



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 423 OF 2013

FRANCIS RIOBA MOSETI PLAINTIFF

VERSUS

NANCY MOTONGORI MWITA 1ST DEFENDANT

DAVID SABI MWITA..... 2ND DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on 16th October 2013 seeking;
 - i. **A declaration that the agreements for sale dated 19th February 2013 and 23rd July 2013 are null and void and should be nullified and/or rescinded.**
 - ii. **An order that the transfer and registration of LR No. Bukira/Bwisaboka/1910 (hereinafter referred to as “the suit property”) in the name of the 1st defendant be nullified and the property reverted to the name of the plaintiff.**
 - iii. **The eviction of the defendants from the suit property.**

In his plaint dated 16th October 2013, the plaintiff averred that he was at all material times the registered proprietor of the suit property and that on 19th February 2013 he entered into an agreement for sale with the 1st defendant under which he agreed to sell to the 1st defendant a portion of the suit property measuring 25feet by 100feet at a consideration of kshs. 150,000/= . The plaintiff averred further that through acts of fraud and manipulation the defendants caused the entire parcel of land comprised in the suit property to be transferred to the name of the 1st defendant even before paying the full purchase price for the portion thereof measuring 25feet by 100feet that had been sold to the 1st defendant by the plaintiff.

2. The plaintiff averred that in perpetuation of the said acts of fraud, the defendants caused the plaintiff to execute some blank papers which were later on converted into an agreement under which the plaintiff is purported to have agreed to refund to the defendants a sum of kshs. 520,000/= for the portion of the suit property that was transferred to the 1st defendant fraudulently so that the same may be transferred back to the plaintiff. The plaintiff averred that the defendant commenced development on a portion of the suit property that was undeveloped and at the same time directed the tenants occupying the developed portion of the suit property to pay their monthly rents directly to the defendants who now claim to be the owners of the entire parcel of land.
3. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 16th

October 2013 seeking a temporary injunction to restrain the defendants from occupying, building, developing and/or doing any other thing on the suit property pending the hearing and determination of this suit. The plaintiff also sought a temporary injunction to restrain the defendants from evicting the plaintiff's tenants from the suit property and from installing new tenants on the same pending the hearing and determination of this suit. The plaintiff's application was supported by the affidavit of the plaintiff sworn on 16th October 2013 in which the plaintiff reiterated the contents of the plaintiff that I have highlighted above. The plaintiff stated that the suit property measured approximately 50feet by 100feet and that a half portion thereof was developed with residential and commercial premises while the remaining half portion was undeveloped. The plaintiff's stated further that he had agreed to sell to the 1st defendant the undeveloped portion of the suit property at kshs. 150,000/=. The plaintiff stated that he had no intention and did not at all agree to sell to the defendants the entire parcel of land. The plaintiff stated that in breach of the agreement that he had entered into with the 1st defendant, the defendants colluded with the officers at the lands office and caused the entire parcel of land comprising of the developed and undeveloped portion of the suit property to be transferred to the name of the 1st defendant.

4. The plaintiff stated that the suit property was transferred to the 1st defendant without a valid consent of the land control board. The property was transferred to the 1st defendant through a purported letter of consent of the land control board that was issued on 18th December 2012 before the plaintiff and the 1st defendant had entered into an agreement for the sale of a portion of the suit property and which consent the plaintiff never applied for. The plaintiff reiterated that he did not sell to the 1st defendant the developed portion of the suit property and that he did not receive a sum of kshs. 450,000/= from the 1st defendant being the purchase price in respect thereof. The plaintiff stated further that when he took issue with the defendants over the transfer of the entire parcel of land to the 1st defendant, the defendants duped him into signing another agreement in which he purportedly agreed to refund to the 1st defendant a sum of kshs. 530,000/=. The plaintiff stated that the 1st defendant has now ended up with his entire parcel of land without paying for it.
5. It is on account of the foregoing that the plaintiff has sought a temporary injunction to restrain the defendants from dealing with the suit property pending the hearing and determination of this suit. The plaintiff annexed to his supporting affidavit, a copy of the agreement for sale of land dated 19th February 2013 that he entered into with the 1st defendant under which he sold to the 1st defendant a portion of the suit property measuring 25feet by 100feet at a consideration of kshs. 150,000/=. a copy of the register for the suit property, a copy of a certificate of official search dated 31st July 2013 in respect of the suit property, a copy of an application for consent of the land control board dated 18th December 2012, a copy of letter of consent dated 18th December 2012, a copy of an instrument of transfer of land dated 22nd February 2013, a copy of a statement recorded by the 1st defendant at Kehancha Police station, a copy of a notice dated 10th March 2013 issued by the 1st defendant to the tenants who were occupying the suit property and a copy of a demand letter dated 26th July 2013 served upon the 2nd defendant by the plaintiff's advocate.
6. The plaintiff's application was opposed by the defendants through a replying affidavit that sworn by the 1st defendant and filed in court on 19th November 2013. In her response to the plaintiff's application, the 1st defendant contended that she purchased the suit property in two portions. Initially, she purchased a half portion of the suit property from the plaintiff at a consideration of kshs. 150,000/= which amount was paid to the plaintiff in full upon execution of the agreement for sale. The 1st defendant contended that subsequently, the plaintiff sold to her the remaining half portion of the suit property which was developed at a consideration of kshs. 450,000/= which amount was also paid to the plaintiff in full before the plaintiff surrendered the original title deed for the suit property to the 1st defendant and executed the instrument of transfer of the suit property in favour of the 1st defendant. The 1st defendant denied that she transferred the suit property to her name fraudulently and contended that the plaintiff executed all documents that were necessary for the transfer of the suit property to the 1st defendant to be effected and urged the land registrar to arrange for a special land control board meeting to deliberate of the application

- for consent as a matter of urgency.
7. The 1st defendant contended that she commenced development on the suit property with the knowledge and approval of the plaintiff after the plaintiff had received the full purchase price in the sum of kshs. 600,000/=. The 1st defendant contended that the plaintiff's complaint all along was not that he never sold the suit property to the 1st defendant but that the purchase price for the developed portion of the suit property was lower and he wanted additional sum of kshs. 200,000.00, which amount the 1st defendant was not willing to pay. The 1st defendant contended that this is what led to the 2nd agreement in which the parties agreed that the plaintiff would refund to the 1st defendant a sum of kshs. 450,000/= together with some expenses that the 1st defendant had incurred in renovating the developed portion of the suit property in consideration of the 1st defendant transferring back to the plaintiff the said portion of the suit property. The 1st defendant contended that she has fully developed the portion of the suit property that was not developed and that there are already tenants in occupation which tenants had given her the funds to carry out the said development. The 1st defendant annexed to her replying affidavit a copy of the agreement dated 23rd July 2013 that she entered into with the plaintiff for the refund of kshs. 520,000/=. The 1st defendant also annexed to her affidavit photographs showing the developments that she has carried out on the suit property.
 8. On 19th November 2013, I directed that the plaintiff's application be heard by way of written submissions. Both parties filed their written submissions and the same are on record. I have considered the plaintiff's application and the two affidavits filed in support thereof. I have also considered the affidavit filed by the defendants in opposition to the application. Finally, I have considered the written submissions filed by the advocates for the parties and the case law cited. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, a temporary injunction shall not issue unless the applicant establishes a prima facie case with a probability of success and also demonstrates that he/she will suffer irreparable injury unless the order is granted. In the event that the court is in doubt, the application would be determined on a balance of convenience. The plaintiff's case is that on 19th February 2013 he entered into an agreement with the 1st defendant for the sale of a portion of the suit property measuring 25feet by 50feet at a consideration of kshs. 150,000/= and that through acts of fraud, the defendants caused the entire parcel of land to be registered in the name of the 1st defendant.
 9. In proof of the said acts of fraud, the plaintiff exhibited a copy of the agreement for sale in which it is stated expressly that the plaintiff sold to the 1st defendant only a portion of the suit property which measures 25feet by 100feet and not the whole of the said property. The plaintiff who denied applying for the land control board consent also produced a copy of a letter of consent purportedly issued by Kehancha land control board on 18th December 2012 purportedly approving the transaction between the plaintiff and the 1st defendant. The plaintiff contended that there is no way land control board consent could have been obtained on 18th December 2012 for a sale transaction that was entered into on 19th February 2013. The plaintiff also produced a copy of the register for the suit property and a certificate of official search which show that the suit property is registered in the name of the 1st defendant.
 10. The 1st defendant on her part has contended that she bought the entire parcel of land comprised in the suit property from the plaintiff at kshs. 600,000/= which amount she paid in full before the property was transferred to her name. The 1st defendant has not placed any agreement before the court in proof of the fact that she purchased the whole of the suit property and not a portion thereof only. The 1st defendant has also not placed any evidence before the court that she paid to the plaintiff a total sum of kshs. 600,000/= and not kshs. 150,000/= only for a portion of the suit property. A copy of the instrument of transfer of land exhibited by the plaintiff shows that the value of the land that was sold to the 1st defendant by the plaintiff was kshs. 150,000/= only. The 1st defendant has also not explained how she managed to obtain the consent of the land control board for the transaction on 18th December 2012 before she even entered into an agreement for sale with the plaintiff.
 11. I am satisfied on the material before me that the plaintiff's contention that a half portion of the suit

property was transferred to the 1st defendant through acts of fraud is not without basis. I am persuaded that the plaintiff has established a prima facie case against the defendants with a probability of success. As to whether the plaintiff stands to suffer irreparable injury unless the orders sought are granted, I am equally persuaded that, that would be the case. The suit property is now registered in the name of the 1st defendant who is at liberty to deal with the same in whatever manner deemed fit. In the circumstances, the suit property may be put out of the reach of the plaintiff if the orders sought are not granted. I have also noted from the record that the portion for the suit property which the 1st defendant is alleged to have acquired fraudulently was developed by the plaintiff who was earning rental income therefrom which income the plaintiff would be kept away from with severe economic consequences if the orders sought are not granted.

12. Due to the foregoing, I am satisfied that the plaintiff has satisfied the conditions for granting a temporary injunction. The plaintiff's application dated 16th October 2013 is therefore well merited. The application is allowed in terms of prayers 4 and 5 thereof save that the 1st defendant shall be at liberty pending the hearing and determination of this suit to occupy, maintain, use and let out the portion of the suit property measuring 25feet by 100feet that she purchased from the plaintiff under the agreement for sale dated 19th February 2013. The plaintiff shall have the cost of the application.

Delivered, signed and dated at KISII this 15th day of August, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Mokuha h/b for Kwanga for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE