



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 339 OF 2010

RAMOKIA HOUSING CO-OPERATIVE SOCIETY LTD..... PLAINTIFF

VERSUS

GEORGE KURIA MWAURA1ST DEFENDANT

KIMANI KAHUHU 2ND DEFENDANT

ARTHER K. WAWERU ANTONY K. NJUGUNA AND

SAMWEL M. MUNGAI AS TRUSTEES OF MT. HEBRON

SELF HELP GROUP.....3RD DEFENDANT

RULING

The Plaintiffs chamber summons application dated 11th October 2010 interalia seeks a temporary injunction against the Defendants restraining them from interfering with parcel numbers **L.R. NO. 9363/191** and **L.R.NO.9363/197** by way of occupation, subdivision, constructing structures thereon, disposing/selling it or alienating it in any other way, demarcating it, surveying it, wasting it and or in any other manner whatsoever as to interfere with the applicants interest, possession enjoyment and quiet possession of the same pending the hearing of the main suit. The plaintiffs further seek an order that the two titles to the suit properties be deposited in court and that the defendants be restrained from processing any papers and/or documents/agreements or leases in respect of land parcel **L.R. NO. 9363/85** till the final determination of the suit.

The plaintiff premises the application on the grounds set out on the face of the application and claim to have purchased and fully paid for the two parcels of land and claim that their members have been settled on the suit land on the basis of a provisional survey and have effected developments on the land. The plaintiffs allege that the Defendants acting in collusion have hatched plans to wrestle the suit properties from them and thereby deny the plaintiffs a portion of 18 acres that they have fully paid for out of **L.R. NO. 9363/85** which measures 51.1 hectares and out of which L.R. and out of which **L.R. Nos 9363/191** and **9363/197** have been curved. The plaintiffs application is further supported on the grounds contained in the annexed affidavit sworn by **Daniel Oganda** on 11th October 2010.

The 1st and 2nd Defendant have in opposition to the plaintiff's application sworn a replying affidavit through **George Kuria Mwaura** and state that the suit properties which were hived out of L.R. NO.9363/85 were transferred to the 3rd Defendant for valuable consideration in June 2009 and the

transfers were registered on 21st June 2010 before the present suit was filed with the result that the orders sought by the plaintiffs against the Defendants are not capable of being granted. The 1st and 2nd Defendants claim that the plaintiff has never occupied the suit premises and are only intent on misleading the court to obtain underserved injunctive orders.

The 3rd Defendant through **Arthur K. Waweru** has sworn a replying affidavit dated 1st March 2013 in opposition to the plaintiffs application. The 3rd Defendant depones that they purchased the suit properties from the 1st and 2nd Defendants for valuable consideration after conducting the requisite due diligence and confirming that the properties were free of any encumbrances and/or inhibitions. The transfer in favour of the 3rd Defendant were duly registered on 21st June 2010 as per the annexed copies to the replying affidavit marked “**AKW1**”. After the registration of the transfers the 3rd Defendant was issued with certificates of title in respect of **L.R. 9363/191** and **L.R. NO. 9363/197** both annexed and marked “**AKW2**” in the replying affidavit by **Arthur K. Waweru**. The 3rd Defendant claim they subsequently have sold the properties which have been amalgamated, subdivided application for and user to be changed from agricultural to residential as been sought as per the communication from the Director of physical planning, Ministry of Lands to the Commissioner of Lands annexed to the replying affidavit and marked “**AKW3**”.

The 3rd Defendant claims to be strangers to the suit in view of the fact that they never had any dealings and/or transactions with the plaintiffs as relates to the suit properties and thus the plaintiffs cannot have a cause of action against the 3rd Defendant. Like the 1st and 2nd Defendant the 3rd defendant denies that the plaintiff’s members were ever in possession and states that at the time the 3rd Defendants purchased the suit premises the same were vacant and unencumbered and they have subsequently subdivided and allocated their members subplots on the suit properties.

The plaintiff in the amended plaint dated 23rd September 2010 under prayer 2 seeks an order cancelling the transfer of **L.R. NO. 9363/191** and **L.R. NO. 9363/197** to 3rd Defendants and further order for specific performance and under prayer 3 prays for damages for breach of contract. It is the 1st and 2nd Defendants contention that the plaintiff failed to honour the agreements for sale dated 29th June 2004 and 8th July 2004 as averred in the sworn affidavit of **George Kuria Mwaura** the 1st Defendant dated 3rd August 2010 sworn in opposition to the chamber summons of 13th July 2010 which the plaintiff subsequently withdrew.

The properties the subject of the sale are stated to be registered in the 3rd Defendant’s name and they were so registered before the institution of this suit by the plaintiff. Registration of the transfers in favour of the 3rd Defendant conferred upon them the rights of a registered proprietor and the certificates of title issued to the 3rd Defendant are conclusive evidence as to the 3rd Defendant’s ownership rights of the suit properties. Under section 26 (1) of the Land Registration Act NO. 3 of 2012 the 3rd Defendant by virtue of being the registered owner is deemed to be the absolute and indefeasible owner of the suit properties and their title cannot be challenged except on the grounds of fraud or misrepresentation and/or if the title is shown to have been acquired illegally, unprocedurally or through a corrupt scheme.

Section 26(1) provides:-

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 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.**

As per the amended plaint no fraud or misrepresentation is pleaded as against the 3rd Defendant who it is acknowledged is the registered owner and neither is it pleaded that the titles were acquired illegally or unprocedurally or through a corrupt scheme. The plaintiff in my view has not laid any basis upon which the titles issued to the 3rd Defendant can be challenged within the law and to that extent I would hold that the plaintiff has not established or demonstrated they have a prima facie case with a probability of success against the Defendants.

I would further hold that the plaintiff has pleaded itself out of the interlocutory remedy of an injunction as in the main suit the plaintiff prays for damages for breach of contract which is an acknowledgement that indeed damages would be an adequate remedy.

The upshot is that the plaintiff has failed to satisfy the threshold established in the **GIELLA- VS- CASSMAN BROWN & CO. LTD case (1973) EA 358** of the conditions that an applicant for an interlocutory injunction needs to satisfy to be entitled to an injunction. No prima facie case that has a probability of success has been established and neither has it been demonstrated that damages would not be an adequate remedy. My own view is that this is a matter where the plaintiff alleges breach of contract and that damages would be an adequate remedy in the event the plaintiff succeeds at the trial and in the circumstances the remedy of an injunctive order would be unavailable.

I accordingly find and hold that the plaintiffs chamber summons of 11th October 2010 is devoid of any merit and I order the same dismissed with costs to the Defendants.

Ruling dated signed and delivered this...3rdday of...April.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant