



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
ENVIRONMENT AND LAND DIVISION
ELC CASE NO. 444 OF 2012

MARY WAMBUI MAINA.....1ST PLAINTIFF

FRANCIS KYUNGUTI2ND PLAINTIFF

FRANCIS K KIBOR3RD PLAINTIFF

VERSUS

LITTLE WOODS ESTATES CO LTD1ST DEFENDANT

SAMUEL KARIBA WAITE2ND DEFENDANT

RULING

The applicants herein brought this Notice of motion dated 25th July, 2012 seeking for various orders. The notice of motion is brought under Section 1A,1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 40 Rule 1 and 2, Order 51 Rule 1, Order 5 Rule 17 of the Civil Procedure Rules and all enabling provisions of the law. The orders sought are

1. Spent
2. Spent
3. Spent
4. An order of prohibiting injunction against the 1st and 2nd Respondents either by themselves, their agents or servants from transferring disposing of, wasting, charging or in any other way dealing with parcel of land No. Nairobi/LR 118/1254 or acting in any other way that will prejudice the plaintiffs interest as bonafide purchaser of value pending the hearing and determination of this suit.
5. Costs of the application be provided for.

The application was supported by the grounds on the face of the application and on the annexed affidavit of Mary Wambui Maina. The grounds in support of the application are:-

1. That the 1st Respondent a land buying company and 2nd Respondent entered into an agreement dated 11th May, 2011 for a sum of Kshs.2.3 million. The 1st Respondent was in turn to sale the subdivide the suit land and offer it for sale to the public. Payments from which were to be remitted to the 2nd Respondent to complete the purchase price, the 1st Respondent to keep the margin

2. That the 2nd Respondent was to facilitate transfers and smooth transaction to the purchasers sourced by the 1st Respondent.
3. That the 1st Respondents agents for the 3rd respondent subdivided the suit plot into twelve units and offered them for sale to the prospective public, the applicants being one of them.
4. That the plaintiffs/applicants have collectively paid a sum of Kshs.1,575,000/= to the 1st Respondents of which sums the 1st Respondent has allegedly not accounted for to the 2nd Respondent.
5. That the plaintiff's have fenced off their respective units cultivated the suit land and even commenced development thereon when the 3rd respondent has stooped them from continuing to do so.
6. That jilted the 3rd Respondent has descended on the applicants and threatened to evict them from their plots and to demolish the developments therein and remove the beacons until the 1st Respondent to account for the said monies.
7. THAT the applicants are innocent purchasers caught up between the alleged misunderstanding of the 1st and 2nd Respondents and are fearful and genuinely so that the 2nd Respondent may dispose of the suit property, evict them or act in other way detrimental to their interest as he has threatened to do.
8. That the 1st Respondents whereabouts are unknown as of now as they have closed shop.
9. That unless the Honourable court preserves the suit property from being wasted, charged, disposed off the or the applicants being ducted the applicants are at the verge of losing their entire savings.
10. That it is therefore in the interest of justice that the Honourable Court do preserve the suit property pending the hearing and final determination of this suit.

The application was opposed by the 2nd Respondent, Samuel Kariba Waite. On 20th June, 2013. Mr. Okemwa confirmed to the court that he has not served summons and the application against the 1st Defendant. He withdrew the case against the 1st Defendant. The application is therefore against the 2nd Defendant herein only.

The 2nd Respondent averred in his affidavit that he is the registered owner of the parcel of land known as Nairobi block 118/1254. He further admitted that on 11th may, 2011 he entered into an agreement for sale of the parcel of land in question with the 1st Defendant for Kshs.2,300,000/= as per the sale agreement annexure SKW 2. That the 1st Defendant failed to pay the purchase price within the stipulated time and so 2nd Defendant rescinded the agreement for sale dated 11th may, 2012. That he did not authorize the 1st Defendant to sell the suit premises or portions thereof to the plaintiffs or any other third parties. That he was not a party to any agreement or sale of the portions of the suit premises between the plaintiffs and 1st Defendant. He further stated that there is no legal rights and or obligations between the plaintiffs and him which can be enforced in law. He also denied ever finding any of the plaintiffs on the suit premises and that he never threatened the plaintiffs. He also denied receiving any payments from the plaintiffs for the sale of portions of suit premises. He averred that the plaintiffs application lacks merit and is an abuse of the court process and the same should be dismissed.

The application was canvassed by way of written submissions. The court has now considered the pleadings generally, the annexures thereto and the written submissions. The court makes the following findings.

The applicants have sought for prohibiting injunction against the 2nd Defendant Samuel Kariba Waite. The suit against 1st Defendant was withdrawn.

The applicants then need to satisfy the conditions set out for grant of injunction relief. – These principles were laid out in case of **GIELLA V CASSMAN BROWN CO. LTD (E.A) 1973 at Page 353**. These principles are.

- a. **Applicant must establish that he has a prima facie case.**
- b. **That applicant stand to suffer irreparable harm.**
- c. **If court in doubt to decide the case on a balance of convenience.**

From the pleadings herein and the annexures, there is no doubt that the 2nd Defendant Samuel Kariba Waite is the registered owner of that land known as LR No. Nairobi block 118/1254. There is no doubt that the 2nd Defendant had entered into sale agreement dated 11th may, 2011 with a company called Little Woods Estate Company Limited which was the 1st Defendant herein before the suit was withdrawn against the said company.

There are allegations by the Plaintiffs that they purchased several portions of land from Little Woods Estate Company Limited with the knowledge of 2nd Defendant. The plaintiffs have attached several receipts to their application to confirm that they paid some monies to **Little Woods Estate Co Limited**, that after the plaintiffs paid monies to Little Woods Estate Co. Limited, a misunderstanding arose between the said Little Woods Estate Co Limited and 2nd Defendant. That the 2nd Defendant turned on the plaintiff and threatened to evict them. That 2nd Defendant was aware of the presence of the plaintiffs on the said parcels of land and cannot turn against them after his misunderstanding with Little Woods Estate Co. Ltd. The 2nd Defendant denied that he was a party to the dealings between the Plaintiffs and Little Woods Estate Co. Ltd. That the said company was not his agent.

However, there is evidence that the plaintiffs have developed their respective parcels of land.

1st Plaintiff has allegedly dug a borehole and deposited building material on the site. The plaintiffs have spent thousands of shillings on the development of their plots and also have paid more than kshs.1.5 million toward the purchase of the land. The 2nd Defendant denied that he was aware of the plaintiffs involvement in his parcel of land.

I have considered the photographs attached to the plaintiffs application. The photographs show there are developments on the land such as a sunk bore hole deposit of building materials and some structures on the said land. The 2nd Defendant has not denied existence of such developments. Such developments were not undertaken in a day. It is evident the 2nd Defendant was aware of them. He did not raise any alarm until when he fell off with Little Woods Estate Co. Ltd. His action misled the plaintiffs and that led the plaintiffs to proceed with the purchase of the various parcels of land from Little Woods Estate Co. Ltd.

Though the 2nd Defendant is the registered owner of the land parcel and is protected by Section 26 of the Land Registration Act 2012. I concur with the plaintiffs submission that the said right is not absolute and can be impeached on the ground of misrepresentation. Section 26(1) of Land Registration Act states as follows:-

26(1) the certificate of titlethe title of that proprietor shall not be subject to challenge except on

- a. **On the ground of fraud or misrepresentation to which the person is proved to be party.**

Though the 2nd Defendant is not the one who sold the portions of Land to the plaintiffs, he was aware of the transactions and kept quiet about it. He only took action after he fell out with Little Woods Estate Co. Ltd.

The court finds that plaintiffs have established that they have a prima facie with probability of success.

On the second principle of irreparable loss or harm, it is evident that the applicants paid some money towards the purchase of their parcels of land. They have also carried substantial development on the parcels of land. If injunction is lifted, the 2nd Defendant would be at liberty to sale, dispose, transfer or

deal with the suit land. That is before the plaintiffs have been given their day in court. I find that the plaintiffs will suffer irreparable loss if the said land is sold. The 2nd respondent will not suffer any prejudice if the orders are granted.

The plaintiffs have been in possession of the suit property. The balance of convenience tilts in favour of the plaintiffs herein. I will also borrow from the authority cited by the plaintiff; **OLYMPIC SPORT HOUSE LTD v SCHOOL EQUIPMENT CENTRE LTD (2012) eKLR** where the court held that

“It is better to safeguard and maintain the status quo for a greater Justice than to let the status quo be disrupted by not granting an interlocutory injunction and after the hearing of the case find that a greater injustice has been occasionedthe court should take whichever course appears to carrying the lower risk of injustice if it should turn out to have been wrong”

If in the instance case the court finds in favour of 2nd Defendant after main suit, the 2nd Defendant will have his land back from the plaintiffs. However if the injunction is lifted and 2nd Defendant given liberty to deal with the land as he wishes and the court finds in favour of the plaintiffs then the plaintiffs might suffer injustice as the land may have been sold and transferred to other parties by then.

After careful consideration of the pleadings herein and the written submissions, the court find that it is fair and just to find in favour of the plaintiffs at this stage. The court consequently allows the plaintiffs notice of motion dated 25th July, 2012 in terms of prayers No. 4. Costs in the cause.

However the plaintiffs to set the main suit for hearing within the next 12 months so that the issues at hand can be resolved expeditiously. Failure to do so, the prohibitory injunction will automatically lapse unless further orders are issued by this court.

It is so ordered.

Dated, signed and delivered at Nairobi this 20th day of August, 2013

L. N. GECHERU,

JUDGE