st defendants. Joromin had no legal capacity to enter into an agreement for sale alone in exclusion of the other administrators. The contention by the other two administrators that Joromin never involved them in the sale of the suit property to the 2nd defendant is therefore not far from the truth. If he failed to involve them in the agreement for sale, it cannot be ruled out that they were also not involved in the transfer.
8. I have also noted that the mutation that gave rise to the suit property was registered on 6th May 2013 while the consent to transfer the suit property to the 2nd defendant is said to have been issued on 7th May 2013 the same day it was applied for. I wonder how consent to transfer could have been issued with respect to a property that was not in existence. I have also noted that although the suit property is said to have been sold to the 2nd defendant for kshs. 700,000/= this amount is not disclosed in the instrument of transfer dated 20th May 2013 in which the consideration for the suit property is estimated at kshs. 100,000/=. The 2nd defendant paid stamp duty on the sum of kshs.100,000/= instead of kshs. 700,000/=. I see no reason why a party who is ready to cheat the Kenya Revenue Authority on taxes cannot cheat on other matters.
9. I am persuaded from what I have stated above that the plaintiff has made out a case of fraud

against the 2nd defendant and Joromin. There is however doubt on the chances of success of this case arising from the fact that the plaintiff seems to be relying on an agreement for sale that was made in the year 1994 and in respect of which no consent was issued by the Land Control Board as a basis for his claim herein. I am therefore doubtful if the plaintiff has established a prima facie case with a probability of success against the defendants. On the issue of irreparable loss, there is no dispute that the suit property is now registered in the name of the 2nd defendant. The 2nd defendant's contention that he is in possession of the suit property is also not disputed by the plaintiff. Since the plaintiff is not in possession of the suit property, I doubt if the plaintiff would suffer irreparable injury if the orders sought are not granted.

10. In view of the findings that I have made above, the plaintiff's application falls for consideration on a balance of convenience. From what I have stated above, the balance of convenience would not favour the granting of an order that will restrain the 2nd defendant from occupying and using the suit property. However in view of the fact that the suit property is in dispute and the process through which it was acquired has been called into serious question, the justice of the matter would require that the status quo in relation to its title be maintained pending the hearing and determination of this suit. The balance of convenience would in the circumstances favour the maintenance of status quo pending the hearing and determination of the rights of the parties. In the Court of Appeal case of, **Ougo & Another vs. Otieno [1987]KLR 364**, it was held that; “ **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.**”
11. In conclusion, the plaintiff's application dated 17th July 2013 would be allowed in part on the following terms; pending the hearing and determination of this suit, the 2nd defendant is restrained from selling, transferring or charging the suit property. 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:-

N/A for the plaintiff

N/A for Johnes Mwita Maswi and Mary Mbone

Mr. Bigogo h/b for Mr. Oguttu for Joromin Mwita Nyamani

Mr. Mose L. for the 2nd defendant

N/A for the 3rd defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE