



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 1086 OF 2014

CYPRIAN OJWANG OMOLLO.....PLAINTIFF

VERSUS

**THE MANAGING TRUSTEE OF THE NATIONAL SOCIAL SECURITY FUND...1ST
DEFENDANT**

**THE NATIONAL SOCIAL SECURITY FUND2ND
DEFENDANT**

CHARLES ONCHURU MACHUNGO3RD DEFENDANT

RULING

The plaintiff by a Notice of Motion dated 8th august 2014 expressed to be brought under Order 40 Rule 1 and 2 of the Civil Procedure rules and sections 3A and 63 (c) and (e) of the Civil Procedure Act seeks the following substantive orders:

1. That the 3rd Defendant/Respondent be restrained by himself his agents, servants, employees or any other persons claiming to act on his behalf from entering, constructing on, developing, damaging, dealing, remaining and/or interfering or wasting the suit plots being **Tassia-11-97/0685/T/002** and **Tassia- 11-97/0684/T003** pending the hearing and determination of this suit.
2. That the 1st and 2nd Defendants be restrained either by themselves or through their agents, servants, employees or any other persons claiming to act on their behalf from allocating plot **NOS. Tassia- 11-97/0685/T/002** and **Tassia-11-97/0684/T/003** to the 3rd Defendant pending the hearing and determination of this suit.

The application is grounded on the grounds that appear on the body of the application and on the plaintiffs supporting and further affidavits sworn on 8th August 2014 and 24th September 2014 respectively. The plaintiff has set out the following grounds in support of the application

- a. That the suit plots were originally allocated to the plaintiff by the 1st and 2nd Defendants and lawfully belong to him.
- b. That the 1st and 2nd Defendants have now purported to allocate the same plots to the 3rd Defendant without any notice of the plaintiff whatsoever.
- c. That the 3rd Defendant has now commenced construction thereof with full knowledge of the 1st and 2nd Defendants.
- d. That there is need to preserve the suit properties pending hearing and determination of this matter.
- e. That it is only in the interest of justice that this application and orders being sought are granted.

The plaintiff by the plaint seeks permanent injunctive orders against the Defendants and a declaration that the two plots the subject of the sale belong to him. It is the plaintiff's case that he acquired the two plots 002 and 003 from **Kwa Ndege Self Help Group** which was recognized as agent for the sale of plots by the 1st and 2nd Defendants as per the letter dated 26th July 2005 where the 1st Defendant wrote to **Kwa Ndege Self Help Group** among others inter alia as follows:-

Re: Sale of Tassia 11 and 111 Scheme.

We refer to various meetings held between your representatives and the fund on the above subject. The Board has considered your proposal and approved the sale of the above plots at the reserved prices below:-

- a. 33x 66ft plot.....Kshs.315,000/-
- b. 100x50 ft plot(1/8).....Kshs.800,000/-

The mode of payment is outright cash or installment within a period of not more than six months with effect from 1st August 2005.

You are requested to submit names of your members who will open individual accounts with the fund to facilitate payment.

.....

Signed

Managing Trustee

The plaintiff claims he made various payments once he was allocated the plots to the 1st Defendant and was issued with receipts collectively marked "**C003**". The plaintiff avers that the 1st Defendant on 14th April 2014 made a demand for payment of money described as for infrastructure development but in June 2014 the court issued an order prohibiting the 1st and 2nd Defendant from unilaterally and arbitrarily repossessing plots in **Tassia II Tassia III** and selling them off to unknown persons.

The plaintiff further depones that on 21st July 2014 he was given a letter by the 1st and 2nd Defendants annexed and marked "**C006**" notifying him that his plots had been allocated to the 3rd Defendant and that when he visited the site he indeed found somebody constructing on the plots provoking the present action.

The 1st and 2nd Defendants have filed a replying affidavit in opposition to the plaintiff's application sworn by **Austine Ouko, Manager Legal Social Security Fund Board**. The 1st and 2nd Defendants admit the plaintiff was offered the suit properties for purchase at the consideration of Kshs.812,000/- but state that the plaintiff failed to meet the terms of the offer. The Defendants contend that the sale of the

suit plots to the plaintiff was on a cash basis and that the plaintiff was supposed to pay the purchase price within 6 months of 1st August 2005 (see plaintiff's annexure "C001" letter dated 26th July 2005). The plaintiff only paid a deposit of Kshs.160,000/- and failed to pay the balance of the purchase price inspite of being reminded and called upon to pay by the 1st and 2nd Defendants(see annexures AO4, AO5 and AO6 attached to the 1st and 2nd Defendants replying affidavit).

The 1st and 2nd Defendants state the plaintiff failed to meet the terms of the offer and that there was no contract of sale that the plaintiff could enforce against the 1st and 2nd Defendants. The 1st and 2nd Defendant contend that as there was no signed agreement for sale as contemplated under section 3(3) of the Law of Contract Act Cap 23 of the Laws of Kenya the plaintiff is non-suited as against the 1st and 2nd Defendants and cannot therefore show or demonstrate he has a prima facie case with probability of success to entitle the court to grant the order of interlocutory injunction in favour of the plaintiff that he seeks.

The 1st and 2nd Defendants further state that as the plaintiff failed to meet the terms of the offer respecting the purchase of the suit properties the 1st and 2nd Defendants revoked the offer to the plaintiff and offered the suit properties to the third Defendant who has fulfilled and satisfied the terms of the offer and has in the premises acquired proprietary interest in the suit properties.

The 3rd Defendant/Respondent filed a replying affidavit sworn on 25th August 2014 in opposition to the plaintiff's Notice of Motion dated 8th August 2014. The 3rd Defendant depones that sometime in July 2014 he got information that plot numbers **Tassia II 97/0684/003** and **Tassia 11 97/0685/002** were available for sale by the 1st Defendant and that after being shown the plots he on 16th July 2014 applied to purchase the same. The 1st Defendant vide a letter dated 21st July 2014 notified the 3rd Defendant that his application to purchase plot **NOS. 97/0685/002** and **97/0684/003** was successful and required him to pay Kshs.1,200,000/- being purchase price and Kshs.983,186.00 being on account of infrastructure Development fees & others charges in respect of each of the two plots. The letters are annexed and marked "**COM2**".

The 3rd Defendant depones that he paid both purchase price and the other charges for the two plots altogether totaling to **Kshs.4,366,372/-** and has annexed the payment cheques and the receipts issued marked "**COM3**". The 1st Defendant after effecting all the necessary payments in full took possession of the suit properties and commenced construction works on the suit plots and photographs annexed and marked "**COM5**" show the extent of the construction works. It is the 3rd Defendants assertion that he is the rightful owner of the suit properties and that the plaintiff's application lacks any merit and should be dismissed.

The plaintiff in a further affidavit filed on 25th September 2014 reiterates the facts set out in his earlier supporting affidavit. The plaintiff depones that the 1st and 2nd Defendants infact drew and issued to the plaintiff Tenant purchase Agreements to be executed between themselves and the plaintiff which the plaintiff signed and returned to the 1st and 2nd Defendants but who did not return duly signed copies to the plaintiff. Copies of the Agreement are annexed and marked "**C003**". The plaintiff asserts that he never received any reminders for the payment of the balance of the purchase price and further states under the Tenant Purchase Agreement Scheme the repayment period was to be over a period of 120 months to 180 months. The plaintiff avers the 1st and 2nd Defendants repossession of the suit properties and the allocation of the same to the 3rd Defendant was not done in good faith as the allocation to the 3rd Defendant was done after the plaintiff had sought to regularize his account with the 1st and 2nd Defendant in regard to the purchase of the suit properties.

The parties filed written submissions as directed by the court. The plaintiff filed his submissions on 11th November 2014 where he reiterates the facts of the case and submits that a prima facie case has been established to warrant the court to grant a temporary order of injunction pending the hearing and

determination of the suit. The 1st and 2nd Defendants filed their submissions on 10th November 2014 and principally asserts that the plaintiff has not shown he has a proprietary interest in the suit properties and no prima facie case with a probability of success has been established and he therefore cannot be entitled to an order of injunction. In particular the 1st and 2nd Defendant denies there was a Tenant purchase Agreement between the plaintiff and the 1st and 2nd Defendant and asserts that the purported agreement exhibited by the plaintiff was not signed by the 1st and 2nd Defendant and therefore did not comply with section 3(3) of the Law of Contract Act and hence the same is unenforceable and cannot be used to found an action such as the present one. The 1st and 2nd Defendants place reliance on the cases of **Jane Catherine Karani –vs- Daniel Mureithi Wachira (2014) eKLR**, **Kirkdale Limited –vs- Mount Agencies Limited & 3 others (2009) eKLR** and **Lee Mwathi Kimani –vs- National Social Security Fund (2014) eKLR** to support their submission that where a contract for a disposition of an interest in land does not comply with the provisions of section 3(3) of the Law of Contract Act the same does not constitute a binding contract which would be enforceable.

