



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT & LAND DIVISION
ELC NO. 288 OF 2012

GEORGE GICHAMU GAKURE.....PLAINTIFF/APPLICANT

VERSUS

HANNA MWIHAKI NJORO1ST DEFENDANT/RESPONDENT

STEPHEN MBURU MUNGAI....2ND DEFENDANT /RESPONDENT

RULING

The plaintiffs Notice of Motion application dated 24th May 2012 inter alia seeks the following orders:

- i. A temporary mandatory injunction reinstating the plaintiff's possession of Plot No. C pending hearing and determination of this application and suit.
- ii. A temporary injunction restraining the Defendants their servants or agents from interfering with the plaintiff's possession of the parcel known as Plot No. C or its new subdivision number and or transferring to third parties pending the determination of this application and suit.

The plaintiff sets out the following grounds as the basis of the application:

- a. *The plaintiff has a prima facie case.*
- b. *The plaintiff duly paid for the subject parcel of land in full and was placed in possession.*
- c. *The defendants in breach of the sale agreement have offered the parcel to new purchasers who displaced the plaintiff in April.*
- d. *The 1st defendant on 21st May, 2012 issued notice of cancellation.*
- e. *The plaintiff stands to suffer irreparable loss.*

The plaintiff has further sworn an affidavit in support of the application dated 24th May, 2012.

In turn the 2nd defendant swore a replying affidavit dated 27th August 2012 in opposition to the plaintiff's application and counsel for the parties have filed written submissions reiterating their respective position.

The salient facts in this matter are not disputed. The plaintiff and the defendants entered into a sale agreement dated 15th September, 2010 whereby the 2nd Defendant agreed to sell to the plaintiffs a portion of his beneficiary entitlement out of land parcel No. MUGUGA/MUGUGA/133 then identified as Plot C & D on the Sketch plan attached to the agreement for sale for the consideration of Kshs. 900,000/= and

over time the Plaintiff paid a sum of Kshs. 450,000/= and the balance being payable on completion.

Against signing the Agreement for sale and paying a deposit of Kshs. 300,000/= the plaintiff was granted possession of the suit premises but the plaintiff states on or about 9th April, 2012 other persons who were unknown to him had been allowed onto his portion of the land by the 2nd defendant and that the 2nd defendant consequently informed the plaintiff he did not wish to proceed with the transaction and offered to make a refund of the deposit paid. A letter from the defendants advocates M/s Kamangu & Company Advocates dated 21st May, 2012 informed the plaintiff that the defendant had decided not to proceed with the transaction and in terms of the agreement for sale tendered a full refund of the deposit paid and the agreed damages being 10% of the purchase price of Kshs. 450,000/=. The defendants tendered a refund of Kshs. 495,000/= being inclusive of the agreed damages for default.

By his plaint the plaintiff seeks a mandatory injunction that he be reinstated into possession of Plot 'C' Muguga/Muguga/133 and further that the Defendants be ordered to specifically perform the contract of sale. Whereas it is the plaintiff's position that since he has tendered the full purchase price of Kshs. 450,000/= for plot 'C' and he was denied re entry into possession since April, 2012 the court should find that he is entitled to be reinstated into possession and grant a mandatory injunction and further issue an order of injunction restraining any interference of whatever manner pending the hearing of the suit.

The defendants for their part contend they have rescinded/cancelled the contract and in terms of the agreement have tendered the requisite refund of the money paid and the stipulated damages under the stipulated damages under the contract for default or failure to complete. It is the defendant's contention that the plaintiff has not demonstrated a prima facie case with any probability of success to entitle him to an order of injunction and has further not demonstrated that he stands to suffer any damage that cannot be compensated in damages. Indeed it is contended the agreement for sale made provisions for payment of damages in the event of breach by any of the parties under clause 5. The defendant have resorted to this provision and have tendered damages of Kshs. 45,000/= being 10% of Kshs. 450,000/= the purchase price of Plot No 'C'.

There is yet another issue that has not been raised by the parties which is the application of the Land Control Act Cap 302 of the Laws of Kenya.

The suit property is not land within a municipality or such land as would be excluded and/or exempted from the provisions of a the Land Control Act and hence would be subject to the provisions of the Act. Under the provisions of the Act a controlled transaction such as a sale is mandatorily required to have the sanction of the land Control Board within 6 months of the date of the agreement failing which the agreement/contract becomes void for all purposes. The sale agreement in the instant case was entered into in September, 2010 and no consent of the relevant Land Control Board has been exhibited. There is every likelihood that the contract has become void by application of the law. The court cannot enforce a contract that has become void.

I am in the circumstances of this matter and having regard to the facts and evidence not persuaded that the plaintiff has demonstrated he has a prima facie case with a probability of success.

I am equally not satisfied that the plaintiff has demonstrated that he stands to suffer irreparable damage/loss that cannot be compensated by an award of damages. Indeed in the sale agreement the parties anticipated that either party could be compensated in damages in the event of breach by either of them. I therefore hold and find that the plaintiff would not suffer any damage that would not be compensatable in damages.

As I have no doubt as regards the first two limbs/conditions that a court must consider in granting an order of injunction I need not consider the question of the balance of convenience.

The upshot is that I find the plaintiff's application lacking in merit and I order the same to be dismissed with costs to the defendants.

That the interim order of injunction granted in this matter on 24th May, 2012 is hereby vacated.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants