



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 800 OF 2013

PETER KARANJA KAMAU PLAINTIFF

VERSUS

VIRGINIA NJERI NJIHIA 1ST DEFENDANT

SAMUEL KIHARA NJIHIA 2ND DEFENDANT

RULING

This is in respect to the plaintiff/applicant's Notice of Motion dated 18th November, 2013 seeking an order to restrain the defendants, themselves, their relatives, agents, employees or servants from evicting, selling, entering or interfering with the plaintiff/applicant's user and occupation of plot No. LOC 2/KANGARI/2010 pending further orders of this Court.

The same is premised on the grounds, inter alia, that the plaintiff/applicant and the respondents entered into a sale agreement in respect to the property LOC 2/KANGARI/2010 (hereinafter the suit property) on 6th May, 2010 and a sum of Ksh. 300,000/= was paid to the respondents on the understanding that the balance would be paid upon transfer. The respondents have now threatened to evict the plaintiff/applicant who has extensively developed the said suit property hence this application which is also supported by the plaintiff/applicant's affidavit also dated 18th November, 2013.

The application itself was preceded by a plaint in which the plaintiff/applicant sought orders that this Court do issue an order to the defendants/respondents to transfer the suit property to him failing which the Executive officer do execute the transfer documents and in the alternative, a refund of the sum paid together with damages for breach of contract stipulated at 100% of the agreed consideration.

A defence was filed in which the defendants/respondents averred, inter alia, that the said agreement was infact unenforceable. However, there does not appear to be any replying affidavit to the said application and although the Court was informed that the defendants/respondents' advocate had been served with both the application and submissions by the applicant's advocate, there was no appearance by the defendants' advocate in Court and the application is really un-opposed.

That notwithstanding, I have considered the application and the law as I should.

This being an application for injunction, I have considered it in light of the principles laid out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** and which are:-

1. ***The applicant must show a prima facie case with a probability of success***
2. ***An interlocutory injunction will not normally be granted unless the applicant might otherwise***

- suffer irreparable injury which cannot adequately be compensated by an award of damages and*
3. *If the Court is in doubt, it will decide the application on a balance of convenience.*

From the evidence placed before me, it is clear that although there was an agreement for the sale of the suit property between the plaintiff/applicant and the defendants/respondents over the suit property on 6th May, 2010 at a consideration of Ksh. 570,000/= of which Ksh. 300,000/= was paid at the signing of the agreement and the balance was to be paid later, the suit property was infact registered in the names of one NJEHIA KAMAU (deceased) as per the copy of the title deed annexed to the plaintiff/applicant's supporting affidavit – annexure **PKK 3(b)**. It is clear therefore that as at the time the two defendants/respondents and two others were purporting to sell the suit property to the plaintiff/applicant, they had no interest in the same which they could transfer to the plaintiff/applicant. The sale agreement (annexture **PKK 1**) provides that the defendants/respondents were selling the suit property as “**administrators of the land parcel No. LOC 2/KANGARI/2010**”. It is however clear from the proceedings in Succession Cause No. 45 of 2011 at the Principal Magistrate's Court Kigumo that the Succession Cause in respect of the Estate of the late NJEHIA KAMAU in whose names the suit property is registered was filed in Court on 7th April, 2011 and the grant of letters of administration issued on 29th June, 2011. Therefore on 6th May, 2010 when the plaintiff/applicant entered into the sale agreement with the defendants/respondents they had no capacity to sell the land to him. Indeed, the parties herein were not only intermeddlers in the property of the late NJEHIA KAMAU but were also committing a criminal offence. **Section 45 (1) of the Law of Succession Act** provides as follows:-

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”

And **Sub-Section 2 (a)** of the same Section provides that:-

“Any person who contravenes the provisions of this section shall –

- a. **be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment..”**

Given those circumstances, I am un-able to find that the plaintiff/applicant has made out a prima facie case with a probability of success to warrant the grant of the orders sought. The plaintiff/applicant cannot benefit from a transaction that is obviously contrary to the law.

Secondly, an injunction will not normally be granted unless the applicant demonstrates that he will otherwise suffer irreparable injury which cannot be compensated in damages. In his plaint, the plaintiff/applicant sought the alternative remedy being the refund of the purchase price which he paid. That sum is Ksh. 300,000/= which was paid out of Ksh. 570,000/= thus leaving a balance of Ksh. 270,000/=. He also seeks damages which is 100% of the agreed purchase price. Therefore, the plaintiff/applicant's loss can be quantified in damages. It is not loss that is irreparable. The plaintiff/applicant has also not met the second test in the **GIELLA** case (supra). He is therefore not entitled to the orders sought in his Notice of Motion dated 18th November, 2013.

Ultimately therefore, the plaintiff/applicant's Notice of Motion dated 18th November, 2013 is dismissed with costs.

The land subject matter of this dispute is situated in Murang'a. The claim itself involves transfer of a property or refund of purchase price which are well within the pecuniary jurisdiction of the Chief Magistrate's Court at Murang'a. I order that this suit be transferred to the Chief Magistrate's Court at Murang'a where it will be mentioned on 22nd December, 2014 for further orders as to trial.

B.N. OLAO

JUDGE

8TH DECEMBER, 2014

8/12/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Mwaura for Mwangi for Applicant – present

Mr. Njoroge for Respondent – absent

COURT: Ruling delivered this 8th day of December, 2014 in open Court

Mr. Mwaura for Mwangi for Applicant present

Mr. Njoroge for Respondent absent.

B.N. OLAO

JUDGE

8TH DECEMBER, 2014