



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 582 OF 2013

JOHN KARIUKI KINYARIRO.....1ST PLAINTIFF

VERSUS

REUBEN WEWERU NJUGUNA1ST DEFENDANT

KARIUKI & GATHECHA RESOURCES LTD.....2ND DEFENDANT

RULING:

Coming before me for determination is the Plaintiff/Applicant's Notice of Motion dated 20th May, 2013 seeking for orders that:

- a. *That an interim injunction do issue restraining the 2nd Defendant , its servants, agents or anybody else claiming under it from alienating ,disposing and/or transferring or otherwise interfering with the Plaintiff's quiet enjoyment of unsurveyed plot number 340 on Land Reference 31/1 Ruaraka in Nairobi pending the determination of this suit.*
- b. *That a temporary injunction do issue restraining the 1st Defendant whether by himself ,his servants, agents or anybody claiming under him, from trespassing , occupying, developing, alienating , wasting , letting or otherwise interfering with the Plaintiff's quiet enjoyment and possession of un surveyed plots numbers 340 and 342 of Land Reference 31/1 Ruaraka pending the hearing and determination of this suit.*
- c. *That a temporary injunction do issue restraining the 2nd Defendant, its servants, agents, or anybody else claiming under it from alienating , disposing and/or transferring or otherwise interfering with the plaintiff's quiet enjoyment of plot number 340 on land Reference /31/1 Ruaraka in Nairobi pending the determination of this suit.*
- d. *That the costs of this application be provided for.*

The application was premised on the grounds stated on the face of the application and on the Supporting Affidavit of **John Kariuki Kinyariro** the applicant herein. These grounds are:-

1. *The 1st defendant has trespassed on the Plaintiff's plots Nos. 340 and 342 of LR No. 31/1 Ruaraka and has commenced constructing on the same. He has refused to stop building despite being informed that the plots actually belong to the Plaintiff, and the Plaintiff reporting the matter to the Police.*
2. *The Plaintiff bought plots No. 339 to 342 from the 2nd Defendant in 1981 for valuable consideration but the said 2nd Defendant entered into an agreement for the sale of plot No. 340 to the 1st Defendant in October 2012 in clear violation of the Plaintiff's legitimate interest in the Plot. The plaintiff is convinced that the Defendants will not desist in trying to deprive him of the ownership of the aforesaid plot number 340 unless they are restrained by this Honourable Court.*
3. *The 2nd Defendant has used its own failure to issue title deed for plot No. 340 to enrich itself unjustly by wrongfully, fraudulently, and unlawfully reselling it to the 1st Defendant.*
4. *The Plaintiff is convinced that the Defendants will not desist in trying to deprive him of the ownership of the aforesaid plots numbers 340 and 342 unless they are restrained by this Honourable Court.*
5. *If the Defendants continue unrestrained, the Plaintiff will suffer substantial loss which cannot be adequately compensated by damages.*

In his Affidavit in support of the application, the applicant averred that in October, 1981, he purchased from the 2nd Defendant four un surveyed plots numbered as **81,82, 83 and 84** each measuring 70 by 35 feet which was part of **LR No. 31/1 Ruaraka** within the City of Nairobi for a consideration of **Kshs. 24,000/=**. He further averred that the 2nd Defendant showed him the plots which the applicant inspected and confirmed they were vacant. He annexed receipt No. 998 dated 5/10/1981 as annexure JKK 1. He further averred that he entered into a sale agreement with the 2nd Defendant on 5th October 1981 and he also paid to the 2nd Defendant Kshs. 1000/= in 1984 to cover legal fees and costs of the sale agreement as evidenced by JKK 2 and JKK3. He further stated the parcel of land **LR No. 31/1 Ruaraka** is still registered in the name of 2nd Defendant because the 2nd Defendant has failed, refused or neglected to have the land surveyed and titles issued to the purchasers. Applicant also contended that plots No. 81 – 84 were delineated as plots No. 340 – 343 as evidenced by JKK 4 and JKK5.

It was his contention that on 18th April, 2013, when he visited his plots **No. 340-343**, he discovered that the 1st Defendant has trespassed on them and commenced construction on plots No. 340 and 342. The applicant contended that since he bought plot No. 340 in 1981 from the 2nd Defendant, the 2nd Defendant did not have any valid title to pass on to the 1st Defendant and the said sale was therefore fraudulent, unlawful and void.

