



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 186 OF 2013

ANNASTACIA NTHENYA ITATU.....PLAINTIFF

VERSUS

NAOM MITI MUIA.....1ST DEFENDANT

MARY WAMBUI MUNGAI.....2ND DEFENDANT

SILAS GACHANJA MACHARIA.....3RD DEFENDANT

RULING

Plaintiff's Case

1. When the Plaintiff's application dated 29/8/2014 came up for hearing ex-parte on 3/9/2014, this Court with Gacheru J presiding, admitted the matter to be heard during the Court vacation and immediately granted injunction orders restraining the Defendants from alienating, selling, transferring, sub-dividing, charging or in any way dealing in or interfering with the property known as DonyoSabuk/Komarock Block 1/18615 situate in Matungulu Division and measuring approximately 7 acres pending the hearing and determination of the application. It is this order that the Plaintiff seeks to be confirmed pending the determination of the suit.

2. The application is premised on grounds that the Plaintiff is the beneficial owner of the suit property which has fraudulently been transferred to the 2nd Defendant. Further, that the District Surveyor is set to commence sub-division of suit property whereas the question of ownership is yet to be determined.

3. In support of the application, the Plaintiff swore an affidavit wherein she deposed that she entered into a sale agreement with the 1st Defendant for the purchase of the suit property at a consideration of Kshs. 420,000/-. The Plaintiff deposes that prior to the purchase she conducted a search at the Lands Registry where she confirmed that the property was registered in the name of the 1st Defendant. After the purchase, the Plaintiff states that she applied for the consent of the Land Control Board on 17/4/2006 and received the Letter of Consent on 26/9/2006. It is the Plaintiff's deposition that she took possession immediately after the purchase but due to work assignments out of the country, she finally only executed the transfer on 4/3/2011. The Plaintiff deposes that she lodged the transfer forms for registration but learnt that the property had been transferred to the 3rd Defendant and subsequently the 2nd Defendant who has title in his name.

Response

4. The 1st Defendant swore a Replying Affidavit on 10/11/2014 wherein she admitted having sold, transferred and given vacant possession to the Plaintiff. The 1st Defendant deposed that she met all her contractual obligations and cannot therefore be liable for the Plaintiff's failure to obtain title in her name. The 1st Defendant denied knowledge of the 2nd and 3rd Defendants and how they came to acquire ownership of the property deposing that she never transacted with either of them.

5. The 2nd Defendant swore a Replying Affidavit on 10/11/2014 wherein she deposed that she purchased the property from the 3rd Defendant in 2011 and caused the title to be transferred to her after following due process in respect to purchase of property. She deposed that prior and even after the purchase, she was not aware of any parties who were interested in the property as an official search conducted prior to the sale confirmed that the same belonged to the 3rd Defendant.

6. The 2nd Defendant deposed that she never met the Plaintiff or the 1st Defendant, she also never engaged with any of them or through their surrogates in any transaction. Further, that she was unaware of their alleged transaction hence she was an innocent purchaser for value and therefore it is imperative that her ownership rights be protected. The 2nd Defendant deposed that she stood to suffer prejudice in the event that the injunction orders are issued in view of the substantial investment and development on the property.

7. The 3rd Defendant did not file any responses to the Plaintiff's pleadings nor appear in court to make representations in respect of the allegations levelled against him.

Plaintiff's Further Response

8. The Plaintiff swore a Supplementary Affidavit on 25/11/2014 wherein she deposed that the 2nd Defendant had failed to furnish a sale agreement in support of the alleged purchase from the 3rd Defendant.

9. It was her deposition that the purported transaction between the 2nd and 3rd Defendants was tainted with illegality on the basis that: the copy of Transfer marked "MWM1" does not have a stamp from the Ministry of Lands or any Lands Registry nor any signature of any official of the Lands Registry; the said Transfer is from third parties to the 3rd Defendant not to the 2nd Defendant; no title document has been availed neither has the search document indicating that the 3rd Defendant was an owner thereof; the Consent of the Land Control Board has also not been annexed; and there is no evidence that consideration was paid.

2nd Defendant's Response

10. In an affidavit sworn on 10/12/2014, the 2nd Defendant deposed that she purchased the property at a consideration of Kshs. 3,640,000/-, the 10% deposit was paid on 15/12/2010 and the property transferred after she settled the balance. The deponent refuted the claim that the Transfer document was forged and annexed a copy of the sale agreement and title.

Submissions

11. The application was canvassed by way of written submissions. Counsel for the Plaintiff filed submissions dated 16/1/2015 wherein counsel submitted that the Plaintiff had established a prima facie case with the probability of success. It was deposed that the 2nd and 3rd Defendant's transaction was suspect based on the highlighted anomalies of the Transfer Document and the defective sale agreement since there was only one witness who attested the 2nd Defendant's signature contrary to Section 3(3) of the Law of Contract Act.

12. Counsel for the 2nd Defendant filed submissions dated 22/1/2015 wherein it was submitted that the

2nd Defendant had exhibited title which, under **Section 26** of the **Land Registration Act (LRA)**, is prima facie evidence that she is the absolute and indefeasible owner. Thereby, she is entitled to the rights and privileges conferred by virtue of registration as envisaged in **Section 24** of the **Land Registration Act (LRA)**. Consequently, that the 2nd Defendant had every right to proceed with sub-division of the property and the orders sought, if granted would be prejudicial to her quiet enjoyment.

Determination

13. The dispute between the parties is that of ownership of the suit property. Whereas the Plaintiff has no title to the property, she contends that she has proprietary rights thereto acquired through purchase from the 1st Defendant who was the registered owner. In support of her deposition, the Plaintiff availed a copy of the Sale Agreement, Requisition form for Stamp Duty, Application and Letter of Consent from Matungulu Land Control Board and a copy of the Transfer, all showing the transaction between herself and the 1st Defendant. This transaction is admitted by the 1st Defendant. The 2nd Defendant is presently the registered owner and deposes how she acquired the property through purchase from the 3rd Defendant. It is her submission that by virtue of Section 26 of the **LRA**, her title is a prima facie evidence that she is the absolute and indefeasible owner of the property.

14. Whereas Section 26 of the Registered Land Act provides that the Certificate of Title to be held as conclusive evidence of proprietorship, the said section provides for circumstances where title can be challenged, to wit;

- a. **on the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.**

15. The Plaintiff has made allegations of fraud against the Defendants averring that the transaction between the 2nd and 3rd Defendant is suspect. The basis is that the Sale Agreement is defective, the Transfer document does not bare a signature or official stamp of the Land Registry and that there is also no letter of the Land Board Consent. Fraud is a serious allegation and the standard of proof, though still on a preponderance of facts, is higher than that of ordinary civil cases: see the case of **Central Kenya Ltd -Vs- Trust Bank Ltd & 4 Others Civil Appeal No. 215 of 1996. [1996]** Such proof can only be furnished upon trial where each party is afforded an opportunity to give evidence and the veracity of the evidence tested on cross-examination.

16. The 2nd Defendant has claimed interest as a purchaser for value without Notice of either the 1st Defendant's interest or the Plaintiff's interest. Such contention as has been demonstrated above is however lacking in various respects. For example, the Land Control Board consent is missing and neither has the 2nd Defendant demonstrated the due diligence undertaken prior to the transfer of the property to herself.

17. I appreciate the suit is still at its interlocutory stage and the Defendants also need only show that the Plaintiff's claim is untenable. It would however be appropriate to preserve the subject matter of the suit. That is the effect of an interlocutory injunction: see **Bonde -v- Steyn [2013] 2 E.A. 8**.

18. The Plaintiff has exhibited substantial interest over the suit property to my satisfaction to warrant the grant of the injunction order. In so far as even the true owner denies ever selling the property to the 3rd Defendant, but only to the Plaintiff, I hold the view that the Plaintiff has established a prima facie case. This is coupled with the fact that the 2nd Defendant's title has apparent question marks. Furthermore, the balance of convenience tilts in favour of preserving the suit property in the interim. I therefore confirm the order of injunction issued by this court on 3/9/2014 pending the hearing and determination of the suit. A formal order to like effect and in terms of prayer number three (3) of the application dated 29th August, 2014 is to be duly extracted.

19. Costs of the application shall be in the cause.

Orders accordingly.

Dated, signed and delivered at Nairobi this 20th day of April, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

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for the Plaintiff/Applicant

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for the Defendants/Respondents