



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC HCCC NO. 747 OF 2012

IN THE MATTER OF CLAIM TO TITLE TO LAND BY ADVERSE POSSESSION

OVER

L.R. NO. KAKUZI/ITHANGA GITUAMBA BLOCK 1/862, 863 & 864 (PREVIOUSLY KNOWN AS PLOTS NOS. 1969, 1970 & 1971 IN MAVOLONI COMPANY LIMITED

KENYA AFRICAN NATIONAL TRADERS & FARMERS UNION (Suing thro' its Office Bearer

KIMANI WANYOIKE CHAIRMAN

PETER MUGEKA MAINA SECRETARY GENERAL &

IBRAHIM WANENE TREASURERPLAINTIFF

-VERSUS-

ZEPHANIA KILUNGU KILONZO.....DEFENDANT

RULING

The plaintiff by an originating summons (OS) dated 25th October, 2012 and filed on the same date seeks a declaration that they have acquired title by adverse possession of the suit premises known as plot Nos. 1969, 1970 and 1971 in Mavoloni company Limited and now known as L.R. Nos. Kakuzi/Ithanga Gituamba/Blocks 1/862, 863 and 864. The plaintiff further seeks the cancellation of the Defendants name as the registered owner of the suit parcels of land and in place thereof the plaintiff to be registered as the proprietor of the said parcels of land.

Simultaneously with the originating summons the plaintiff filed a notice of motion seeking an injunction against the defendant and/or his agents or servants, restraining any of them from alienating, transferring, selling, disposing, using, charging, and/or trespassing on the suit property pending the hearing and determination of this suit. The plaintiffs application is grounded on grounds set out on the face of the application as follows:-

- i. The subject property is owned by Kenya African National Traders & Farmers Union who acquired the same in 1993 and who have been in continuous uninterrupted and quiet possession of the suit

- property for over 18 years and has thus acquired title to the suit property by adverse possession.
- ii. The defendant has recently purported to deal with the suit property and without notice to the plaintiff and which dealings are unsustainable in law as the defendant's claims to title over the suit premises have been extinguished by operation of law and the Limitation of Actions Act.
 - iii. The defendant having sold and been paid fully for the property, he should not be allowed to fraudulently benefit from the same property.
 - iv. Damages would not be an adequate remedy.

The plaintiff's application is further supported by the affidavit of Kimani Wanyoike sworn on 25th October, 2012 and the further affidavit sworn on 10th December, 2012. The defendant opposes the plaintiff's application and has sworn a replying affidavit dated 21st November, 2012 and a further affidavit sworn on 28th January, 2013. The parties have also filed written submission in support of their respective positions and contentions.

The brief facts of the case are that the plaintiff claims to have pursuant to a sale agreement entered into on 3rd November, 1993 purchased the Defendants plot Nos. 1969, 1970 and 1971 in Mavoloni Company Ltd all said to comprise in aggregate 15 acres for the consideration of Kshs. 420,000/=.

The alleged agreement is signed by the officials of the plaintiff and the defendant. The agreement provided that the final payment would be made on 12th November, 1993 and indeed on 12th November, 1993 a petty cash voucher No. 077 is exhibited in the plaintiff supporting affidavit showing the payment and acknowledgment of the sum of Kshs. 420,000/= by the defendant. The plaintiff claims that after the payment of the full purchase price they were let to take possession which they did and have remained in uninterrupted and continuous possession ever since. The plaintiff claim that they have acquired title to the land by adverse possession. The plaintiff claim that for the defendant to process the titles to the 3 plots in his name was fraudulent and intended to defeat the plaintiffs entitlement to ownership of the suit property. The plaintiff state they have acquired title to the land and a refund of the purchase price was out of the question.

The defendant for his part while admitting there was an agreement to sell the parcels of land to the plaintiff denies that he signed the alleged agreement dated 3rd November, 1993 or the payment voucher for Kshs. 420,000/= dated 12th November, 1993. Instead the defendant claims the agreement respecting the purchase of the said suit property was oral and that the sale price was Kshs. 900,000/= and not Kshs. 420,000/= as the plaintiff claims. The plaintiff claims to have been paid Kshs. 450,000/= leaving a balance of Kshs. 450,000/=. The defendant claims that he only signed an acknowledgment of the down payment for Kshs. 450,000/= and not Kshs. 420,000/= although this acknowledgment is not exhibited by the defendant. The defendant claims he did not part with possession of the land since he had only been paid half of the price. The defendant denies being aware that any subdivisions have been done on the suit property by the plaintiff and/or that any developments have been made on the lands.

The defendant states he has revoked the sale and has offered to refund the sum of Kshs. 450,000/= paid by the plaintiff but the plaintiff has refused to accept the refund.

On an application seeking the grant of an injunction the applicant is required to satisfy the now well settled conditions for the grant of an interlocutory injunction as enunciated in the often cited case of **GIELA VS. CASSMAN BROWN & CO. LTD (1973) EA 358** namely:-

- i. Demonstrate that the applicant has a prima facie case with a probability of success;
- ii. That the applicant stands to suffer irreparable loss/damage that cannot be adequately compensated by an award of damages and
- iii. And in case of a doubt in regard to (i) and (ii) above that the balance of convenience is in favour of the grant of an injunction having regard to the attendant circumstances.

I have considered the material placed before the court through the parties filed affidavits and the parties submissions and find that two conflicting positions emerge in regard to the purported agreement for sale

and on the question of possession. The plaintiff relies on the signed agreement dated 3rd November, 1993 and the fact that the full purchase price as per that agreement was paid on 12th November, 1993 upon which possession was granted. The defendant disputes this and states the agreement was oral and that the sale price was Kshs. 900,000/= out of which Kshs. 450,000/= was paid to the defendant which he claims to have signed an acknowledgement for though no proof has been furnished.

The court cannot at this stage make any definite finding on the contested issues as these would need to be canvassed during the trial by way of tendering evidence. However, were the plaintiff's contentions and averments to be proved at the trial the plaintiff's suit would have a probability of succeeding. The plaintiff has tendered documentary evidence in the form of the sale agreement and the payment voucher for Kshs. 420,000/= which the defendant is stated to have received.

On the face of it these documents support the plaintiffs claim even though they could be disproved at the trial. On the basis of this evidence I am prepared to find and hold that he plaintiff has demonstrated they have a prima facie case with a probability of success at the trial.

Having made a finding that the plaintiff has established a prima facie case with a probability of success at the trial I have no difficulty in the circumstances of this case in finding that damages would not be an adequate remedy in case the plaintiff were to succeed at the trial and the suit property has been dealt with prejudicially by the defendant by that time.

The sale agreement relied on by the plaintiff was entered into in 1993 and the defendant was making an offer to refund Kshs. 450,00/= which he admits having received in 1993. In my view in case the plaintiff paid for the purchase of the suit property in full in 1993 it would be inequitable to the plaintiff to be merely offered a refund. The applicant has stated it purchased the suit land for allocation to its members and has caused the land to be subdivided for settlement of its members.

The plaintiff may not be in a position to obtain alternative land for its members having regard to the costs and locations. In the circumstances I hold and find that the plaintiff stands to suffer irreparable loss/damage that cannot be compensated for in damages in case the injunction is not granted.

As I have held that the first two conditions for the grant of an injunction have been satisfied I need not consider the balance of convenience and in the premises I find that the plaintiffs application dated 25th October, 2012 has merit and I grant an interlocutory injunction in favour of the plaintiff in the following terms:-

1. That the Defendant by himself his servants, agents and/or assignees or any person claiming title through the defendant be and is hereby restrained from alienating, transferring, selling, disposing, using, charging, mortgaging, developing on or constructing on, trespassing on, entering upon, or in any manner whatsoever dealing with the suit property known as L.R. No. Kakuzi/Ithanga/Gituamba/Block1/862, 863 and 864 (previously known as Plot Nos. 1969, 1970 and 1971 in Mavoloni Company Limited) pending the hearing and determination of this suit.
2. That the defendant do pay the costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

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