

REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 695 OF 2012

JERRY IVERY.....1ST PLAINTIFF

AZAEL KELLY WIGGWA.....2ND PLAINTIFF

URBAN FAMILY MINISTRIES CDC INC.....3RD PLAINTIFF

VERSUS

JOYCE WAWERU.....1ST DEFENDANT

HEDRICK MASAKI OMANWA.....2ND DEFENDANT

RULING

The Plaintiffs filed a Notice of Motion dated 9th October 2012 seeking an injunction against the 1st Defendant to restrain her from dealing with the suit properties known as LR Nos. 15921 and 15922, and/or interfering with the 1st and 3rd Plaintiffs' interests in the said properties. The Plaintiffs' case that the 1st Plaintiff through an agent known as Mr. Abbas Mohammed entered into a sale agreement to purchase the suit properties on 24th April 2010 with a party described in the pleadings as the 3rd Defendant. Upon perusal of the said agreement which was attached to a supporting affidavit sworn by the 1st Plaintiff on 9th October 2012, it appears that the agreement was entered into between the said agent and the 3rd Plaintiff.

The Plaintiffs further claim that the 1st Defendant then approached the 1st Plaintiff's Advocates, and upon misrepresentation that she was his wife and that she had been sent by him, collected all the completion documents copies of which were also attached to the supporting affidavit. The Plaintiffs are apprehensive that the 1st Defendant will fraudulently transfer the property and interfere with their interests in the suit property.

The Defendants did not enter appearance or respond to the said Notice of Motion, and the Plaintiff's counsel in brief submissions dated 3rd July 2013 prayed the Notice of Motion be allowed, and relied on section 64 of the Constitution and sections 2, 46 to 67 and 85 to 95 of the Land Act. The counsel did not illustrate how the sections he cited apply to this case, given that they contain provisions that range from the transfer and transmission of leases to the discharge and transfer of charges. In addition the constitutional provision he relied upon describes and defines private land, and does not provide any particular right or remedy. More significantly the said counsel in his submissions did not show whether and/or how the legal criteria for the grant of a temporary injunction had been met by the Plaintiffs.

I have read and carefully considered the Plaintiffs' pleadings and submissions. What I am required to do at this stage is to determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and particularly whether the Plaintiffs have met the said requirements.

The first question I must answer is whether the Plaintiffs have established a *prima facie* case. The Plaintiffs have provided evidence of the sale agreements between an agent of the 1st Plaintiff and the 3rd Plaintiff dated 24th April 2010. It describes the said agent of the 1st Plaintiff as the vendor, and as being

the beneficial owner of the property by virtue of a sale agreement between him and the 2nd Defendant. This latter sale agreement was not produced in evidence. There is however another sale agreement that is attached dated 14th November 2013, entered into by the 2nd Defendant and 1st Plaintiff, wherein the 2nd Defendant is described as the vendor and beneficial owner of the suit property by virtue of a title deed in his name. No evidence of the 2nd Defendant's title to the suit property was however produced.

The completion documents attached as evidence were an undated and unsigned transfer, and an acknowledgment of payment purported to be signed by the 1st Plaintiff and 2nd Defendant. The evidence that was attached that linked the 1st Defendant to the transaction was an affidavit sworn by the 2nd Plaintiff on 26th April 2012 in support for an application for caution to be placed on the suit property. He stated therein that the completion documents were stolen and that it was the 1st Defendant who took them from his chambers. There is also a demand letter on record which was addressed to the Defendants dated 25th September 2012, and written by the Plaintiffs' Advocates.

After examining the evidence that was produced by the Plaintiffs and in light of the above-stated observations, it is my finding that they have not established a *prima facie* case. This is for the reason that they have not brought any credible evidence of their legal or equitable interest in the suit property. In particular, no evidence was brought to show the existence of the suit properties and/or who the owners of the same are, and this court cannot make a finding in the absence of such evidence of the Plaintiff's equitable interest in the same by virtue of purchase. It is also my view that the appropriate remedy for the Plaintiffs in the circumstances set out in their Notice of Motion is to pursue criminal investigations and prosecution against the 1st Defendant.

This court accordingly declines to grant the orders sought in the Plaintiffs' Notice of Motion dated 9th October 2012. The Plaintiffs shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____15th ____ day of __October____, 2013.

P. NYAMWEYA

JUDGE