



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 228 of 2012

EDWARD NJOROGE MWANGI.....PLAINTIFF

VERSUS

FRANCIS MURIUKI MURAGURI & ANOTHER..... DEFENDANT

R U L I N G

The plaintiff and the two defendants are a male adults of sound mind residing and working for gain in Karatina Town within the Republic of Kenya

The gist of this matter as discerned from the plaint is that by contract of sale dated 30th March 2010 the 1st defendant did agree to sell to the plaintiff parcel of land **L.R NO.IRIAINI/KAIRIA/747/27** measuring 0.0297 Ha at a price of Kshs.1,400,000/= which amount was to be applied to repay a loan that the 1st defendant owed the Consolidated Bank Ltd so that the property could be discharged to facilitate its transfer to the plaintiff.

That by a contract dated 21st June 2012, the 1st defendant did agree to the sell to the 2nd defendant parcel of land L.R. NO.KARATINA TOWN BLOCK 576 at a price of Kshs.2,000,000/=

That the plaintiff took possession of the property L.R. NO.IRIAINI/KAIRIA/747/27 together with all the subsisting tenancies and started receiving monthly rent payment from the tenants with effect from the month of April 2010 up to September 2012 when the 2nd defendant wrote to the tenants advising them to stop paying rent to the plaintiff and instead the same to be paid to the 2nd defendant's agent one **M/s Gladys Nyaguthii Karanja**.

That following the notice diverting the rent from the plaintiff, he wrote a demand letter inquiring from the 1st defendant and the 2nd defendant the change of events to which the 2nd defendant replied that the 1st

defendant had signed all the necessary transfer documents in his favour.

The plaintiff further avers that the defendant's move to have the land registered in the name of the 2nd defendant thereby effectively denying the plaintiff his interest in the said property is **fraudulent**.

It's the plaintiff's averment that the 1st and 2nd defendant have deliberately **colluded** hence breaching the trust bestowed upon the 1st defendant by the plaintiff with the net effect of the 1st defendant **mischievously re-selling** the subject parcel of land **No.KIRIAINI/KAIRIA/747/27** to the 2nd defendant and subsequently the 2nd defendant illegally obtaining land parcel **No.IRIAINI/KAIRIA/747/27**.

That in view of the aforementioned unilateral acts of the defendant the plaintiff's claim is for an order for permanent injunction restraining the 2nd defendant from collecting rent, selling, alienating and or disposing off **L.R NO.IRIAINI/KAIRIA/747/27**.

The plaint was accompanied by a **Notice of Motion** dated 31st October, 2012 brought under **Order 40 rules 2, 3 & 9** of the Civil Procedure Rules and all other enabling provisions of law. The application is supported by the affidavit of the plaintiff Edward Njoroge Mwangi sworn on the 31st of October, 2012. The main prayer in the notice of motion is for a **temporary injunction** as per prayer 3 of the said motion pending the hearing of the suit. The grounds of the application are that the plaintiff assumed possession of the land has been collecting rent since the year 2010. Moreover, he has paid the entire purchase price. Despite all these the 2nd defendant has started collecting rent denying the plaintiff his life interest. This matter appeared in court at the first instance on the 31st of October 2012 when the same was certified urgent and prayer 2 of the notice of motion granted. The interim orders issued on the said date and which have been extended to the date of the ruling are still in place.

In his **supporting affidavit** sworn on the **31st October 2012** and filed on the same date the plaintiff deposes that on the 30th of March, 2010 he entered into a sale agreement with the 1st defendant in respect of property **No.L.R. NO.IRIAINI/KAIRIA/747/**

27. The agreement was annexed in the affidavit. The purchase price was Kshs.1,400,000 which money was paid. The entire purchase price was to be applied to repay the loan that the 1st defendant owed Consolidated Bank whereby the said property was among other properties charged. Upon payment of the said sum the said property was to be discharged to facilitate it's transfer.

The plaintiff executed the agreement and the property was put in his possession and occupation and began receiving the rent. **However**, in October 2012 all tenants received letters from **Sichangi and Company Advocates** instructing them to pay rent to another person. The plaintiff sought information from the first defendant and the latter told him that the Bank discharged the suit property as agreed but wrongly transferred it to the 2nd defendant. The plaintiff upon inquiry established that the property had been transferred to the 2nd defendant by the 1st defendant. The 1st and 2nd defendant entered into an agreement dated 21/6/2012 for the purchase of the parcel of land known as **L.R. NO.KARATINA TOWN BLOCK 576 and not the suit property**.

On the 22/11/2012, the 1st defendant through the firm of Kagundu & Mukunya Advocates entered a notice of appointment of advocates and a memorandum of appearance. He filed his replying affidavit on the 26th October 2012. The same was sworn on 24th October 2012.

The ***gist*** of the replying affidavit is that on the 2/2/2008 at his instance, the Consolidated Bank did offer him a financial accommodate to the tune of kshs.5,500,000 whereupon he gave a parcel of land ***Iriaini/Kairia/747/27, Iriaini/Kiaguthu/688*** and ***Karatina Town Block 1/576*** as securities however, as he progressed to service the loan he faced financial constraints and decided to sell one of the charged properties, ***Karatina Town Block 1/576*** to service the loan.

On the 21/6/2012, he entered into an agreement with Ephantus Wachira Ngochi, (the 2nd respondent) for sale of Karatina Town Block 1/576. The purchase price was to be remitted directly to the Bank and the purchased parcel of land was to be discharged by the Bank to facilitate transfer to the 2nd defendant. Thereafter the bank was to restructure the balance and have new terms of payment whereby the parcel of land ***Iriaini/Kairia/747/27*** and ***Iriaini/Kiaguthu/688*** would remain charged to serve the unpaid loan. The bank forwarded to him a letter of offer to that effect. The 1st defendant states further that as this was happening, the plaintiff whom he owed 1,400,000, an amount he lent in the early 2010 was putting pressure on him to offer him security for the said amount. On 30/3/2010, he offered parcel of land Iriaini/Kairia/747/27 as security for the said Kshs.1,400,000 to the plaintiff as demanded and later on entered into a sale agreement with the plaintiff in respect of the said land. He allowed the plaintiff to collect rent which was being applied to repay money lent to him.

The 1st defendant is categorical that he never intended to sell the land to the 2nd defendant. The property he sold to the 2nd defendant was ***Karatina Town Block 1/576*** and not ***Iriaini/Kairia/747/27***. The Notice of change of ownership of occupants is annexed as FMM III. The 1st defendant states that he did a search at the lands office and found that the suit property had been transferred from him to the 2nd Defendant and believes that it was done through collusion between the Bank and 2nd Defendant to deprive him of his property. Further that the land was transferred ***fraudulently*** and ***corruptly***. The defense filed by the 1st defendant is dated 4th December 2012 and reiterates the statements in the replying affidavit.

On the 23/11/2012, the 2nd defendant through Ng'ang'a, Munene and Co. advocates filed a Notice of Appointment of Advocates and a replying affidavit

In the ***replying affidavit*** dated and filed on the 23rd November, 2012 the 2nd defendant asserts that the suit property was transferred to him by the 1st defendant by way of private treaty having signed the necessary sale agreement and transfer. Prior to the transfer he paid Consolidated Bank which had a charge on the property a total of Kshs.1,000,000 and signed a security for a further Kshs.1,000,000 to have the suit property discharged. The 2nd defendant now claims that he holds absolute title to the suit property. He states that the plaintiff is guilty of material non disclosure as he failed to disclose that the property was still up for sale by public auction before the transfer. The second defendant asserts that the plaintiff can only recover his monies paid to the 1st defendant. Lastly the 2nd defendant states that the plaintiff failed to explain why a transfer had not been sought for over a period of two years from 30/3/2010.

The **gravamen** of the plaintiff's submission is that there is clear evidence of **fraud**. That the fact that the defendant has denied ever selling the land or transferring the same to the 2nd defendant is evidence of fraud. In his defense the 1st defendant states that he intends to sue the Bank for **fraudulently** and **unlawfully** transferring the land to the second defendant. The plaintiff further questions the speed at which the property was discharged on the **2nd October 2012**, a certificate of lease issued on the **same date** and the same charged in the bank to secure a loan on the **same day** by the 2nd defendant. The plaintiff further submits that he would suffer irreparable damages as a result of the occupation of the said suit land by the second defendant as the same prevents him from receiving his monthly rent collections which is the only income.

The **gravamen** of the 1st defendant's submissions is that he has **never entered into any sale agreement** with the 2nd defendant for the sale of parcel of land Iriaini/Kairia/747/27. He further submits that the transfer purportedly executed by the 1st defendant in favour of the 2nd defendant annexed to the 2nd defendant replying affidavit is a **fabrication** and a **forgery**.

The second defendant submits that the application is **Bad in Law, frivolous and a gross abuse of court process** as it is brought under order 40 rule 2 of the Civil Procedure Act and Rules 2010. The 2nd defendant further argues that the effect of section 24 of the Land Registration Act 2012 is that the registered proprietor has **absolute rights and privileges** over the suit property. Lastly the 2nd defendant submits that since the suit property is registered in the name of the 2nd defendant, his remedy if any lies only against the 1st Defendant. The 2nd Defendant is in actual occupation in the sense that he is collecting rent. The balance of probabilities therefore tilts in favour of the 2nd defendant.

On the first issue raised by the second defendant namely that the application is bad in law, frivolous and an abuse of the process of court, the 2nd defendant argues that there is no contract between the plaintiff and the 2nd defendant, and I agree with him, **however**, I do not agree with the 2nd defendant that there must be a contract between the two for order 40 Rule 2 to be invoked. Order 40 Rule 2 provides as follows:-

2 (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

The 2nd defendant has chosen to interpret the rule without a consideration of conjunctive and disjunctive words "**or**" and "**and**". It is a trite rule of interpretation that the word "**or**" is normally disjunctive and the word "**and**" is conjunctive. The positive use of the word '**or**' should always be construed and read in the alternative. **Order 40 rule 2** gives an alternative to breach of contract as other injury of any kind relating to the same property or a right. Both the plaintiff and 1st defendant have alleged that the 2nd defendant and the Consolidated Bank fraudulently transferred the suit property to the 2nd defendant without the 1st defendant's knowledge. This is likely to be considered as an act that causes an injury to the plaintiff in respect of the suit property due to the fact that he has an agreement of sale and has been collecting rent.

The second argument by the 2nd defendant is that he is the registered proprietor hence has absolute rights, however, this argument is countered by the plaintiff's and 1st defendant's argument that the 2nd defendant is party to fraud, misrepresentation, and, corruption in obtaining title to the parcel of land.

The third argument by the 2nd defendant that the plaintiffs case has no chances of success as the suit property is registered in the name of the 2nd defendant and that his remedy lies against the 1st defendant. I do find that with the first defendant alleging fraud on the part of the 2nd defendant, this argument does not hold water.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. At this stage what I need to do is to rule as to whether the plaintiff has established **a prima facie case** with a likelihood of success. For the order of temporary injunction to issue the requirements stated **In Giella -V- Cassman Brown & co. Ltd 1973 (EA) 358** must be met. The plaintiff must establish a *prima facie* case with a likelihood of success. The plaintiff produced an agreement of sale in respect of the property dated 30th March 2010. The purchase price was to be paid fully upon execution of the agreement. The property was already charged to the Consolidated Bank and the 1st Defendant undertook to clear the outstanding loan by November 2010 and thereby obtain a discharge of charge. The whole process was to lead to the transfer of the property to the plaintiff.

The 1st Defendant appears to agree with the plaintiff and asserts that the transfer of the parcel of land to the 2nd defendant was illegal and fraudulent. Section 26 1(a) & (b) of the Land Registration Act 2012 envisages a challenge to a certificate of title on the grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

It is the finding of this court that from the foregoing, the plaintiff has established a **prima facie** case with a likelihood of success due to the fact that he has an **agreement of the sale** and the 2nd defendant's title is being challenged on grounds of **fraud**.

On whether if an order of injunction is not issued the plaintiff will suffer irreparable injury that cannot be compensated in monetary terms, the court agrees with the plaintiff that if the rent that is alleged to be his only source of income is stopped, he is likely to **suffer irreparably**. Lastly since the court is not in doubt the issue of **balance of probabilities** is not relevant.

The plaintiffs application dated 31st October 2012 is hereby allowed. Costs in the cause.

Dated, signed and delivered at Nyeri this 19th day of March 2013.

A. OMBWAYO

JUDGE