



IN THE HIGH COURT OF KENYA

AT NAKURU

ENVIRONMENT AND LAND COURT

CIVIL CASE NO.134 OF 2013

ISAAC INDAH MUCHESI..... PLAINTIFF

VERSUS

LAWRENCE GICHURU NJENGA.....1ST DEFENDANT

JOHN LUSI 2ND DEFENDANT

SILFESTUS GITIMU3RD DEFENDANT

REGISTERD TRUSTEES

(AFRICA ISRAEL NINEVEH CHURCH) ...4THDEFENDANT

RULING

The Notice of Motion dated 11/2/2013 was filed by Isaac Indah Muchesi, the plaintiff/applicant herein seeking that this honorable court be pleased to grant an order of interim injunction restraining the defendants either by themselves, servants and/or agents howsoever from developing, constructing any kind of building and/or structures, selling, alienating, disposing or in any way dealing with **Nakuru Municipality Block 29**(" suit land") to the detriment or adverse to the interest of the plaintiff pending the hearing and determination of this suit.

The grounds which the application is premised are found in the body of the application and a supporting affidavit sworn by the applicant on 11/2/2013.

The 1st respondent swore a replying affidavit dated 28/2/2013. He strenuously opposed the application and prayed that the application be dismissed with costs to him.

The applicant states his case as follows: That the applicant is the registered owner of the suit land. By a sale agreement dated 11/2/2009, the applicant sold to the 1st respondent the suit land at Kshs450,000: That upon signing the agreement the 1st respondent paid Kshs 110,000 as part of the consideration and was immediately given possession. The balance was to be paid as follows: Kshs100,000 before 31/12/2009 and Kshs 240,000 before 31/3/2010.

The 1st respondent did not honor the agreement and only paid Kshs90,000 on 18/6/2010, Kshs 20,000 on 9/9/2010 and has an outstanding balance of Kshs230,000 plus liquidated damages of Kshs45,000. This failure by the defendant to pay forced the plaintiff to cancel the sale transaction vide a letter dated

6/4/2011, ask the 1st respondent to stop developing the suit land and pick his refund less 10% being liquidated damages. The 1st respondent had his own version as to why he failed to make payment as stipulated in the agreement. He stated that this was occasioned by the applicant's evasiveness and disappearance when required to process the title: That as a result of this behavior he visited Kalenjin Enterprises, the company that had "sold" the suit land to the applicant to ascertain facts about the suit land. While there, he was warned that the suit land had not been cleared by the company and that anyone transacting should do so at their own risk. The 1st respondent finally got hold of the applicant and they both visited the company where it emerged that the applicant's late father was the registered shareholder in the company and not the applicant and that the suit land did not have a title deed. To circumvent this, the applicant produced an affidavit from his other family members "giving him authority" as the first son to deal with the suit land on their behalf. Convinced, the 1st respondent paid the applicant a further Kshs. 20,000 to facilitate the processing of the title deed and have the same transferred from the original owner directly to the 1st respondent. This never came to be as the applicant instead processed the title in his own name.

The 3rd and 4th respondents vide an affidavit of service sworn on 14/2/2013 by Hebron Odhiambo Omolo were served but did not enter appearance.

The 2nd defendant was not served.

Counsels for the respective parties agreed by consent to file and highlight written submissions in respect of the application. Only the 1st respondent filed his written submissions on 14/5/2013.

When this application came up for hearing before me on 3/6/2013, Counsels for the respective parties reiterated the respective contentions by their clients which contentions/ submissions I have considered. Counsel for the applicant sought leave to file a further affidavit to show that the lower court matter CMCC NO. 1099 of 2011 had been withdrawn.

The conditions upon which an interlocutory injunction may be granted were well settled in the case of **Giella V Cassman Brown & Co. Ltd (1973) EA 358**. They are:-

- “1. The applicant must demonstrate that he has a prima facie case with a probability of success;**
- 2. An interlocutory injunction will normally not be granted unless the applicant will suffer irreparable loss that cannot adequately be compensated in damages;**
- 3. If the court is in doubt, it will decide the application on a balance of convenience.”**

At this stage the court is not required to make any final findings on the facts. That will be for the main hearing. The issue is therefore whether the applicant satisfies the above conditions. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the appellant has a prima facie case. However, traditionally, courts have always considered all the three principles.

Prima facie is defined in **Mrao Ltd vs. First American Bank Kenya Ltd & 2 Others (2003) KLR 125** "..... a case which, on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation rebuttal from the latter"

From the material before court, it is common ground that pursuant to a sale agreement dated 18/6/2010 between the applicant and the 1st respondent, the 1st respondent paid part of the consideration and had immediately taken possession of the suit land, developed the same and also disposed off part of the land to the 2nd, 3rd and 4th defendants. It is clear from the affidavit evidence that the applicant entered into a sale agreement and purported to sell the suit land when he was not the registered owner or in

possession of letters of administration to enable him deal with the estate of a deceased person. He also filed this suit while the lower court matter CMCC 1099 of 2011 was still pending.

I have taken the liberty to peruse the file and found that the suit was withdrawn on 4/6/2013. This was a day after the hearing of this application contrary to what counsel for the applicant had informed the court. I find that the applicant has not come to court with clean hands and does not deserve the equitable relief sought. In my view he has failed to establish a prima facie case.

On the second limb the plaintiff has failed to demonstrate what injury he will suffer which cannot be adequately compensated by an award of damages. Although the 1st respondent also lacked capacity to enter into sale agreements and therefore had no good title to pass to the 2nd, 3rd and 4th respondents he has been in occupation of the suit land with the blessing and knowledge of the plaintiff. The balance of convenience tilts in favor of the defendants.

To this end, I hold that the applicant has failed to demonstrate that he has a prima facie case with high chances of success and I decline to grant prayer (c) of the Notice of Motion dated 11/2/2013 as prayed.

Costs to be in the cause.

Dated signed and delivered in open court at Nakuru this 21st day of AUGUST 2013

L N WAITHAKA

JUDGE