



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 187 OF 2013

EVANS NYABWARI ABUGA PLAINTIFF/APPLICANT

VERSUS

1. RICHARD NYAKUNDI1ST DEFENDANT/RESPONDENT
2. NYAKIOGA NYAGAKA.....2ND DEFENDANT/RESPONDENT
3. PETERSON MOSOTI MOCHACHE3RD DEFENDANT/RESPONDENT

RULING

1. What is before me is the Plaintiff's application dated 23rd May, 2013 in which the Plaintiff has sought an interlocutory injunction to restrain the defendants from transferring or interfering in any way with all those parcels of land known as **LR. No. Nyaribari Chache/B/B/Boburia 7122** (hereinafter referred to as "**Plot No. 7122**") and **LR. No. Nyaribari Chache/B/B/Boburia/7123** (hereinafter referred to as "**Plot No. 7123**") pending the hearing and determination of this suit. The Plaintiff's application is supported by the Plaintiff's affidavit sworn on 23rd May, 2013. The application was brought on the grounds that; the Plaintiff had purchased a portion measuring 35feet by 100feet of Plot No. 7122 from the 1st defendant at a consideration of Ksh. 180,000.00. Plot No. 7122 was a portion of a former larger parcel of land then known as LR. No. Nyaribari Chache/B/B/Boburia/ 1714(6765!)(hereinafter referred to as "**Plot No. 1714**") which was registered in the name of the 2nd defendant's deceased mother, one, MELLEN MORAA MASESE. Plot No. 1714 was apparently subdivided which subdivision gave rise to six parcels of land namely, LR. Nos. Nyaribari Chache/B/B/Boburia/7122, 7123, 7124, 7125, 7126 and 7127. The Plaintiff claims that when he proceeded to fence the portion of Plot No. 7122 that he had purchased, he was blocked from doing so by the 3rd defendant. The Plaintiff later learnt through a search conducted at the lands office that the 3rd defendant is registered as the proprietor of Plot No. 7123. The Plaintiff claims that the 3rd defendant acquired the title to Plot No. 7123 irregularly by manipulating the Mutation Form through which Plot No. 1714 was subdivided. The Plaintiff claims that through this act of fraudulent manipulation of the mutation form, Plot No. 7123 which the 3rd defendant claims to be the owner stands on the ground where Plot No. 7122 is situated. The Plaintiff has therefore been unable to take possession of the portion of Plot No. 7122 that he purchased from the 1st defendant. The Plaintiff claims that the 3rd defendant now intends to sell Plot No. 7123 to a third party. The Plaintiff is apprehensive that if the intended sale goes through, he may lose the portion of Plot No. 7122 that he had purchased since Plot No. 7123 which the 3rd defendant intends to sell has been superimposed on Plot No. 7122 on the ground. It on account of the foregoing that the Plaintiff came to court to restrain any dealing with both Plot No. 7122 and Plot No. 7123 pending the hearing and determination of this suit in which he has sought an order

- nullifying the titles for Plot No. 7122 and Plot No. 7123 and afresh subdivision of Plot No. 1714 to be carried out so that the Plaintiff can obtain a title for the portion of Plot No. 7122 which he purchased from the 1st defendant. The Plaintiff seems not to have annexed any document to his affidavit in support of the application. However, the bundle of documents that he filed in court contained among others; a copy of the Mutation Form through which Plot No. 1714 was subdivided into six portions mentioned above, a copy of the agreement for sale between the Plaintiff and the 1st defendant dated 11th April, 2012, a copy of a certificate of official search in respect of the title of Plot No. 7123, a copy of the agreement for sale between the 1st and 2nd defendants and a copy of acknowledgment dated 8th May, 2012 by which the 2nd defendant acknowledged receipt of Kshs. 60,000.00 from the Plaintiff.
2. The Plaintiff's application was opposed by the 3rd defendant who filed a replying affidavit sworn on 28th June, 2013 for that purpose. In his replying affidavit, the 3rd defendant contended that he is the registered proprietor of Plot No. 7123 which is separate and distinct from Plot No. 7122 which the Plaintiff claims to have purchased from the 1st defendant. The 3rd defendant contended that as the proprietor of Plot No. 7123 he cannot be restrained from dealing with the same. The 3rd defendant contended further that the agreement for sale that was entered into between the Plaintiff and the 1st defendant is null and void due to the fact that no consent of the land control board was obtained within the mandatory six (6) months for the transaction. The 3rd defendant contended therefore that such agreement cannot form a basis for an injunction application. The 3rd defendant contended further that the Plaintiff's application does not meet the minimum threshold for granting interlocutory injunction.
 3. When the application came up for hearing on 3rd July, 2013, the Plaintiff appeared in person, there was no appearance for the 1st defendant, the 2nd defendant appeared in person and Mr. Nyariki, advocate appeared for the 3rd defendant. In his submission in support of his application, the Plaintiff submitted that; he bought Plot no. 7122 from the 1st defendant and fenced the same. When he went to develop the same, the 3rd defendant stopped him from doing so on the allegation that the parcel of land that he wanted to develop belonged to the 3rd defendant and that the 3rd defendant had a title to it. In view of this development, the Plaintiff engaged a land surveyor to come to the ground and ascertain the position of the two plots on the ground, namely, Plot No. 7122 that the Plaintiff had purchased and the parcel of land that was being claimed by the 3rd defendant. The Plaintiff invited the 2nd defendant who was the original owner of Plot No. 7122 to be in attendance. The said surveyor noted that Plot No. 7122 is present on the ground but there is another Plot No. 7123 which although appears in the mutation form that gave rise to Plot No. 7122 does not actually exist on the ground. The Plaintiff submitted that Plot No. 7123 is owned by the 3rd defendant and that the 3rd defendant is claiming that Plot no. 7122 which exists on the ground is his Plot No. 7123. The Plaintiff submitted that the said surveyor who he had invited to ascertain the boundaries of the two parcels of land had informed him that Plot No. 7122 and Plot No. 7123 does not exist on the ground as they appear on the mutation form that gave rise to the same. The Plaintiff urged the court to grant the injunction sought so as to maintain the status quo because the 3rd defendant wants to sell Plot no. 7123 which is actually Plot No. 7122 on the ground. On his part, the 2nd defendant submitted that as far as he is concerned, he sold Plot No. 7122 to the 1st defendant and he was not privy to the transactions that the 1st defendant may have entered into with the Plaintiff and the 3rd defendant.
 4. Mr. Nyariki, advocate for the 3rd defendant submitted that the plaintiff has no valid claim against the 3rd defendant because the Plaintiff's claim is based on an agreement for sale between the Plaintiff and the 1st defendant that was made on 11th April, 2012 with respect to which consent of the land control board was supposed to be obtained within six (6) months and which consent the Plaintiff had failed to obtain. Mr. Nyariki submitted that the Plaintiff's right over Plot No. 7122 expired and his only remedy is to obtain a refund of the purchase price from the 1st defendant. Counsel submitted that the Plaintiff has admitted in his own documents presented to court that Plot No. 7123 is registered in the name of the 3rd defendant. Counsel submitted that the Plaintiff's

agreement for sale with the 1st defendant was with respect to Plot No. 7122 which is distinct and different from Plot No. 7123. Counsel submitted that since Plot No. 7122 and Plot No. 7123 were created at the same time, there was no way in which the mutation could have been interfered with. Counsel submitted that it is upto the Plaintiff to look out for Plot No. 7122 on the ground an exercise in which the Plaintiff need not involve the 3rd defendant. Counsel submitted that the survey drawings submitted by the Plaintiff to court shows clearly that the two plots are clearly separate and distinct meaning that the Plaintiff and the 3rd defendant have distinct parcels of land which do not even share a boundary. Counsel submitted that there is no reason at all why the 3rd defendant has been dragged into this suit by the Plaintiff. Finally, Mr. Nyariki submitted that the plaintiff has not met the conditions for granting interlocutory injunction. In his response to the submissions by Mr. Nyariki, the Plaintiff submitted that the mutation form that gave rise to Plot No. 7122 and 7123 is a forgery and that the 3rd defendant was involved in the said forgery. He submitted further that he has already obtained consent of the land board for the sale transaction between him and the 1st defendant.

