



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 152 of 2011

EZEKIEL SUKURU MAUMBA PLAINTIFF/APPLICANT

VERSUS

THOMAS ONDIEKI NYAIRO DEFENDANT/RESPONDENT

RULING

1. The application coming up for hearing is dated 26th July 2011 brought by the plaintiff seeking orders of prohibitory injunction restraining the defendant from entering, constructing and/or interfering with the plaintiff's quiet possession of LR NO.MATUTU SETTLEMENT SCHEME/960 and an order for mandatory injunction directing the defendant/respondent to remove the construction materials and temporary structures on LR NO. MATUTU SETTLEMENT SCHEME/960. The applicant also prays that the OCS Manga police station do ensure compliance with these orders. The applicant also prays for costs of the application.

2. The application is premised on the grounds set out on the face of the said application and those set out in the affidavit sworn by the plaintiff EZEKIEL SUKURU MAUMBA.

3. In his affidavit the plaintiff states that he is the registered proprietor of all that parcel of land known as MATUTU SETTLEMENT/SCHEME/

960 (**the suit land**) as seen from a copy of search marked as annexure 'ESM-O1' He further states that he entered into a sale of land agreement with the Defendant on the 7th October 2009 selling a portion of land measuring 1 acre out of Matutu settlement/ scheme/693 which agreement was a controlled transaction within the meaning of **section 6 (1) of Cap 302 Laws of Kenya**. There is attached a copy of the said agreement marked as annexure "**ESM 02**".

4. The applicant states that upon entering into the sale agreement, he embarked upon subdividing the land and transferring portions thereof to other persons and remaining with only the suit land. The applicant states that the respondent has been reluctant to proceed and complete the conveyance, but now demands specific performance as he also prepares to start construction thereon. The applicant prays for an order of injunction against the respondent as he stands to suffer substantial loss in the event that the order sought is refused. The applicant also wants the respondent to be ordered to remove construction materials from the suit land so that he can get access thereto and proceed with his usual business.

5. The applicant also contends that the respondent will suffer no prejudice since the transaction under which the respondent claims did not meet the requirements of the law.

6. The application is opposed vide the Replying Affidavit sworn by the respondent Thomas Ondieki Nyairo sworn on 16th September 2011. The respondent states that he has never entered into any sale agreement with the applicant with respect to plot number MATUTU SETTLEMENT/SCHEME/960. The respondent also avers that the applicant has never occupied the alleged one (1) acre out of the suit land; that the agreement entered into was with regard to MATUTU SETTLEMENT/SCHEME/693 wherein the applicant had committed to sell 1 acre of land out of his 23 acres and thereafter to cause subdivisions so that the 1 acre could be registered either in the respondent's name or in his name. He states further that soon after the agreement the applicant was paid Kshs. 82,000/= for purposes of obtaining the land control Board consent which payment has been acknowledged in the sale agreement annexed and marked "TON".

7. The Respondent avers that the applicant neither carried out the subdivision nor caused any transfer to be effected in favour of the Respondent and that the instant application together with the entire suit is meant to settle scores between the parties herein, particularly because the respondent refused to give handouts to the applicant outside the terms of the sale agreement. The Respondent states that because he already took possession of the suit land way back in 2009, any orders of injunction will have an adverse effect upon him as he has developed the land and made it his family home. The Respondent prays that the application be dismissed with costs.

8. By agreement of the parties, this application was canvassed by way of written submissions. The submissions were filed on 11th November 2011 and 30th March 2012 respectively. I have carefully read through the submissions and the accompanying authorities. Whereas the applicant prays that the application be allowed as prayed, on the basis that he is the registered proprietor of the suit land and has a *prima facie* case with probability of success in accordance with the principle set out in the case of **Giella -vs- Cassman Brown & Co. Ltd. [1973] EA 358**, the Respondent urges the court to dismiss the application with costs. The Respondent's contention is premised on the ground that he is in possession of the suit land, he has developed the same and lives on it together with his family and that an order of injunction will cause him and his family untold suffering. The respondent also contends that the applicant should not be allowed to take advantage of his own breach of the agreements between himself and the respondent as to do so would be to allow the applicant to steal a match on the respondent. The respondent also submits that the applicant is not candid in his pleadings, especially because he has failed to disclose in the plaint that the respondent has paid more than 80% of all the monies due from him to the applicant, which amount total Kshs.1332000/=.

9. The Respondent cited a number of authorities, all of which the court has taken time to read. As I do not wish to go to the core of the applicant's claim against the Respondents, I will go straight to the issue of whether or not the applicant has satisfied the conditions laid down in the **Giella case** for the granting of injunctions. The main argument by the applicant is that he is the registered proprietor of the suit land. That the transaction being a controlled transaction did not go through the process of getting consent from the relevant Land Control Board and that as such the Respondent who admittedly is in occupation of the suit premises having paid over Kshs.1000000/= to the applicant should be thrown out. As was held (Obiter) by Madan JA in the case of **Ngobit Estate Ltd. -vs- Carnegies [1982] KLR 437**, there was tyranny in "the draconian provisions of the **Land Control Act**", **Cap 302 Laws of Kenya**. The draconian provisions namely **Section 6 (1)** and **(2) Sections 8 and 9** of the said Act have since changed, (see **Statute Law (Repeal and Miscellaneous Amendments) Act 1980** and a more friendly provision vide section 8 introduced. However, as I have stated earlier, I am not deciding the case between the parties. That will be the privilege of the Land and Environment Court at the opportune time.

10. Both mandatory and prohibitive injunctions asked for here are equitable remedies and must satisfy those standards which are applicable. They also are discretionary and like all discretionary remedies it cannot be exercised by merely considering what as between the parties would be fair to be done but discretion by court should be exercised in accordance with settled principles.

11. First the applicant should have clean hands. The court declines to grant equitable remedies where there is evidence of any illegality, fraud mis-representation or mistake, also where there has been unreasonable delay and secondly court will not grant relief where to do so would cause great hardship

amounting to injustice. As for mandatory injunctions, Megarry J said in the case of SHEPHERD HOMES LTD VS SANDHAM [1970] WLR 365 as follows:-

“As it seems to me there are important differences between prohibitory and mandatory injunctions. By granting prohibitory injunction the court does no more than prevent for future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what happened in the past that is left for the trial to be dealt with by the damages or otherwise, on the other hand a mandatory injunction tends at least in part to look to the past in that it is often a means of undoing what has already been done so far as that is possible. Furthermore whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps and way..... the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to erection..... an interlocutory application for mandatory injunction was one of the rarest cases that occurred for court would not compel a man to do so serious a thing as to undo what he had done except at the hearing. Even if today the degree of seriousness of such an order is not quite so profound the seriousness of such an order remains as an important factor. Another aspect of the point is that if a mandatory injunction is granted on motion there will normally be no question of granting a further mandatory injunction at the trial. What is done is done and the plaintiff has on motion obtained once and for all the demolition or destruction that he seeks. Where the injunction is prohibitory however, there will often still be a question at the trial whether the injunction should be dissolved or continued.”

12. Mandatory injunction is asked for in the instant case, but these principles are not discussed. There are no procedural rules upon which mandatory injunction is granted. The courts use **Section 3A** of the **Civil Procedure Act** as Court’s inherent jurisdiction. It is a drastic remedy and in our jurisdiction the Court of Appeal declared that it be granted sparingly and with reluctance and only in very special circumstances.

13. Gicheru J.A (as he then was) in EAST AFRICAN FINE SPINNERS LTD (IN RECEIVERSHIP) & 2 OTHERS –VS- BEDI INVESTMENTS C.A CIVIL APPLICATION NO. NAI 72 OF 1994 approved Megarry J’s statement above referred to. The Honourable Judge of Appeal added that the court has to consider whether in the circumstances as they exist after the breach if a mandatory order can issue and if so what kind of a mandatory order will produce a fair result.

14. Megarry J. in the Shepherd’s case (above) also had this to say:- **“In this connection the court must..... take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the Defendant.”**

15. These are the principles to be applied in determining this application. The second prayer is for prohibitive injunction and the principles applicable in this branch of the law were settled by the case of Giella –vs- Cassman Brown Ltd [1973] E.A 358. It was held therein that for an applicant to succeed he must show a prima facie case with probability of success, secondly he must show that he will suffer irreparable damage that cannot be properly compensated by an award of damages and if in doubt the court is to decide the case on a balance of convenience.

16. What I can say here is that putting the two contending arguments side by side, I am of the considered view that the applicant has not made out a *prima facie* case with a probability of success nor has he demonstrated that he is likely to suffer such damage as cannot be compensated by payment of damages. First, there appear to be glaring misrepresentations in the Supporting Affidavit. The agreements between the parties herein are not disputed. The payments totaling over Kshs.1,000,000/= by the Respondent to the applicant are not disputed. The fact that the respondent is in actual possession and occupation of the suit land is also not disputed.

17. As Madan JA pointed out in the Ngobit Case(above) **“equity will no longer stand aside and weep.”** I also find that the provisions of **sections 1A and 1B** of the **Civil Procedure Act, Cap 21 Laws of**

Kenya and Article 159 (2) (d) of the **Constitution of Kenya 2010**, provide that the overriding objective of the courts is to do substantive justice to parties appearing before them so that the purpose and principles of the constitution are protected and promoted. Among the values and principles of the constitution are the rule of law, democracy, human, dignity, equity, social justice, equality and human rights. In the instant case, to proceed to disrupt the respondent's family life before the case against him is fully heard would run counter to the principles of the Constitution.

18. In the result, I find the applicant's Notice of Motion dated 26th July 2011 to be devoid of merit. The same is hereby dismissed with costs to the Respondent.

19. It is so ordered.

DATED and delivered at Kisii this 27th day of March, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Aoga holding brief for G.M. Nyambati for Plaintiff/Applicant

Mrs. Asati for Mose for Defendant/Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.

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