



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT NO. 247 OF 2011

**UBORA HOUSING CO-OPERATIVES SOCIETY LTD
.....PLAINTIFF**

VERSUS

**SANYOCK ENTERPRISES LIMITED.....1ST DEFENDANT
JOSEPH WAMWAYI ODUNDO2ND DEFENDANT
RAILWAYS HOSUING CO-OP SOCIETY.....3RD DEFENDANT
THE COMMISSIONER OF LANDS4TH DEFENDANT
THE HONOURABLE ATTORNEY GENERAL.....5TH
DEFENDANT**

RULING

The plaintiff's application dated 22nd December 2011 prays for the following orders:-

- 1. That this application be certified as urgent and heard exparte in the 1st instance service thereof being dispensed with.**
- 2. That pending the inter –partes hearing of this application, this Honourable Court be pleased to grant an order of temporary injunction restraining the Defendants whether by themselves, servants, agents, successor or assigns howsoever from entering, encroaching , trespassing, working, constructing, fencing alienating, building and or transacting in all that parcel of land known as L. R. No. 15300 (I. R. 96243).**
- 3. That this Honourable Court be please to grant an order of temporary injunction restraining Defendants whether by themselves, servants, agents, successor or assigns howsoever from entering, encroaching, trespassing, working, constructing, fencing alienating, building and or transacting in all that parcel of land known as L. R. NO. 15300 (I. R. 96243) pending hearing and determination of this suit.**
- 4. That the OSC Kondele Police Station do help in enforcing any orders of the court.**
- 5. That costs of the application be provided for .**

The same is supported by an affidavit sworn on the same date by one **Paul Nyerere Ogori** who is the plaintiff's Chairman.

The documents attached to the said affidavit shows that it purchased the suit land from the 1st defendant on 17th October 2007 for a total purchase consideration of Kshs. 7,500,000. Subsequently, the applicant proceeded to sub-divide the suit land into 79 plots and allotted it to its 45 members.

The 4th defendant herein proceeded to issue the relevant consents for the land to be transferred to the plaintiff / applicant. From the plaintiff annexures it has paid all the necessary rates and rents and other outgoings, due to the relevant statutory bodies as well as completing the entire purchase consideration to the 1st and 2nd defendants. It was further the plaintiff's case that they have gone ahead to occupy the parcels of land by erecting temporary structures thereon including fencing and a site house.

It's also the plaintiff's case that the 1st defendant has been unable to transfer the land to them citing non-performance of the agreement on the plaintiff/ applicant part.

The plaintiff / applicant content that the 3rd defendant on 14 and 19 December 2011 hired some goons who came and destroyed the applicant site house and the fence. The 3rd defendants according to the plaintiff claim that they are the legitimate owners of the suit land. They therefore pray that the defendants be enjoined. That is the plaintiff / applicant's case.

The 3rd defendant on the other hand has opposed the application through the replying affidavit of one **Evans Orangi Bogonko** sworn on 10th January 2012. The 3rd defendant / respondent content that it purchased the suit property on 23rd December 2004 from the 1st Defendant for a total purchase consideration of Kshs. 5, 213,750. which it has paid in full. The 1st defendant after getting all the relevant consents from the 4th defendant had the land transferred to it on 16th December 2009. They exhibited the title which is now in their own name. The transfer document dated 2nd July 2007 is in their favour. They have also exhibited all the other conveyancing instruments and payments including the stamp duty payment. According to the 3rd respondent it's the plaintiff who is a trespasser.

I have carefully perused the documents filed by the parties herein. I have also heard their counsels' submissions together with the authorities they have persuaded me to rely on. The duty of this court at the moment is to issue interlocutory orders based on the facts as they are. The weighty issues of fraud or otherwise is left for the trial court.

What is not disputed by the parties herein is that there was a sale agreements between the 1st defendant and both the plaintiff and the 3rd defendant. The agreement between the 1st defendant and the 3rd defendant is dated 23rd December 2004 for a total purchase consideration of Kshs. 5, 213, 750 whereas that of the plaintiff is date 17th October 2007 for a total purchase consideration of Kshs. 7, 500,000. What runs across the said agreement is that the 1st defendant was the registered owner of the suit property and that it was one and the same parcel of land namely L. R. No. 15300, Kisumu Municipality.

What is equally and apparently clear is that the agreement between the 1st defendant and the 3rd defendant was the first and that it appears that the 1st defendant went ahead to transfer the suit land to the 3rd defendant in 2nd July 2008 with full knowledge that he had already entered into a sale agreement with the plaintiff. As earlier own indicated the 3rd defendant obtained his title on 16th December 2009. The plaintiff on the other hand was unable to obtain the same. In fact what the plaintiff has exhibited is the old title which had not been transferred to the 3rd defendant.

At this preliminary stage therefore it's the 1st and 2nd defendants who owe explanation to both the plaintiff and the 3rd defendant. The 1st and 2nd defendant didn't file any response to the plaintiff application. Had it file them perhaps it would have shed some light on some truths.

Based therefore on the fact that it does not hold the title to the suit land, what is the strength of the plaintiff's application?. It has contended that its on the suit parcel of land and not the 3rd defendant. The 3rd defendant has exhibited its title deed and the process that it followed to obtain it. This apparently has not been faulted by the plaintiff / applicant.

What is the effect of allowing the plaintiff / application? It shall mean that the 3rd defendants who are

holders of the title shall not be able to move forward and utilize the land in whatever way it deems necessary. The now famous authority of **Giella =vs= Cassman Brown and Co Ltd [1973] E. A. 358** is of outmost important in this case. The principles therein are worth reproducing, namely that for a party to succeed in having the orders of injunction granted it must:-

- (a) Show a prima facie case with a probability of success**
- (b) An applicant if an injunction is not granted might suffer irreparable harm and loss**
- (c) If in doubt the court shall decide on a balance of convenience.**

On the face of it the balance of convenience seems to tilt in favour of the applicant/plaintiff. They have demonstrated that they are on the suit property and that they purchased the same from the 1st defendant. The 3rd defendant has not demonstrated that it's on a physical occupation of the suit property. This however does not defeat its superiority on title. The 3rd defendant has established clearly how it purchased the suit property and how it come into possession of the title deed.

That title deed is closely guarded by Section 23 (1) of the Registration of Title Act which states:-

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietors thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner, thereof subject to the encumbrances easements, restriction and condition contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenges except on the grounds of fraud or misrepresentation to which he is proved to be a party”.

I have not been shown any other title by the applicant. The title exhibited in his affidavit is the same title prior to it being transferred to the 3rd defendant.

Based on the above circumstances I am inclined to dismiss the plaintiff / applicant application. The issue of fraud as earlier own indicated shall be a matter of trial. The fact that the 3rd defendant first entered into agreement with the 1st defendant prior to the agreement between the plaintiff and the said 2nd defendant and the fact that it had the title transferred in his farvour prior to the plaintiff gives it a legitimate strength of ownership at this stage.

The applicant has not shown any prima facie cased against the 3rd defendant as much as both are innocent purchasers for value without notice. As regards irreparable harm and loss, the same can still be quantified and be paid by way of damages especially by the 1st and 2nd defendants who clearly are direct vendors of the two sets of sale agreements.

I shall therefore dismiss the application dated 22nd December 2011 with costs to the 3rd defendant.

Orders accordingly.

Dated, signed and delivered at Kisumu this 22nd of February 2012

H. K. CHEMITEI
JUDGE

In the presence of:

..... **for Applicant**

..... **for Respondents**

HKC/aao