Section 3(3) of the Law of Contract Act provides as follows:-

3.(3) No suit shall be brought upon a contract for disposition of land unless:-

(a) the contract upon which the suit is founded

(i) is in writing

(ii) is signed by all the parties thereto, and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by each party.

The Court of Appeal in the case of **Jane Catherine Karani –vs- Daniel Mureithi Wachira (Supra)** considered the application of section 3(3) of the Law of Contract Act and observed thus:-

“It is clear from the reading of section 3(3) of the Law of Contract Act that the signature of each party is required to be attested by a witness who was present during the execution of the agreement. We have perused the agreement and we find that it is only the appellants signature that was attested by her husband. This was clearly contrary to section 3(3) of the Law of Contract. We therefore concur with the learned Judge’s (Ongundi J) findings that the agreement was unenforceable”.

The court of Appeal also in the case of **Kirkdale Limited –vs- Mount Agencies Ltd & 3 others (supra)** where as in the present case an agreement was forwarded for execution to the Appellant but was not executed, the court held that such an agreement would not be relied on for non compliance with the provisions of the law. The court, while considering the applicability of Section 3(3) of the Law of Contract Act observed thus-

“-----we are not sure the said first respondent has a basis for insisting that it entered into a valid agreement with the appellant for sale of L.R.NO.209/4548 situated in Nairobi. The draft agreement the 1st respondent sent to the appellant for execution was not returned executed as required. And because the statutory requirements for the land sale transaction were not complied with, the 1st respondent cannot fall back to a constructive trust for a remedy in a case of this nature”.

This court in the case of **Lee Mwathi Kimani –vs- National Social Security Fund (2014) eKLR** considered a somewhat similar situation as in the present case where the plaintiff had been making payments (deposits) towards the purchase of a plot in the same **Tassia Estate Scheme** but no formal Tenant purchase Agreement was signed by the parties although the plaintiff/Applicant argued the payment of the deposits towards the purchase constructively meant there was such an agreement. The

court observed in the case as follows:-

“The issue thus does arise whether infact there was any Tenant purchase Agreement for the purchase of the suit property by the plaintiff from the Defendant. That the Defendant made an offer to the plaintiff for the purchase of the suit property in April 2004 as per letter of 28/4/2004 annexed as “AN2” in the Defendants replying affidavit is not denied. There is evidence that the plaintiff did not meet the terms of offer as the Defendant’s letters of 5th January 2006 and 22nd September 2006 when the alleged Tenant Purchase Agreement (TPS) was entered into and what the terms of the agreement were. The Tenant Purchase Agreement would amount to a disposition of an interest in land and would in terms of section 3(3) of the Law of contract Act (Cap 23) of the Laws of Kenya be required to be in writing and signed by each of the parties to the contract and their respective signatures attested”.

The court in the matter went further to observe that:-

“The Plaintiff has not exhibited any signed contract between him and the Defendant for the purchase of the suit property. The abstract of the statement of account alone cannot in my view satisfy the requirements of section 3(3) of the Law of Contract Act and in the absence of the formal signed agreement between the parties cannot supplement the agreement”.

The 1st and 2nd Defendants in the premises submit the plaintiff has not demonstrated a prima facie case and/or that he stands to suffer any irreparable harm that cannot be compensated in damages if the injunction is not granted and he is successful at the trial. It is the 1st and 2nd Defendants submission that the plaintiff has failed to satisfy the threshold for the grant of an interlocutory injunction as established in the case of **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358** and his application for injunction ought to be dismissed.

The 3rd Defendant in his filed submissions reiterates the facts of the matter in as far as they relate to him and submits that the 1st Defendant upon receiving the full payment of the purchase price and other charges amounting to **Kshs.4,366,372/-** confirmed ownership of the plots to the 3rd Defendant who immediately commenced construction.