The 2nd Defendant also raised a preliminary objection on a point of law which will I have to determine herein. The 2nd Defendant stated that the applicant's suit is statute barred and should be dismissed with costs.

The 1st and 2nd Defendants/Respondents filed their Replying Affidavits in opposition to the applicant's Notice of Motion.

Reuben Njuguna Waweru, the 1st Respondent averred that he has not trespassed on the plaintiff's land as alleged. He also averred that he purchased the plot in question from the 2nd Respondent on 26th October 2012. He stated that he purchased the plot reference No. 31/1/340 from the 2nd Respondent /Defendant in 2012 for Kshs. 1000,000/= . He further averred that he was shown the plot on

the survey plan and on the ground before buying it and confirmed that the same was vacant. It was his contention that he commenced construction on the plot in April, 2013 and he is a stranger to the Plaintiff's allegation that he bought the same plot from the 2nd Defendant/Respondent in 1981..

It was further his contention that he bought the plot while it was vacant and the plaintiff had bought plots No 81 – 84 (inclusive) on LR No. 31 area A/B while the 1st Respondent purchased plot No 340 of LR No 31/1 which are different parcels of Land. The 1st Respondent averred that the land was registered in the name of the 2nd Defendant and he is therefore an innocent purchase for value without notice. That it was his constitutional right to protection of property which he had lawfully and legitimately acquired.

Dominic Gathecha Kinyanjui , swore a Replying Affidavit on behalf of 2nd Respondent. He stated that the 1st Defendant purchased Plot No. 31/1/340 located on LR No. 31/1 from the 2nd Defendant/Respondent in 2012 for **Kshs 1 Million**. It was his contention that the 1st Defendant was shown the plot on the survey plan and on the ground before buying it. The 2nd Respondent averred that though the Plaintiff wanted to purchase plots No. 81 – 84 (inclusive) on LR No.31/Area A/B , in 1981, the Land Control Board did not grant consent for such transfer. He therefore averred that without such consent from Land Control Board, the sale agreement for plots No. 81-84 was null and void.

Further that the said sale agreement is also not admissible in court as stamp duty was not paid on it. The 2nd Respondent also averred that since the suit arose from the purported sale agreement entered, it is bad in law as it has been caught up by Statute of Limitation.

The parties herein consented to canvas the matter herein by way of written submissions. I have now considered both the Notice of Motion dated 20th may, 2013 and the Preliminary Objection raised by the 2nd Defendant. I have also considered the written submissions and the relevant law and I make the following findings.

The 2nd Defendant has raised a Preliminary Objection. When a preliminary point is raised, it should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone (See **Quick Enterprises Ltd vs Kenya Railways Corporation , Kisumu High Court , Civil Case No.22 of 1999.**

Again, a preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See **Pan African Builders and Contractors Ltd and Another Vs Jogdish Sign,Civil Appeal No. 52 of 1995** and of **Mukisa Biscuit Manufacturing Co.Ltd Vs West End Distributors Ltd (1969) E A 696 at 701.**

The 2nd Defendant argued that the suit herein is statute barred and should therefore be dismissed. It was submitted that the sale agreement was executed on 5th October 1981 and the suit application being based on a contract of Sale of Land, Section 4(1) (c) of the limitation of Acts Act applies. It was further submitted that by virtue of the said section, the plaintiff ought to have filed any claim based on the agreement within six years from the date of the agreement. He submitted that the suit is therefore bad in law. However, the plaintiff submitted that the cause of action arose on 12th October 2012 when the suit land was sold to the 1st Defendant. I will concur with the plaintiff's submissions, that before 12th October, 2012, the plaintiff had nothing to complain against the 2nd Defendant. The cause of action arose on 12th October 2012 and so the suit is not time barred.

