



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 483 OF 2013

DANIEL KIPKENDA RONO.....PLAINTIFF

VERSUS

JAMES KARIUKI NG'ANG'A.....DEFENDANT

ANGELA MULWA.....1ST INTERESTED PARTY

ROSE MBITHE MULWA.....2ND INTERESTED PARTY

MORIAH PROPERTIES LIMITED.....3RD INTERESTED PARTY

FRANCESCA WAMBUI KIARIE.....4TH INTERESTED PARTY

RULING

There are two applications for determination before this Court. The first is a Notice of Motion dated 19/4/2013 by the Plaintiff seeking various injunctive orders, and the second is one dated 13/6/2013 by the Intended Interested Party seeking joinder to the proceedings. I will start by considering the Intended Interested Party's application for joinder first, before that of the Plaintiff's.

The Intended Interested Party's Application

Francisca Wambui Kiarie, the Intended Interested Party/Applicant is seeking an order that she be joined in this suit as an Interested Party. Her application is premised on grounds that she is the Defendant's wife and has substantial interest in the suit premises as it is a family property. She avers that they have children who are entitled to parental care and protection, which is at peril due to the current wrangles over the suit premises. It is her averment that by virtue of the suit premises being family property, she and the children will be arbitrarily deprived of their interest therein, and it's pertinent that she be joined as a party in order to ventilate their interests.

The application is supported by an affidavit sworn by the Applicant on 13/6/2013 wherein she deposes that she got married to the Defendant through a traditional marriage ceremony in 1987, and that the marriage is blessed with three issues namely Andrew Kiarie Kariuki, Yvonne Gathoni Kariuki and Roseanne Wanjiru Kariuki. It is the Applicant's disposition that she and her husband have consistently worked hard to ensure their children's welfare and in that regard they both pooled resources towards the purchase of the property that is the subject of this suit. The Applicant stated that she has as a result a substantial interest in this suit. In support of her application, the Applicant annexed copies of the birth

certificates of the children, and also receipts of the schools fees paid for the children.

The Applicant did not file any submissions on her application.

The application was opposed by the Plaintiff who filed Grounds of Opposition dated 1/7/2013 wherein he averred that the application is vague, ambiguous and seeks to frustrate his claim. Secondly, that it is an abuse of the court process. It was his averment that the Applicant had no locus and neither was she a proper party in this suit, and therefore her application should be dismissed with costs to the Plaintiff.

Counsel for the Plaintiff filed submissions dated 1/7/2013 wherein he submitted that the Applicant herein is not a party to any series of the alleged acts. It was his submission that the Applicant had not demonstrated in her documents how being a party to the suit shall enable the court to effectively and completely adjudicate upon all questions involved the suit, including breach of the sale agreement to which she was not party to. Counsel submitted that the nature and content of the application was that of a matrimonial cause and in respect of children rights and welfare, which this court had no jurisdiction to adjudicate over. Counsel also submitted that no prejudice could be suffered by the Applicant as she could institute a suit for the recovery of land.

I have considered the pleadings and submissions filed by the Applicant and the Plaintiff. I note that section 93 of the Land Registration Act now provides that where matrimonial property or land is obtained for use of both spouses, there shall be a presumption that the spouses shall hold the land as joint tenants. Further, that where the registered spouse wishes to dispose of the said property he or she shall seek the consent of the other.

However, the said Act was enacted and came into effect in 2012, after the transaction giving rise to the suit herein had been entered into by the Defendant and Plaintiff. The said Act is therefore inapplicable to the circumstances of this suit. I also agree with the Plaintiff that if the Applicant wishes a determination of her matrimonial property rights in the suit property then this court may not be the right forum to canvass her claim. In the instant case, the main issue is whether the Defendant has breached the terms of the sale agreement entered into on 26/5/2009. It thus my view is that the Applicant is not a necessary party in assisting the Court to adjudicate over this issue. I am in this regard persuaded by the decision in **Werrot and Company Ltd and others v Andrew Douglas Gregory and others, Nairobi (Milimani) High Court Civil Case No. 2363 of 1998 (1998) LLR 2848 (CCK)** where Ringera J. (as he then was) held as follows:

“For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”

The Applicant's prayer for joinder is therefore denied for the foregoing reasons, and the Applicant shall meet the costs of the Notice of Motion dated 13/6/2013.

Plaintiff's Application

I will now proceed to consider the outstanding prayers in the Plaintiff's application which are as follows:

1. An order of temporary injunction against the Defendant herein restraining him from wasting and/or interfering with the Plaintiff's quiet possession, accessing and/or any dealing in any way with that parcel of land known as Title No. Ngong/Ngong/56584 and 56585 both sub-division of Title No. Ngong/Ngong/9064 measuring 1.05 hectares of thereabouts situated at Ngong Township pending the hearing and determination of this suit
2. An order of Prohibition against the Land Registrar Kajiado from alienating, sub-dividing, transferring or otherwise dealing with Title No. Ngong/Ngong/56584 and 56585 or any portion carved out of these titles pending determination of this application and suit.
3. A mandatory injunction against the Defendant compelling him to vacate from

Ngong/Ngong/56584 and 56585 or land previously forming part of Title No. Ngong/Ngong/9064 measuring 1.05 hectares situated in Ngong Township and in default to be forcibly evicted therefrom.

4. A cancellation of the Title to land parcel No. Ngong/Ngong/56584 and 56585 and a reversion to Title No. Ngong/Ngong/9064 in the name of the Plaintiff, and that the Deputy Registrar be ordered to execute all the relevant transfer forms to facilitate issuance of title to the Plaintiff.
5. An order directing the OCS Ngong Police Station to enforce the order.

The Plaintiff claims that he entered into a sale agreement with the Defendant dated 26th May 2011 to purchase a parcel of land measuring 1.05 hectares known as Ngong/Ngong/9064 (hereinafter referred to as the suit property). The Plaintiff avers that he was awaiting registration of the transfer when, without his knowledge and consent, the Defendant illegally and unlawfully sub-divided the suit property to create title numbers Ngong/Ngong/56584 and 56585 respectively. It is his averment that upon redemption of the loan by the Plaintiff as per the agreement, the Defendant collected the original title and refused to surrender the same or transfer the suit property to the Plaintiff.

The application is supported by an affidavit sworn by the Plaintiff on 19/4/2013 wherein he deponed that on the 26/5/2011 he and the Defendant entered into a sale agreement for the suit property at a consideration of Kshs.2,600,000/=, subject to payment of outstanding loan arrears at K-REP bank. The Plaintiff deponed that pursuant to the sale agreement, he made a direct cash payment to the Defendant of Kshs.410,000/= being part of 10% deposit of the purchase price which amount was duly acknowledged by the Defendant. He further stated that he made a further part payment of Kshs.1,005,000/= by issuing two bankers cheques in favour of the chargor's, upon written advise from the Vendor's advocate for the redemption of loan arrears.

The Plaintiff stated that it was his expectation that upon payment of 50% of the Purchase price, the Defendant would grant him vacant possession, hand over the original title and a signed transfer to enable him process the title. However, that the Defendant failed to perform his part of the agreement, and that has to-date refused to execute the transfer forms and to surrender the completion documents for the suit property despite receiving consideration. Further, that the suit property has changed hands and the Defendant has been unjustly enriched from the unlawful action of sub-division of the property into Title No. Ngong/Ngong 56485 and 56484 respectively, and transfer of part of the suit land to third parties thereby defeating this claim. The Plaintiff annexed various documents in support of his claim and application.

This application was opposed by the Defendant who filed Grounds of Opposition dated 19/4/2013 and a Replying Affidavit sworn on 17/5/2013. The Defendant opposed the application on grounds that it is an abuse of the court process for reasons that is not supported by a competent affidavit; the orders sought are against persons who are not parties to this suit; and further that the said orders are inconsistent with the prayers in the Plaint.

In the Replying Affidavit, the Defendant admitted the contents of the Plaintiff's affidavit save that after the Plaintiff made the payments referred to, he failed to perform his part of the sale agreement by refusing to complete payment of the purchase price, despite knowing that time was of the essence. It was his disposition that on noting that the Plaintiff wanted to have the suit property transferred to him without completing the purchase price, he moved to sell the properties to third parties. The Defendant stated that he subsequently sub-divided the suit property into two portions, transferred one portion to a third party and retained the other.

The Defendant deponed that he was unaware of a caution allegedly registered against the title by the Plaintiff, and that the caution annexed in the Supporting Affidavit appeared unregistered. He contended that the Plaintiff had come to court with unclean hands and was undeserving of the order sought as he had failed to pay the outstanding balance of the purchase price. Further, that in any event the subject matter of the sale agreement is no longer in existence, as the property has been sub-divided and portion of the same transferred to third parties. It was the Defendant's averment that the Plaintiff cannot obtain orders that cannot be enforced.

The application was also opposed by the interested parties. The 1st Interested Party, a Director of the 3rd Interested Party swore a Replying Affidavit on 17/5/2013 and deponed that she and the 2nd Interested Party are the registered and indefeasible proprietors of the property comprised in Title No. Ngong/Ngong/56485. It was her disposition that on 6/3/2012 the 3rd Interested Party and the Defendant entered into an agreement for sale of land, wherein the latter agreed to sell a parcel of land known as L.R. No. Ngong/Ngong/56485, being a sub-division of L.R. No. Ngong/Ngong/9064 and measuring 1.05 hectares situated in Ngong Township.

It was her disposition that the Register of Lands is the conclusive evidence of the status of such land as is registered thereunder, and a search conducted at the Lands Registry established that there was no encumbrance whatsoever pertaining to L.R. No. Ngong/Ngong/9064. Further, that the Defendant was subsequently issued with a title deed for Ngong/Ngong/56485 on 5/4/2012, which he thereafter transferred to the 3rd Interested Party. She averred that the interested parties have been in occupation of, and developing their parcel of land from 19/2/2013.

The deponent stated that the 3rd Interested Party's purchase of the property was completely innocent, and it is therefore a bona fide purchaser for value without any notice whatsoever of any defect on the title thereof. She deponed further that the title obtained by the 3rd Interested Party and later transferred to her and the 2nd Interested Party is free from any defects or encumbrances and therefore cannot be defeated by another party's claim to the same, and the only legal and viable recourse available to the Plaintiff is an action for damages or loss of bargain against the Defendant. The deponent prayed that orders against the property be discharged and the Plaintiff's application be dismissed with costs. In support of their response, the interested parties annexed copied of their title documents and sale agreement.

The Plaintiff swore a Further Affidavit on 28/6/2013 in response to the Defendant and the Interested Parties' Replying Affidavits, wherein he stated that the Defendant is the one who occasioned the delay by failing to execute the transfer documents and avail the consent to transfer, despite numerous reminders from the Plaintiff's Advocates for him to do so. The Plaintiff reiterated that it was a term of their sale agreement that possession was to be given to him upon payment of 50% of the purchase price. Consequently, that the purported sale of the suit property to the 1st, 2nd and 3rd Interested Parties was unlawful, illegal and fraudulent.

The Plaintiff's application was canvassed by way of written submissions. Counsel for the Plaintiff filed submissions dated 1/7/2013 wherein he argued that the sale agreement entered between the Plaintiff and the Defendant on 26/5/2011 was valid and met the criteria of a valid agreement as stipulated at section 3(3) the Contract Act which provides that the same be in writing, signed and witnessed. It was counsel's submission that upon execution of the sale agreement and after receiving part payment of the purchase price, the Defendant had no property to transfer under the principle of *nemodat quod non habet*.

Counsel also submitted that the Plaintiff was a bona-fide purchaser for value, having entered into a valid sale agreement and paid part purchase price, thus the Plaintiff had acquired pecuniary interest over the property and was entitled to quiet enjoyment of the suit property. Counsel further submitted that the sale agreement remained valid, binding and enforceable to the extent that the Defendant has not adduced evidence or proved rescission, termination and refund of deposit as the per the agreement.

It was his submission that an order of specific performance be awarded to compel the Defendant to honour his part of the bargain, or that in the alternative the Plaintiff be awarded damages of Kshs. 8 million being the current market value of the parcel.

Counsel submitted in respect to the title obtained by the interested parties that the same was obtained through concealment of facts, deceit and misrepresentation on the part of the Defendant. Therefore, counsel submitted, the Register at the Lands Registry could only be taken as conclusive evidence of the status of the land, except where fraud and/or misrepresentation is proved by a party. Further, counsel submitted that the interested parties' constitutional rights to ownership of property are limited as the Plaintiff's right as a bona vide purchaser came in first hence the maxim *where equities are equal, the first*

in time prevails.

Counsel for the Defendant on his part filed submissions dated 2/9/2013 wherein he argued that the Plaintiff's pleadings quantified the damages he allegedly suffered, and that he therefore had not met the criteria for injunctive relief as he could be adequately compensated by way of damages. In respect to a balance of convenience, the counsel submitted that the Defendant and interested parties were in possession of the premises and had developed the same, hence it tilted in their favour. Counsel also submitted that the prayer for mandatory injunction should not be granted at the interlocutory stage devoid of it being a simple and clear case, and of special circumstances.

Counsel for the Interested Parties filed submissions dated 23/9/2013 wherein he submitted that the purpose of an interlocutory injunction pending the hearing and determination of a suit is to maintain the *status quo* prevailing at the time of the order of the court. Counsel submitted that the status prevailing at the time of the Plaintiff's application is that the interested parties are in possession of the purchased property and are in the process of developing the same, thus an order seeking to preserve the *status quo* would only mean that the interested parties continue with their possession which would defeat the entire purpose of the Application.

It was counsel's submission that by virtue of section 26 of the Land Registration Act the title for the interested parties cannot be subject to challenge except upon grounds of fraud or misrepresentation to which they are proved to be party to. Counsel submitted that matters of fraud must be specifically pleaded and proved, and that the Plaintiff had not provided any proof of the interested parties involvement in any fraud or illegal dealings in the purchase or transfer of the suit property. Counsel cited the case of **Esau Mumia Buhinywa v The City Council of Nairobi & 3 Others HCCC No. 1127/2003** on their position that they were bona fide purchasers for value. In respect to irreparable loss, counsel submitted that if there was any loss incurred by the Plaintiff, then an award of damages would be an adequate remedy for his claim. Counsel referred the Court to the case of **American Cyanamid Co v Ethicon Ltd (1957) 1 ALL ER 504** in this regard.

With respect to the ingredient of balance of convenience, counsel submitted that balance tilts in of the favour interested parties for reasons that they purchased the property lawfully and have been in occupation thereof, and developed the same since taking possession on 19/2/2013. On whether the Plaintiff was entitled to the grant of mandatory injunction, counsel referred to the case of **Locabail International Finance Ltd – Vs – Agroexport and others (1986) All ER 901**, where it was held that a mandatory injunction should only be granted in clear and simple cases.

I have carefully considered the pleadings and submissions by the Plaintiff, Defendant and Interested Parties herein. The issues for determination are firstly, whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and secondly whether the mandatory injunctions he seeks can issue. The requirements for the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

At this stage, I find that the Plaintiff has established a *prima facie* case against the Defendant for reasons that the latter does not dispute the sale agreement entered between him and the Plaintiff. The Defendant also does not dispute receipt of the part payment made to him and the bank so as to discharge the title to the suit property. However, I also find that the prayers sought by the Plaintiff are not in the nature of a temporary injunction but are mandatory injunctions, as they seek to have the Defendant and the Interested Parties give vacant possession of the suit property to the Plaintiff, and the cancellation of their titles which are in the nature of final orders.

It was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. I find in this regard that the terms of the sale agreement entered into

are contested as between the Plaintiff and Defendant, and particularly as to its completion, and this is therefore not a clear case in which such final orders such as those sought by the Plaintiff can be granted.

I will therefore proceed to decide on the Plaintiff's Notice of Motion on the basis of a balance of convenience. As the Plaintiff has already paid a substantial amount of the purchase price to the Defendant, I am of the opinion that it is necessary for the suit property to be preserved. However, I also note that the Defendant and Interested Parties are the ones currently in possession of the suit property, and to this extent the balance of convenience tilts in their favour.

I accordingly order as follows:

1. That the *status quo* to be maintained pending the hearing and determination of the suit filed herein or until further orders shall be as follows:
 - a. The Defendant and Interested Parties herein shall not sell, transfer or in any other manner dispose of or alienate the property known as Title No. Ngong/Ngong/56584 and 56585, being subdivisions of Title No. Ngong/Ngong/9064 and situated at Ngong Township
 - b. The Plaintiff shall not in any manner interfere with the Defendant's and Interested Parties' occupation and possession of the said property.
2. The costs of the Plaintiff's Notice of Motion dated 19/4/2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 29th day of November , 2013.

P. NYAMWEYA

JUDGE