



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC CASE NO. 391 OF 2013

AGENDI INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

NAFTALI MAINA KIHARA.....1ST DEFENDANT

LAND REGISTRAR, NYANDARUA.....2ND DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion dated **28th May, 2013** under **Order 40 Rule 1, 2 and 3** and **Order 51 Rule 1** of the Civil Procedure Rules, 2010 and **Sections 3 and 3A** of the Civil Procedure Act and all enabling provisions of the law seeking the following substantive orders;

(i) That the 1st defendant be permanently restrained from trespassing, entering, interfering, fencing off, blocking or in any manner interfering with the plaintiff's members' peaceful and quiet possession of **Nyandarua/ Mutonyora /86 (Subdivisions Nyandarua /Mutonyora /3486-3503)** ("hereafter referred to as the suit property") pending the hearing and determination of this suit.

(ii) That the 2nd defendant be directed to place a restriction on the Title Deed of the suit property.

2. The application is premised on the grounds set out therein and is supported by an affidavit sworn by **John Kimani Ng'ang'a**, a director of the plaintiff. He deposes that the plaintiff is a land buying company formed to resettle its members who were victims of the tribal clashes; that they had bought the suit property from one **Mary Nduta Rukwaro** in 1996 but in 1998 a fire razed down the offices of the plaintiff which destroyed most of their records as evidenced by the police abstract (**JKN-5**); that the 1st defendant had fraudulently transferred the suit property to himself and now intended to sell it off to unsuspecting third parties. He urged the court to grant them the prayers sought as they had established a prima facie case and their members would suffer irreparable harm as they had nowhere else to go and had put up developments on the suit property.

3. The application was opposed by the 1st defendant through a replying affidavit dated **11th December, 2013**. He deposed that he was the rightful owner of the suit property having been allocated the same by the Settlement Funds Trustee (**SFT**). He avers that whereas it is true that the land was originally allocated to the said **Mary Nduta Rukwaro**, she failed to repay the loan to **SFT** and the land was reallocated to him. He paid the necessary consideration and requisite fees after which **SFT** executed a discharge and transfer and he consequently obtained title (**NMK 3-5**). He further deposed that he had subdivided the suit property into 18 parcels of which only 4 people were in occupation that had attached photographs showing scattered development on the suit property (**NMK 8**) and denied that victims of tribal clashes lived there. Finally he deposed that this was a ploy to attract sympathy from

the court as the plaintiff had not established any connection with the suit property; that they had not established a prima facie case nor had they established how they would suffer irreparable harm. He urged the court to dismiss the application with costs.

4. The matter proceeded to inter parte's hearing on **19th May, 2014** with Mr Kabita appearing for the plaintiff and Mr Mutonyi appearing for the 1st defendant. The office of the Hon Attorney General merely entered appearance for the 2nd defendant on **13th August, 2013** but did not respond to the application nor participate in the hearing of the application.

5. Mr Kabita reiterated the facts as presented in the application and its supporting affidavit.

6. Mr Mutonyi also reiterated the facts as presented in the 1st defendant's replying affidavit. In addition he submitted that the plaintiffs had attached no evidence demonstrating how the original transaction occurred between themselves and the said Mary Nduta Rukwaro, nor had they attached any evidence of how they had subdivided the suit property amongst its members, or even a list of the names of their members. On his part the 1st defendant had exhibited receipts as proof of purchase, discharge of the charge over the property and a title deed. He further submitted that the status of the members being victims of the tribal clashes was a move to seek sympathy of the court as they had not been enjoined as parties in the suit.

7. In response, Mr Kabita submitted that the plaintiffs were in occupation of the suit land, not the 1st defendant as alleged by counsel for the 1st defendant.

8. From the facts presented to this court through affidavit evidence, the question that comes to the fore is this, should this court grant the order of interlocutory mandatory injunction sought?

9. A mandatory injunction, at the interlocutory stage, is normally granted in the clearest of cases and where there are special circumstances. **See Halsbury's Laws of England Vol. 24 (4th edition) para. 848.** This was also the holding in the case of **Locabail International Finance Ltd vs Agroexport and others (1986) All ER pg. 901** wherein the court stated;

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction".

See also the cases of *The Despiria Pontikos (1975) 1E.A. - 38; Mucuha -vs. - Ripples Ltd (1990-1994} 1 EA 338* and *Kenya Breweries Limited -vs. - Okeyo) 2002} 1EA 109 CAK.*

These decisions and others have reiterated that an interlocutory mandatory injunction shall only be granted in very special cases and in very clear circumstances.

10. The Courts have also held that granting a mandatory order or injunction may have the effect of bringing the litigation to an end at the interlocutory stage. This was echoed by the Court of Appeal in the case of **Trinity Prime Investment Ltd vs Savings & Loan and another Civil Appeal No. 90 of 1998** that **"where the Court has granted an interlocutory injunction prayed for, it should not grant a mandatory injunction whose effect shall bring the litigation to an end."**

11. Do the circumstances of this case satisfy the criteria repeatedly reiterated by the above cases and others? In my view, the application herein is not a clear case to warrant the Court to grant an interlocutory mandatory injunction. A mandatory injunction against the 1st defendant seeking to

permanently restrain him from trespassing, entering, interfering, fencing off, blocking or in any manner interfering with the plaintiff's members' peaceful and quiet possession of the suit property will amount to extinguishing his rights of ownership over the suit property at an interlocutory stage. As to whether the 1st defendant had the suit property fraudulently transferred to him by the 2nd defendant, is an issue to be canvassed during the main hearing.

12. From the affidavit evidence, it is not clear who is in occupation. The plaintiffs allege that their members are in occupation but this is disputed by the 1st defendant who has exhibited some photographs **(NMK8)** showing scattered developments. A permanent injunction therefore restraining the 1st defendant from entering the suit property would amount to an eviction if he is in occupation from the suit property and consequently ending the suit at an interlocutory stage. The issue before this court is not direct and simple and there are no special circumstances adduced by the applicant to warrant a mandatory injunction. Even if some people are in occupation of the suit property the plaintiff has not adduced any evidence showing that these are its members.

13. To this end, the applicant has failed to meet the threshold for grant of the interlocutory relief. In the result, I decline to grant the orders sought in the Notice of Motion dated 28th May, 2013 and dismiss the motion with costs to the 1st defendant.

Dated, signed and delivered at Nakuru this 19th day of September 2014.

L N WAITHAKA

JUDGE.

PRESENT

Mr Kabita holding brief for Mr. Gathui for the plaintiff

N I A for the 1st defendant

N I A for the 2nd defendant

Emmanuel Maelo: Court Assistant

L N WAITHAKA

JUDGE