5. I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit of the 3rd defendant together with the submissions that were made before me by the Plaintiff and the 3rd defendant's advocates. The law on interlocutory injunction is now well settled. As was stated in the case of, **Giella vs. Cassman Brown & Co. Ltd. (1973) E.A 358**, an applicant for interlocutory injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that unless the injunction is grant he will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience. I must say at the outset that I have been unable to understand the Plaintiff's claim against the defendants and more particularly against the 3rd defendant.
6. The Plaintiff's case as pleaded in the Plaint is that he purchased a portion of Plot No. 7122 from the 1st defendant. The 1st defendant had hitherto purchased the said plot from the 2nd defendant. When the Plaintiff went to the ground to fence the said plot that he had purchased from the 1st defendant, the 3rd defendant who was on the ground stopped him from doing so claiming that the land that he wanted to fence was Plot No. 7123 and that it belonged to the 3rd defendant who had a title to the same. Faced with this resistance the Plaintiff engaged a surveyor to come to the ground and point out the boundaries of the two plots. The said surveyor informed the Plaintiff that there was a problem on the ground as concerns the location of the two plots on the ground that would require rectification of the mutation form that was used to subdivided the original parcel that gave rise to among others Plot No. 7122 and Plot No. 7123.
7. The Plaintiff's claim is for the nullification of the titles for the two parcels of land and the rectification of the Mutation Form that gave rise to the same. The Plaintiff has not sought any other prayer in the plaint even the injunction that is being sought in the present application. It is clear from the foregoing that the Plaintiff's main contention is that the mutation that gave rise to Plot No. 7122 and Plot No. 7123 was erroneous. That is why the Plaintiff has sought an order for the cancellation of the two titles so that the subdivision is done afresh.
8. The first question that arises is, how were the defendant's involved in the preparation of the said mutation and what was their contribution to the errors that the Plaintiff is complaining about so as to make them liable in this suit seeking the rectification of the said mutation. The Plaintiff has not at all proffered any answer to this question. The mutation that the Plaintiff is complaining about was prepared on or about 14th January, 2001. It was prepared at the instance on one, MELLEN MORAA MASESE who was the owner of the original Plot No. 1714(6765) that gave rise to six (6) parcels of land including Plot No. 7122 and Plot No. 7123. The 1st defendant purchased from the 2nd defendant what is now Plot No. 7123 on or about 9th September, 2002 while the Plaintiff purchased the same parcel of land from the 1st defendant on 11th April, 2012. The Plaintiff has not come out clearly as to when the said error in the mutation occurred between 14th January, 2001 when the said mutation was prepared and 11th April, 2012 when the Plaintiff purchased Plot No. 7122 from the 1st defendant and what role if any each of the defendants played in the process. When the Plaintiff purchased Plot No. 7122, it already had a separate title. Plot No. 7122 and 7123

together with four other parcels which are not the subject of this suit originated from Plot No. 1714(6765). As submitted by the 3rd defendant's advocate, the two parcels are separate and distinct and do not even share a boundary from the documents that have been submitted to court by the Plaintiff. It is difficult therefore to imagine how the mutation form that has been exhibited by the Plaintiff which shows the two parcels of land as separate and distinct could have been interfered with so as to place Plot No. 7123 and Plot No. 7122 at the same location on the ground. May be the Plaintiff would be able to prove that at the trial.

9. At this stage however, the Plaintiff has not tendered any proof even on a prima facie basis of such a possibility. The other question that arises is that the Plaintiff has sought the nullification of the mutation form that gave rise to Plot No. 7122 and 7123. As I have mentioned above, the said mutation gave rise to six parcels of land four of which are not the subject of this suit and may be registered in the names of persons who are not parties to this suit. I don't think that the court would be able to give orders that affect parties who are not before it.
10. Due to the foregoing, I am not satisfied that the Plaintiff has established a prima facie case against the defendants with a probability of success. Having come to that conclusion, I am not obliged to consider whether the Plaintiff stands to suffer irreparable harm if the order sought is not granted. The Plaintiffs Notice of Motion application dated 23rd May, 2013 is therefore not for granting. The same is dismissed with costs to the 3rd defendant.

Delivered, dated and signed at KISII this 29th day of November 2013.

S. OKONG'O

JUDGE

In the presence of:

Present in person - the Plaintiff

N/A for the 1st Defendant

Present in person the 2nd Defendant

Mr. Nyagwencha h/b for Nyariki for the 3rd Defendant

Mobisa Court clerk

S. OKONG'O

JUDGE