



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 374 OF 2008

SUSAN NJERI WAIRIA NJOROGE)

BEDAN NDUNGU KAMAU) PLAINTIFF/RESPONDENT

-VERSUS-

MARY WANJIKU NG'ANG'A.....1ST DEFENDANT/APPLICANT

GITAU KIRUMBA.....2ND DEFENDANT/APPLICANT

RULING

The Defendants have by a Notice of Motion dated 26th February, 2013 stated to be brought under Section 13 of the Environment and land Court Act and all enabling provisions of the Law sought the following orders:-

1. That the interim injunction issued against the defendants be discharged.
2. That the suit be dismissed for want of prosecution or in the alternative for being frivolous as against the 2nd defendant.

The application is premised on the grounds:-

1. The injunction is causing Hardship to the 2nd Defendant at the registered owner of the suit property given that it has hindered use and enjoyment of the land.
2. The plaintiff is not keen to prosecute the matter given that it has been over four years and the plaintiff has not prepared the suit for hearing.

The 2nd Defendant has sworn a supporting affidavit in support of the application dated 26th February, 2013 where he deposes that he purchased title number Naivasha/Mwichiringiri Block4/424 from the 1st Defendant who was the first registered proprietor after conducting a search of the property at the Lands Office. The 2nd Defendant further depones he is unable to deal with his land in any way owing to the

subsisting order of injunction. He contends that he plaintiff has no case against him and that the plaintiff has failed to prepare the suit for trial for the last 4 years and that the same ought to be dismissed for want of prosecution.

The plaintiffs for their part filed grounds of opposition to the application dated 14th May, 2013. Inter alia the plaintiffs contend the Defendants application is misconceived, incompetent and amongst to an abuse of the court process and further contend the application is an impediment to the first conclusion of the matter.

When the Defendants application came for hearing before me on 21st May, 2013 I directed the parties to file written submissions but by 19th June, 2013 when the matter came up[for mention for further directions only the plaintiff had filed submissions and there was no attendance on the part of the Defendant/applicants and ruling on the application was reserved for delivery on 29th July, 2013.

I have perused the court record and it is apparent that this case was caught up by the revised Civil Procedure Rules 2010 which under Order 11 requires parties to a suit to file witness statements, documents and agreed issues before a suit can be fixed for hearing. The obligation to comply with order 11 of the civil procedure Rules is for both parties. It is a requirement under order 11 of the Civil Procedure Rules for parties to hold a pre trial conference where directions on hearing are given by the court.

From the court record it is evident that the plaintiff has fixed the case for hearing on 4 Occasion the last of which was on 15th October, 2012. On all the four occasions no proceedings took place for reasons that are not recorded. It is presently the practice of the court not to list any matter for hearing where there has been no compliance with order 11 of the Civil Procedure Rules.

I am in the premises not prepared to hold that the plaintiff is not interested in prosecuting the matter having regard to the attempts made at fixing the matter for hearing. I suppose the plaintiffs may not have been appropriately advised that pre trial directions are necessary before a matter can be listed for hearing.

The plaintiff's claim the suit property was fraudulently transferred the same to the 2nd Defendant to the prejudice of the plaintiffs.

There is a triable issue in regard to whether or not the transfer to the 1st Defendant was fraudulent as alleged by the plaintiffs and to that extent it cannot be determined that the suit is frivolous as against the 2nd Defendant until evidence is taken.

I am in the circumstances not persuaded that I should dismiss the suit for want of prosecution and/or for being frivolous. I will not discharge the order of injunction but I direct that the parties and in particular the plaintiff do fast track the preparation of the suit for hearing and in that regard I further direct that he parties do make full compliance with order 11 of the Civil Procedure Rules within the next 45 days from today and ensure that the suit is fixed for a pre trial conference for directions on hearing not later than 90 days from today failing which the plaintiffs suit will stand dismissed for want of prosecution with costs to the Defendant.

I therefore disallow the Defendants application dated 26th February, 2013 but I order that the costs for the application will be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants