



ELIZABETH NJANGO.....PLAINTIFF/APPLICANT

VERSUS

1. PRISCILLA NTHOKI MUSELA

2. PRIME ARMS LIMITED

3. MARTHA BOSIBORI MOGIRE.....DEFENDANTS/RESPONDENT

RULING

1. The application before the Court is one dated **29th March, 2011**. It is a Notice of Motion (“*Application*”) filed by the Plaintiff/Applicant (hereinafter “*Applicant*”) seeking orders that:

a. The matter be certified urgent and heard *ex parte* in the first instance and service thereof be dispensed with;

b. Pending hearing and determination of [the Application], the 3rd Defendant and her agents be restrained from entering, dealing and/or transferring LR No. 12715/3718, Plot No. 14 (Original 12715/526/14) (“*Suit Property*”) pending the hearing and determination of the suit herein.

c. The Officer in charge, Athi River Police Station do enforce these orders;

d. The costs of [the] Application be provided for.

2. The Application is predicated upon a plaint of even date. The Plaintiff asks for a permanent injunction in similar fashion to the current Application; specific performance of a sale agreement between the Applicant and the 1st and 2nd Defendants; Damages for breach of the Sale Agreement; costs of the suit; and such further relief as the Court may deem fit to grant.

3. The Application is supported by the Affidavit of the Applicant sworn on **29th March, 2011** (hereinafter, “*Applicant’s First Affidavit*”) and a Further Supporting Affidavit sworn on **12th April, 2011** (“*Applicant’s Second Affidavit*”) which was filed pursuant to the leave of the Court.

4. The Application is vigorously opposed by the Defendants, especially the 3rd Defendant. The 1st and 3rd Defendants have filed a Replying Affidavit and the 3rd Defendant has filed a Further Replying Affidavit. The 2nd Defendant has also filed a Replying Affidavit.

5. The Application was heard *ex parte* by Justice Kihara Kariuki on **30th March, 2011**. He granted temporary orders of injunctions and directed that the Application be served for *inter partes* hearing. The temporary orders were extended a number of times. The parties eventually agreed to canvass the Application by way of written submissions followed by oral highlighting. The Applicant and the 1st and

3rd Defendants filed their written submissions and their advocates appeared before me on **6th December, 2012** for highlighting of their submissions. Counsel for the 2nd Defendant chose not to file written submissions or make oral submissions and represented that his client wished to rely *in toto* on the Replying Affidavit of **Julius Muvea Muinde** on record.

6. At its core this is a knotted problem about two land transactions one of which was purportedly rescinded. The four central issues in the main suit would be, first, to determine as a matter of the law of contract if the sale agreement between the Applicant and the 2nd Defendant was validly rescinded and/or terminated for material breach of contract as alleged by the 2nd Defendant and denied by the Applicant.

7. The second central issue is whether the parcels of land sold to the Applicant and the 3rd Defendant are one and the same. The Applicant urges that the Suit Property is the subject matter of the sales to both herself and the 3rd Defendant. The 3rd Defendant claims that her parcel is **Plot No. 15** while the Applicant's real claim is against **Plot No. 14** – which is owned by a Third Party not party to the present proceedings.

8. The third central issue is who has possession of the Suit Property: each of the Applicant and the 3rd Defendant claims they have sole possession of the Suit Property and that they would be irredeemably damaged if a Court order dispossesses them through an injunction or refusal to issue one as the case may be.

9. The fourth central issue is whether the 3rd Defendant is a *bona fide* purchaser for value without notice: The Applicant appears unsure about this; at times she argues that there was malice and collusion between the Defendants to deprive her of the Suit Property; at other times she suggests that both she and the 3rd Defendant are *bona fide* purchasers for value without notice but that she enjoys the legal advantage as the first in time.

10. At this point in the proceedings, the Court cannot, of course, resolve any of these issues definitively. Still, it is called upon to form a provisional view of the evidence and record to determine if injunctive relief is appropriate at this stage.

11. It is now well established in Kenya that there are three main factors to be considered in determining whether to grant a preliminary injunction. (See *Giella v. Cassman Brown*). The trial court must evaluate whether:

a. The Applicant has showed that it is likely to prevail on the merits;

b. The Applicant has demonstrated that it will suffer imminent irreparable harm if the injunction is not granted; and

c. The harm the Applicant is likely to suffer absent the injunction outweighs the harm it would cause to the adverse party.

12. Thus, the Applicant must, in the first instance, demonstrate the likelihood of succeeding on the merits. To determine if she had discharged this burden, I will now consider the competing theories of the case for the Applicant and the Defendants.

13. The Applicant's version of the story is that she entered into a Sale Agreement with the 2nd Defendant for the Suit Property being **LR No. 12715/3718, Plot No. 14** (original No. 12715/526/14) on **02/11/98**. She says she paid the full purchase price of **Kshs. 250,000/=**. The parcel of land was to be excised from the "*main title*" parcel number **LR 12715/526** registered in the name of the 1st Defendant. She says that since she completed paying the purchase price (the latest receipt for payment the Court could see was one for **09/01/2001** for **Kshs. 5,000/=**), she has been requesting, without success, for the 2nd Defendant to complete the transaction and facilitate the transfer of the parcel of land to her. Her

efforts have been rebuffed and the 2nd Defendant, in a letter dated **26/01/2011**, claimed to rescind the sale contract and purported to refund her purchase price (of **Kshs. 229,000/=**). The purported unilateral rescission of the sale contract was, in the Applicant's view, wrongful and ineffectual since she was already the effective buyer of the Suit Property. As such, she wants injunctive relief against the 3rd Defendant who has recently "*taken possession of the [Suit Property] and demolished the [Applicant's] semi-permanent house and erected a perimeter wall claiming to be the owner.*" (See the body of the Application)

14. On the other hand, the Defendants' story is as follows. The 1st Defendant sold all that parcel of land formerly known as **LR 12715/526** to the 2nd Defendant. The plan all along was for the 2nd Defendant to subdivide it and sell it into smaller parcels. This did happen but the transfer has never quite occurred from the 1st Defendant who still holds the title in her name. The plan is for the title to be transferred directly from the 1st Defendant to the third parties who purchased the property from the 2nd Defendant. As part of the transaction between the 1st and 2nd Defendant, however, the 1st Defendant was allocated two parcels of land (as part of the purchase price). One of these parcels was **Plot No. 15**. The 1st Defendant subsequently sold this parcel to one **Timothy Wathome** who, in turn, sold it to the 3rd Defendant on or about **03/10/2008**. The 3rd Defendant claims she immediately took possession of the parcel, fenced it; planted trees; and started the process of getting the title transferred to her. That **Plot No. 15** is the Suit Property. The 1st and 3rd Defendant confirms this version of the story and that the 2nd Defendant claims that the Sale Agreement between itself and the Applicant was rescinded for material breach by the Applicant. At all material times, the 2nd Defendant has been willing to refund the deposit of the purchase price which it places at **Kshs. 229,000/=**.

15. So, is the Applicant likely to succeed on the merits of this case? I have my doubts that she will. All I am prepared to say at this point is that the Applicant has a suit which raises serious questions which go to the merit in her claim against the 2nd Defendant. Even before a full development of the record, it is quite clear that her claim against the 2nd Defendant raises serious questions about the propriety of the termination of the Sale Agreement based on a claim of material breach. However, in my view, that "*serious question*" against the 2nd Defendant does not translate into a claim with a likelihood of success against the 3rd Defendant against whom injunctive relief is sought. I say so for at least four reasons.

16. First, the Applicant has not placed sufficient materials on record to persuade the Court that the Suit Property is, indeed, the land respecting which she entered into a Sale Agreement with the 2nd Defendant on 02/11/98. While both the Applicant and the 3rd Defendant have filed separate survey reports, the Court has little basis for choosing one over the other except to point out that the **Survey Report** by **Mr. Benson M. Kathenge** of **Geosite Systems** seems to more accurately and reliably identify the parcel of land in contention. It gives a plausible theory to explain the seeming discrepancy between the number "14" in the LR number and the actual plot number on the scheme plan. It helps that one of the basis of the report is that the parcel surveyed is the actual one in the possession of the 3rd Defendant and that the beacons are marked with the number "15." Finally, both the 1st Defendant and the 2nd Defendant confirm that the plot sold to the 3rd Defendant is the Suit Property and that the plot which was the subject of the Sale Agreement dated **02/11/1998** between the Applicant and the 2nd Defendant is a different one. It is for the Applicant to demonstrate that she will succeed on the merits, and to the extent that, at best, there are serious doubts as to the very identity of the subject-matter impugns her ability to do so.

17. Second, the identity of the suit land to which the Applicant is laying claim is further put in doubt by the uncontested revelations in the affidavit of **Mr. Julius Muvea Muinde**, the 2nd Defendant's director. **Mr. Muinde's** affidavit annexed documents which show that the Applicant has made efforts to claim a different plot, being **Plot No. 14** from the third party who is occupying it upon finding out that the plot she had bought had been resold. She has even lodged a caveat against that property and reported the matter to the Athi River Police Station and CID headquarters. All these efforts intensify doubts that the Suit Property is the subject matter of her Sale Agreement with the 2nd Defendant.

18.Third, the Applicant has placed scant credible evidence to demonstrate that she is in possession of the Suit Property. Control and possession of the Suit Property would be a factor to be considered both in deciding whether her claim takes precedence over the 3rd Defendant's claim as well as whether she is likely to suffer irreparable damage if an injunction is not granted. In my view, the Applicant has not demonstrated possession. It is noteworthy that the Applicant does not say when she took possession of the Suit Property or when she allegedly erected a semi-permanent house on the Suit Property. It is also noteworthy that she claims that the 3rd Defendant only recently forcibly took possession of the Suit Property but somehow managed to take down her semi-permanent house and build a wall perimeter fence before she could come to Court. Equally noteworthy is that the Applicant, in her written submissions, is praying to be put in possession (see bottom of p. 3 of Applicant's Written Submissions). Also noteworthy is the claim in the Plaintiff that "*the 3rd Defendant has now demolished the Plaintiff's semi-permanent house and other improvements on the suit premises and intends (sic) to put up a perimeter wall and block me from accessing my property to my prejudice.*" (See para. 11 of the Plaintiff) Finally, there is the affidavit of **Charles Mutuku Maingi** in which he avers that only a few months before the filing of the suit the Applicant sought his assistance to be shown her parcel of land. In that same affidavit, **Mr. Maingi** avers that the Applicant went to the Suit Property two weeks prior to the filing of the suit, cut the fence and entered the Suit Property and placed a container on it. These claims by **Mr. Maingi** have not been denied or contested by the Applicant.

19.On the other hand, the 3rd Defendant has averred that she has had physical control and possession of the Suit Property since she purchased it in 2008. She has also demonstrated that she has put in motion measures to perfect her title. She has annexed copies of correspondence and payments she has made to this effect. Both the 1st and 3rd Defendant corroborates her version of the story as does **Mr. Charles Mutuku Maingi**, a neighbour and, independently, the survey report by **Mr. Kathenge**. On the basis of this straightforward story by the 3rd Defendant, contradistinguished against the inconsistencies in the Applicant's story, the Court is entitled, at this point, to impugn the Applicant's claim that she has been in possession of the Suit Property. In fact, the Court outright disbelieves the Applicant on this issue.

20.Fourth, and perhaps most importantly, as the Applicant herself alternately accedes at times, the 3rd Defendant is also a *bona fide* purchaser of the Suit Property for value without notice. While the Applicant, in her less charitable moments, suggests otherwise, it seems clear that the 3rd Defendant purchased the Suit Property from one **Timothy Wathome** without any indication that there was ever any dispute regarding it. The 3rd Defendant immediately took possession of the Suit Property and commenced efforts to perfect her title. Assuming, *arguendo*, that the property she took possession of is the Suit Property to which the Applicant is also laying claim, it is not ineluctable that equity divines that the Applicant's claim takes precedence over that of the 3rd Defendant. Indeed, in the specific circumstances as laid out above, the opposite might be true. There is an old maxim which refers to a *bona fide* purchaser for value without notice as "*equity's darling.*" From the record, holding all constant, the 3rd Defendant appears to be a *bona fide* purchaser for value without notice who did all she could to put the world on notice about her interests and claims to the real estate. The Applicant, on the other hand, appears to have done little in ten years to perfect her title and ownership of the Suit Property. As the Court points out above, the equitable and prudential reasons seem to point in favor of the 3rd Defendant.

21.The result is that the Court has serious doubts if the Applicant will be successful in her suit against the 3rd Defendant and prove that she is entitled to the Suit Property. Even then, she might still be entitled to injunctive relief if I have doubts on the question of merits, can prove irreparable harm in the absence of an injunction, and can show that the balance of convenience tips in her favor.

22.The Applicant relies on the case of *Shariff Abdi Hassan v Nadhif Juma Adan* (Civil Appeal No. 121 of 2005) (unreported) for the position that it is the trespasser who should give way pending the determination of the dispute and that it is no answer that the alleged acts of trespass are compensable in damages to urge that she satisfies the second *Giella* factor. With respect, the *Shariff Abdi Hassan* case is distinguishable from the facts herein. In that case, the Applicant had established on a *prima facie* basis that he was the registered proprietor of the Suit Property and that he held Certificate of Lease to it. The

Applicant in that case had always been in possession of the Suit Property but shortly before the suit was instituted the other party had entered the Suit Property and erected illegal temporary structures on it. Here, on the other hand, the Applicant has not established even on a *prima facie* basis that she is the owner of the Suit Property or that she is even in possession thereof. Indeed, available evidence suggests that it is the Applicant who attempted to enter the Suit Property and then seek to preserve her advantage by filing the present Application.

23. Since the Applicant has not demonstrated that she is in possession of the Suit Property and has not even demonstrated that she has sued over the correct Suit Property, she cannot plausibly demonstrate irreparable harm absent an injunction. For the same reason, the balance of hardships and convenience are not in favor of the Applicant either. I have believed the 3rd Defendant's narrative that she has been in possession of the Suit Property since she purchased the same in 2009. A temporary injunction in the terms prayed for by the Applicant would, in essence and, without ample justification, dispossess the 3rd Defendant.

24. The result is that even if I granted the Applicant some benefit of doubt on the question of likelihood of succeeding on the merits and presumed that her suit raises serious questions going to the merit, the other two factors, and especially the balance of hardships and convenience do not tip in the Applicant's favor. Consequently, the Applicant is not entitled to the extraordinary remedy of preliminary injunction. I therefore dismiss the Application dated **29/03/2011** with costs and discharge all the interim orders subsisting in this case.

DATED and DELIVERED at MACHAKOS this 27TH day of FEBRUARY, 2012

J.M. NGUGI

JUDGE