The 3rd Defendant submits that he had no knowledge and/or notice of any third party interest in the suit property and contends he was an innocent purchaser for value without any notice.

The 3rd Defendant referred the court to the cases of **Amos Wangeera Njoroge & 9 others –vs- Serah Wamunyu & Another (2014) eKLR** and **Metra Investments Ltd –vs- Standard Chartered Bank Ltd & others (2011) eKLR** to illustrate the factors to be considered in the case of an innocent purchaser for value who has no notice. The 3rd Defendant argues that the plaintiff has no prima facie case and at any rate even if he was to be successful damages would be an adequate remedy.

I have considered the pleadings the affidavits in support and in opposition to the plaintiffs application and the parties submission and the issue for the court to determine is whether indeed the plaintiff has satisfied the conditions for the grant of an interlocutory injunction as established in the case of **GIELLA –VS- CASSMAN BROWN & CO. Ltd (1973) EA 358** to warrant the grant of the injunction sought. The conditions the applicant needs to satisfy are that:-

- i. He has a prima facie case with a probability of success,
- ii. He stands to suffer irreparable damages that cannot be compensated by an award of damages.
- iii. Incase of any doubt in regard to the above two conditions the court may determine the application by considering the balance of convenience.

Upon evaluation of all the material placed before the court by the parties I am not persuaded the plaintiff has demonstrated a prima facie case with a probability of success. Although it is not doubted that the 1st

and 2nd Defendants made an offer to the plaintiff to purchase the suit plots there is no evidence that the plaintiff satisfied the terms of the offer. One of the terms of the offer was that payment for the plots was on outright cash basis or installments within a period of not more than 6 months with effect from 1st August 2005. This term of the offer was not complied with and even though the 1st Defendant sent a reminder for payment of the balance of the purchase price on 11th February 2009 requiring the balance of Kshs.812,000/- to be paid within 14 days that does not appear to have happened. The plaintiff paid a deposit of Kshs.160,000/- in 2009 with the last deposit of Kshs.10,000/- being made on 30th November 2009. The plaintiff places reliance on the deposits he made and a purported Tenant purchase Agreement which he states was forwarded to the 1st and 2nd Defendant duly executed by the plaintiff for their execution but which the 1st and 2nd Defendant failed to return to him duly executed on their part. Prima facie the plaintiff does not appear to have complied with the offer terms and he cannot also show he has an agreement that satisfies the requirements of section 3(3) of the Law of Contract Act on which the present suit is founded. As observed earlier section 3(3) of the Law of Contract Act requires that the agreement for a disposition of any interest in land be signed by the parties to it and their signatures be duly attested by a witness who was present when the agreement was signed by the parties. The Tenant purchase Agreement relied upon by the plaintiff is not signed by the 1st and 2nd Defendants and is therefore not enforceable against the 1st and 2nd Defendants. In those circumstances I am unable to find that the plaintiff has a prima facie case with a probability of success.

The 1st and 2nd Defendants have sold the suit plots to the 3rd Defendant who has taken possession and has commenced constructions thereon. There is no evidence to suggest that the 3rd Defendant is anything but an innocent purchaser for value. The plaintiff it would appear was not in physical possession of the suit properties and had not effected any developments thereon. My view is that the plaintiff cannot suffer any damage that would not be compensatable in damages were he to be successful at the trial. The value of the suit properties would be easily ascertained by a valuer at the time the suit is heard and determined. The balance of convenience were that to be a consideration would in my view tilt in favour of not granting the injunction in favour of the plaintiff in this matter.

I am mindful that the conditions for the grant of an injunction are considered sequentially such that if the first condition is not satisfied then the injunction cannot be granted. Since I am satisfied the plaintiff has not demonstrated a prima facie case I would on that ground alone decline to grant the injunction sought.

In the premises I find and hold that the plaintiff's Notice of Motion dated 8th August 2014 lacks any merit and I order the same dismissed with costs to the defendants.

Orders accordingly.

Ruling dated, signed and delivered this.....12thday of...March.....2015.

J. M. MUTUNGI

JUDGE

In presence of:

.....For the Plaintiff

..... For the Defendant