The 2nd Defendant also submitted that the Sale Agreement was for an agricultural land and by virtue of Section 6(1) of the Land Control Act, the consent of Land Control Board was mandatory. The Plaintiff submitted that the land was within Nairobi City Council and there was no evidence that it was an agricultural land. The issue on whether the land was agricultural land or not and whether ***Land Control***

Board's consent was a mandatory required is a matter to be decided by the trial court and I cannot decide on it at this interlocutory stage,

On the other issue that the sale agreement relied on is not admissible as it offends the requirements of the Stamp Duty Act as it was not stamped, I will concur with the Plaintiff's submissions that the sale agreement dated 12th October 2012 in favour of 1st Defendant was also not stamped. These are issues that will probably be raised during the main trial. I find that the preliminary objection raised herein is not capable of disposing off the matter preliminarily without the court having to ascertain some facts. The court therefore dismisses the preliminary objection raised by the 2nd Defendant herein.

Applicant herein has sought for injunctive orders which are equitable remedies. These remedies are issued at the discretion of the court but the said discretion should be exercised judicially (See **Hasmukh Khetsi Shah Vs Tinga Traders Ltd, Civil Appeal No. 326 of 202 (2002) KLR 4624.**

In deciding whether to grant or not to grant injunctive orders sought , I will be guided by the principles laid down in the case of **Giella Vs Cassman Brown & Co.Ltd 1973(EA) 358 and Kibutiri Vs Kenya Shell, Nairobi High Court, Civil ase No. 3398 of (1980) KLR 390,** where it was held that.

“The conditions for granting a temporary injunction in East Africa are well known and these are; first the applicant must show a prima facie case with a probability of success, secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

Has the applicant herein been able to establish any of the three principles stated in the above quoted cases?.

Firstly, applicant has to establish that he has a prima facie case with high probability of success. Prima facie case was described in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125,** held that:-

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

The applicant herein stated that he purchased four plots from the 2nd Defendant on 5th October 1981. The four plots where no 81 – 84 from land Reference No. 31/1 Ruaraka. The plaintiff /applicant attached his sale agreement and later submitted that the 2nd Defendant showed him where the plots were. He confirmed the land was vacant and he took possession of the same. The applicant later stated that when he visited his plots on 18th April, 2013 he found 1st Defendant putting up a building on one of his plots which he had been given a new number as 340. The applicant noted that 2nd Defendant had entered into a sale agreement with the 1st Defendant on 12th October 2012 as evidenced by annexure .

The Defendants have however argued that though the 2nd Defendant sold land to 1st Defendant that was a different parcel of land from that of the plaintiff/Applicant. However, the applicant argues that he was shown the land he bought on the ground and he knew where it was. The plaintiff/applicant has therefore raised an arguable case which establishes a prima facie case as stated in the case of **Mrao Ltd Vs First American Bank of Kenya (Supra).**

It is evident that the plaintiff purchased the parcels of land in 1981. He had held legitimate expectation that these parcels of land are his. Whether he took possession or not, that was not a reason for anyone to take them away from him. The 1st Defendant is putting up a building on one of the parcels of land. If that is allowed to continue, the Status Quo of the land will change. The purpose of an injunction is to maintain status quo and the status quo that the applicant herein expects is the status quo which existed

before the 1st Respondent started to put up the building on the suit land.

I find that since the applicant had legitimate expectation and if the construction is allowed to continue the status quo of the suit land will change, the applicant will suffer irreparable loss which cannot be compensated by way of damages.

In the instant case, the court is not in doubt. However, if I was to decide on the issue of balance of convenience, I find that the plaintiff purchase of the parcels of land was earlier than the purchase by the 1st Defendant. It is well known maxim of Equity that “*when two equities are equal, the first in time prevails*”.

The plaintiff was earlier in his purchase of the suit premises. I find that the balance of convenience tilts in his favor.

Having now considered the Notice of Motion dated 20th May, 2013 brought by the plaintiff /applicant, I find it merited and I allow the same in terms of *prayers No. 3 , 4 and 5* .The costs of this application shall be borne by the Defendants/Respondents.

It is so ordered.

Dated, signed and delivered this **8th day of April , 2014**

L.GACHERU

JUDGE

In the Presence of:-

.....for the Applicant/Plaintiff

.....for the 1st Defendant/Respondent

.....for the 2nd Defendant/Respondent

Lukas: Court Clerk

L.GACHERU

JUDGE