REPUBLIC OF KENYA

High Court at Machakos

Civil Case 221 of 2012

URBANUS KIOKO MUNYAO.....PLAINTIFF

VERSUS

MUTHIO KAVOI KATHUKU alias MUTHIO KAVOI.....DEFENDANT

RULING

The application dated 22nd June, 2012 is for issuance of a temporary injunction order restraining the respondent/defendant, her authorised agents, servants, employees and/or any other person acting under her authority from disposing of or dealing in any other manner with Commercial Plot No. 0753 and the card issued in respect of the said plot pending hearing and determination of the suit.

The application is premised on grounds that the Applicant/Plaintiff is the lawful owner of the plot, having purchased shares ofKonza Ranching and Farming Co-operative Society Ltd from one Muthio Kavoi Kathuku **alias** Muthio Kavoi who had been allocated membership No.361.

Thereafter, following ballots conducted share No. 361 comprised of Commercial Plot No.0753 and Agricultural Plot No.0797. The Respondent however only gave the applicant one card for Agricultural Plot No. 0797 and declined to deliver the card for commercial plot No. 0753 to enable him transfer the same into his name.

The application is supported by an affidavit sworn by the applicant in which he reiterates what is stated in the grounds of the application.

In her replying affidavit the respondent opposed the application and claimed ownership of the share No.361 at Konza Ranching and Farming Co-operative Society Ltd. She averred that in the course of transacting she dealt with some go-between/brokers but did not meet the applicant at the time of sale.

She sold of her commercial plot comprising of two (2) acres in the year 2010. At the time of balloting on 10th May, 2012, she was allotted two (2) shares:-

§ Agricultural plot –No.0797

§ Commercial plot No.0753

Further, that he gave the card for the agricultural plot to the applicant and the card for the commercial plot to one Titus I. Ndambuki. The applicant was therefore using trickery to obtain her property as he was well aware that he only purchased the agricultural plot comprising of ten (10) acres at Kshs. 4.7 million. She claimed ownership of 0.8 acres of the land as it turned out to be 10.8 acres.

In a supplementary affidavit sworn thereto the applicant denied having involved brokers in the negotiations but argued that they were used by the respondent. He averred that indeed he met the respondent and even paid her the balance of the purchase price in person. He denied knowledge of one Titus Ndambuki.

Both counsels for the applicant and the respondent filed written submissions to the application which I have duly taken into consideration alongside cited authorities.

In determining whether or not to grant orders sought, I do uphold principles enunciated in the celebrated case of **Giella vs Cassman Brown & Co. Ltd [1973] E.A.**

The issues for determination will therefore be:-

§ Whether the plaintiff has a *prima facie* case with a probability of success.

§ Whether the plaintiff will suffer irreparable loss that cannot be compensated by an award of damages if the order sought is not granted.

If the court is in doubt it should decide the application on a balance of convenience.

The genesis of this claim arises out of a sale agreement. On the 4th February, 2012 the applicant and the respondent entered into an agreement that was reduced into writing. Annexture *"UKM"* is a handwritten document which states that the respondent sold to the applicant Konza Ranching and Farming Co-operative Society Limited Shares membership Number 361 at Kshs. 4,700,000/=. Thereafter on 6th February, 2012 the sale agreement was formalized before an advocate. The terms of the agreement indicate that what was sold was ten (10) shares held at Konza Ranching and Farming Co-operative Society Limited. The price was Kshs. 4,700,000/=. The respondent undertook to surrender the original membership card for the shares to facilitate transfer thereof. Annexture "UKM4" is an allotment letter indicating that the respondent was allocated an Agricultural Plot No.0797 and a Commercial Plot No.0753. It is not in dispute that she only handed over to the applicant documents in respect of Plot No.0797 (agricultural plot).

The respondent argues that she could not have sold to the applicant the commercial plots as she had already disposed it of. Annexture "MK2" is a sale agreement dated 18th May 2010 in respect of sale of a two (2) acres (Commercial Plot) being part of membership of No.361, Konza Ranching and Farming Co-operative Society Limited.

I do take note of the fact that at the time of selling the shares to the applicant the balloting had not been done. Therefore the issue whether or not the agreement purported to have been made in the year 2010 existed will be established at the hearing of the substantive suit.

What is apparent is the fact that there is some ambiguity as to what exactly was sold, whether it is the sole membership No. 361 or some ten (10) shares. The court would seek to establish what membership No. 361 compromised of. This would bring us to the issue whether the applicant will suffer irreparable loss if the order sought is not granted.

It is averred by the respondent that she has property hence capable of compensating the applicant in case he succeeds in his cause.

It is submitted that the applicant will suffer irreparable loss if not granted the relief sought. The reason being that he purchased all the shares and rights accruing from Plot No. 361, rights he is being deprived of. What has not been demonstrated is whether the applicant had taken possession of the commercial plots. The fact that he investigated and discovered that contrary to what he was made to believe that the respondent had been allocated only the agricultural plot; indeed she had also been allocated the commercial plots. If he was not in possession of the commercial plots then the injury he may suffer will be adequately compensated by an award of damages.

As a court I would be required to act in order to preserve interest of justice. What I have aforestated clearly shows that *status quo* is not sufficient to justify issuance of the injunctive relief sought at this stage, it is therefore just that *status quo* prior to institution of this suit be maintained, and I so order.

Each party shall bear their own costs.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **21ST** day of **MARCH, 2013.**

L.N. MUTENDE
JUDGE