



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 886 OF 2014

TRISANDS LIMITED..... PLAINTIFF

VERSUS

NJERI NGINORA... 1ST DEFENDANT

PETER KINYANJUI NAHASHON..... 2ND DEFENDANT

JANE WAMBUI NGINORA..... 3RD DEFENDANT

PATRICK KUNGU NGINORA..... 4TH DEFENDANT

TERESIAH MWIKALI RANJA 5TH DEFENDANT

MARGARET WAMBUI MUCHAI 6TH DEFENDANT

RULING

Before the court for determination is the plaintiffs Notice of Motion dated 3rd July 2014 brought under section 3A of the Civil Procedure Act and Order 40 Rule 1(a), 2(1), 4(1), 10(1) and Order 51 of the Civil Procedure Rules. The plaintiff states the 1st to 6th Defendants have unlawfully and illegally sold off land parcel **Juja/Juja East Block 1/136** to the 7th Defendant in breach of an Agreement for sale dated 7th September, 2011 between the plaintiff and them and that the 7th Defendant intends to remain in possession and to commit acts of waste unless he is restrained by the Honourable court. The plaintiff in the premises prays for an order that:-

1. Pending the hearing and determination of the plaintiff's application and suit that the court be pleased to preserve the status quo of the suit property and also restrain any development, excavation, mining, utilization or any other dealings or transactions with the suit land as the 1st plaintiff does claim a valid first purchaser's interest over the land.
2. The costs of the application by provided for.

The plaintiff's application is supported on the grounds set out on the face of the application and on the supporting affidavit sworn by **Paul Kinyanjui Ndungu** Advocate for the plaintiff and the replying affidavits sworn on 6th October 2014 by **John Kenneth Njuguna Njonge** a director of the plaintiff in

response to the replying affidavits sworn in opposition to the application by the 1st-6th defendants on one part and the 7th defendant on the other part.

The 2nd defendant, **Peter Kinyanjui Nahason** swore a replying affidavit, on 4th August 2014 on his behalf and on behalf of the 1st, 3rd, 4th, 5th & 6th Defendants in opposition to the plaintiff's application. The 7th Defendant, **Harun Nganga Wanyoike** swore a replying affidavit on 7th August 2014 and a further affidavit on 1st December in opposition to the plaintiff's application.

I have perused the application and the affidavits sworn in support and in opposition and the facts are straight forward. Briefly the facts are that the plaintiff on 12th September 2011 entered into an agreement with the 1st Defendant who was the intended administratrix of the estate of one **Nginora Gakoru** (deceased) who was the registered owner of land parcel title number **Juja/Juja East Block1/136** on the terms and conditions set out in the agreement annexed and marked "**PKN1**". As per the agreement the beneficiaries of the deceased estate who are the 2nd to 6th Defendants had consented to the sale of the parcel of land to the plaintiff once the letters of administration were issued to the 1st defendant. The 2nd to 6th defendants signed a memorandum of understanding dated 12th September 2011 with the plaintiff affirming their consent to the 1st Defendant being issued with the grant of letters of administration to the estate of **Nginora Gakoru** and sanctioning the sale of the suit property to the plaintiff. The memorandum of understanding is annexed and marked "**PKN2**".

Pursuant to the agreement with the 1st Defendant the plaintiff states that it paid a total sum of Kshs.1,840,000/- towards the purchase price leaving a balance of some Kshs.900,000/- which was payable on completion of the transaction. The plaintiff however states that upon the letters of administration being obtained the suit property was transferred to the 2nd defendant by the 1st defendant and that he hastily sold and transferred the suit property to the 7th defendant. The plaintiff avers that the sale to the 7th Defendant was unlawful and illegal and states that the way and manner the sale to the 7th Defendant was executed shows that the 7th defendant and the 1st to 6th Defendants were in collusion and that the 7th Defendant was not an innocent purchaser. The plaintiff avers that the 7th Defendant was aware that the plaintiff was purchasing the suit property yet he secretly went behind the plaintiff's back to purchase the property.

The 1st to the 6th Defendants admit the agreement the plaintiff entered with the 1st defendant but state that the plaintiff through his conduct frustrated the performance of the contract resulting in the defendants rescinding the agreement. The Defendants aver that the plaintiff failed to complete the agreement after the letters of administration were procured by the Defendants in spite of being notified by the defendants that the letters of administration had been obtained. The 1st-6th Defendants aver that they were selling the suit property to raise funds to support their mother, the 1st defendant, who was ailing and required constant medication and as the plaintiff was unwilling to complete the transaction they opted to sell the property to the 7th defendant. The 1st-6th Defendants state that they offered to make a refund to the plaintiff of the deposit paid towards the purchase price but the plaintiff declined and/or refused to accept a refund and instead instituted these proceedings. Refund cheques annexed and marked collectively as "**PKN3**".

The 7th Defendant for his part states that he got information from an acquaintance that the 2nd Defendant/Respondent was selling the suit property and that after conducting a search of the suit property and confirming the property was registered in the name of the 2nd defendant and it had no encumbrances he negotiated to purchase the property at the price of Kshs.6,000,000/-. The Agreement for sale dated 30th April 2014 is annexed and marked "**HNW3**". In furtherance to the Agreement for sale a transfer was executed and registered whereupon the 7th defendant was issued a title deed in respect of title Number **Juja/Juja East Block 1/136** dated 2nd May 2014 under the provisions of the Land registration Act NO. 3 of 2012.

The 7th Defendant avers that he immediately took possession of the suit property following the purchase and commenced mining of stones until he was stopped by an order of the court issued on 17th July 2014. The 7th Defendant avers that he was a bonafide purchaser for value without any notice of any third party interests. He states that as the bonafide registered owner he is entitled to protection of his property rights under the law and avers the court order of 17th July 2014 is prejudicial to his interests and the same ought to be vacated and/or set aside.

The 7th defendant in response to the averments by the plaintiff that he was aware that the plaintiff was purchasing the suit property states that the search on the property did not reveal any third party interest and he was entitled to deal with the registered owner of the property on the basis that there were no encumbrances on the property. Besides the 7th Defendant avers that the contract the plaintiff seeks enforcement of became void by operation of the law in that no land control board's consent was sought and granted under the provisions of the Land Control Act, Cap 302 Laws of Kenya. The contract therefore is unenforceable and the plaintiff's prayer for specific performance of the contract is misconceived and untenable in law. The 7th defendant argues that the plaintiff has no prima facie case with any probability of success to entitle the plaintiff to an order of injunction.

The parties filed written submissions to canvass the application. The 7th defendant filed his submissions on 13th February 2015, the 1st – 6th defendants on 18th February 2015 and the plaintiff on 25th February, 2015. The parties submissions reiterate the facts of the case as outlined above and address issues of law. The Defendants in their submissions have raised issue with the plaintiff's Advocate swearing the affidavit in support of the application arguing that the Advocate lacked the authority or competence to swear the affidavit. The 7th Defendant has raised the issue that the plaintiff's contract with the 1st-6th defendants became void for failure to comply with the provisions of the Land Control Act.

I have carefully perused the pleadings, the application and the affidavits in support and in opposition of the application and the submissions filed by the parties. At this interlocutory stage I am not required to make any definitive findings on matters of evidence particularly where the facts are disputed and/or contested and that will be the preserve of the trial court. The application before the court being one that seeks conservatory orders which are in the nature of an injunction in the sense they are restraining orders the applicant would be expected to satisfy the conditions for the grant of an interlocutory injunction as established in the case of **GIELLA –vs- CASSMAN BROWN & CO. LTD (1973) EA 358** and which have been continuously applied by the courts in this country.

The applicant must demonstrate the following to succeed in an application for injunction:

- i. He has a prima facie case with a probability of success,
- ii. He will suffer irreparable damage that cannot be compensated by an award of damages
- iii. In case the court is in doubt the court can decide the application by considering the balance of convenience.

The plaintiff in the present suit basis his action on the agreement for sale dated 12th September 2011 and under special condition 1. (iii) of the sale agreement the agreement provided that a consent from Land Control Board would be one of the completion documents that was to be delivered on or before the completion date. This in my view suggests the property the subject of the sale was land that fell within a controlled area and therefore the provisions of the Land Control Act, Cap 302 Laws of Kenya would be applicable. Section 6 of the Land Control Act provides that any transactions relating to sale or transfer of land within a controlled area is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with the Act.

Section 8(1) of the Land Control Act provides thus:-

8.(1) An application for consent in respect of a controlled transaction shall be made in the

prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto.

There is no evidence that any consent of the Land Board was sought and obtained by the parties as required under the Act. If no consent was obtained by the parties the agreement for sale automatically became void by operation of the law and would not be enforceable and the remedy available to the plaintiff would be one for refund and/or payment of damages if it was established the defendants were the parties who breached the agreement for sale.

The sale to the 7th Defendant was completed and the 7th Defendant is presently the registered proprietor of the suit property following a sale and payment of consideration in the sum of Kshs.6,000,000/- as per the agreement of sale between the 7th Defendant and the 2nd Defendant who was the registered owner. The 7th Defendant has pleaded that he was an innocent purchaser for value without any notice of any third party interests. An official search of the property carried out on the property dated 13th March 2014 annexed and marked "HNW2" shows the 2nd defendant, **Peter Kinyanjui Nahason**, was the registered owner and there was no encumbrance noted against the title. There was in the circumstances nothing to hinder the 7th Defendant from transacting on the said property.

Under Section 24(a) of the Land Registration Act 2012, the 7th Defendant was upon registration as the owner of the suit property conferred with absolute rights of ownership which could not be defeated otherwise than as provided by the Act under Section 26(1) (a) & (b) on either grounds of fraud or misrepresentation to which he was proved to be a party or if it is shown the title was acquired illegally, unprocedurally or through a corrupt scheme. Section 24(a) of the Act provides:-

24. Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

Section 26(1) of the Act provides:-

26.(1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-

(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, unprocedurally or through a corrupt scheme.

Although the plaintiff has averred that the transfer to the 7th defendant was carried out hastily, that in itself cannot constitute fraud on the part of the 7th Defendant. The evidence as per the search was that this property was free of encumbrances as at March 2014 and the agreement of 30th April 2014 may have been to formalize a transaction that may have been afoot for quite a while. Having paid the full purchase price against the signing of the agreement there was nothing to prevent the execution and presentation of the transfer for registration provided all the necessary completion documents were available.

The plaint filed by the plaintiff does not plead any fraud or misrepresentation on the part of the 7th Defendant and no particulars of such fraud or misrepresentation are pleaded in the plaint and as such the

7th defendant's title is unimpeachable on the grounds of either fraud or misrepresentation. The evidence available is that the 7th Defendant regularly purchased the suit property as illustrated by the agreement of sale and the duly executed and registered transfer. Where a party alleges fraud, the particulars of the fraud have to be specifically pleaded and proof offered on a standard usually higher than proof on a balance of probabilities.

The plaintiff has relied on the case of **David Onjili Ombele & Another –vs- Lilian Isigi Munyeshi & 3 others (2014) e KLR where Hon. Justice Munyao Sila** upheld an earlier sale transaction as against a subsequent sale where the vendors had sold the same property to two separate parties as in the present case. However the facts in that case were not similar to the facts in the instant case as in that case neither of the transactions had been completed and none of the parties had been registered as owner. In the case it was not apparent whether the transaction was a controlled transaction to which the provisions of the Land Control Act Cap 302 Laws of Kenya were applicable. Quite clearly therefore the facts in the two cases are distinguishable.

In the circumstances and having regard to all the material that has been placed before me I am not satisfied the plaintiff has demonstrated a prima facie case with a probability of success to warrant the court to grant the conservatory order sought.

On the question whether the plaintiff would suffer irreparable damage that cannot be compensated by an award of damages my view is that he would not. Under paragraph 12 of the plaint the plaintiff has set out the damage or loss it would suffer and in the event the trial court finds the provisions of the Land Control Act Cap 302 were applicable to the plaintiff's sale agreement with the 1st Defendant and there are strong indications that the transaction was a controlled transaction. If that be the case then the plaintiff's remedy would be a refund of the purchase price paid pursuant to section 7 of the Act.

As I do not entertain any doubt in regard to the first two conditions that a party needs to satisfy to warrant the grant of a temporary injunction I need not consider in whose favour the balance of convenience would tilt but even if I was to do so, I would still find in favour of the 7th Defendant who apart from being the registered owner following the purchase of the suit land he was let into possession and he had commenced mining stone in the suit premises.

The upshot is that I find and hold that the plaintiff's Notice of Motion dated 3rd July 2014 is devoid of merit and the same is ordered dismissed with costs to the defendants. The interim orders are vacated and discharged.

Orders accordingly.

Ruling dated, signed and delivered this **19th** day of **June** 2015.

J. M. MUTUNGI

JUDGE

Mr. Njenga..... For the Plaintiff

MS Nyamwata..... For the Defendants