



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.236 OF 2011

STEPHEN NDIRANGU WAMBUGU

.....**APPLICANT/PLAINTIFF**

VERSUS

JOHN NJENGA NGETHE**REPODENT/**

DEFENDANT

RULING

The applicant, **Stephen Ndirangu Wambugu** has brought this action simultaneously with the instant motion in which motion he seeks an order to restrain the respondent **John Njenga Ngethe**, from interfering with parcel of land known as KIAMBOGO/KIAMBOGO BLOCK 1/159 until the suit herein is heard and determined. He also seeks a mandatory injunction directed at the respondent to remove from the property the temporary structures.

It is the applicant's contention that by an agreement entered into on 11th August, 2011 the previous registered proprietor of the suit property Pius Bwogeri sold to him the suit property at a consideration of Kshs.8,000,000/=. This was after he (the applicant) had conducted a search at the Land Registry and obtaining the requisite consents. The property was subsequently transferred to him and title deed issued in his name.

A few days after such registration, the applicant was surprised to learn that certain persons engaged by the respondent were on the property fencing and putting up temporary structures. He moved to court to stop those activities.

The respondent has denied the allegations of encroachment and maintained that he is the registered proprietor of the property having obtained registration in 1989; that he has never transferred the property to any other person and has been in continuous occupation of the same; that the alleged transaction between the applicant and the seller, Pius Bwogeri is fraudulent; that he was equally surprised to learn that the applicant was claiming the ownership of the property; that the said Pius Bwogeri has been engaged in illegal and fraudulent land transfers which has landed him in a criminal court; and finally that it is doubtful if the purchase price was fully paid before the alleged transfer of the property to the applicant.

I have considered the application, affidavits sworn in support of each party's case and written submissions as well as authorities cited. Being an application for a temporary injunction, the strictures enunciated in the famous **Giella V. Cassman Brown & Company Limited** (1975) EA 358 at 360,E and later explained in the **Kenya Commercial Finance Company Limited V. Afraha Education Society** (2001) 1 EA 8 must be satisfied.

First, the applicant must show a *prima facie* case with a probability of success, secondly, it must be demonstrated that the applicant might suffer irreparable injury if the injunction is not issued and thirdly, should the court be in doubt, it will decide the application on a balance of convenience. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the applicant has a *prima facie* case. However, traditionally, courts have always considered all the three principles.

In considering whether the applicant has a *prima facie* case, the court at this stage is not required to consider the merits of the applicant's case but merely to see if there are violations of the applicant's rights which would necessitate the calling for a rebuttal from the respondent.

At the time this suit was instituted, the respondent was the only party on the property, irrespective of how and when he entered the property. It is common ground that there are two title deeds to the property. As between the parties, the respondent's title predates that of the applicant or the applicant's predecessor in title.

While it is the applicant's contention that he is an innocent purchaser for value without notice, the respondent maintains that the transaction giving rise to the applicant's title was fraudulent.

For his part, the applicant has also argued that the respondent has not exhibited a certificate of official search to confirm the authenticity of his title. To these questions definite answers will come at the trial. At this stage I am only concerned with the question whether the applicant has a *prima facie* case. *Prima facie*, the two parties have title deed to the property. **Sections 27(a), 28, 39(1) and 143** of the **Registered Land Act** are all applicable to the parties.

The absolute ownership vested in the registered owner of a property registered under the Act can only be defeated in specific instances as provided by the Act, including instances where registration is shown to have been obtained fraudulently or by mistake and only where it is proved that the proprietor was a party to the fraud or knew of the mistake. I must emphasise that **Section 32(1)** of the **Act** insists that there cannot be two title deeds or certificates of title to one parcel of land.

Although land registration regimes in this country are based on what is now commonly known as the Torrens System, named after Sir Robert Torrens of South Australia, any registration obtained by fraud will be vitiated.

There are certain aspects of the applicant's claim that tend to suggest that the transaction leading to his registration may not have been above board. In the first place, it is the applicant's case that the consideration was Kshs.8,000,000/=.

According to the sale agreement, Kshs.3,620,000/= was paid on execution and the balance of Kshs.4,380,000/= was to be paid on or before 11th November, 2011. The applicant was to take possession after the seller had surrendered all the relevant documents and executed a transfer and also only upon the applicant settling the balance of the purchase price.

Taking into account depositions of Mr. Charles Munene, Advocate before whom the agreement was executed, in his affidavit dated 10th November, 2011, only Kshs.2,000,000 was paid before him upon execution of the agreement and not Kshs.3,620,000/=. The only other payment allegedly made towards the purchase price relate to two cheques both dated 27th June, 2011 payable to Pius Ambuki Bwogeri, one for Kshs.500,000/= and the other for Kshs.550,000/=.

It must be noted that these cheques predate the agreement. The agreement was on 11th August, 2011 and the cheques, as I have noted are dated 27th June, 2011. If they were made as part payment towards the purchase price they ought to have been mentioned in the agreement. The *Mpesa* payments have not been proved.

Another curious aspect of the transaction is that although the payment of the full purchase price appears not to have been made, the applicant proceeded to obtain the title deed. That title deed was issued on a date before the date of the agreement. It is dated 10th August, 2010, one day before the agreement.

For these reasons, I come to the conclusion that the applicant has failed to demonstrate a *prima facie* case with a probability of success. The value of the property according to him is Kshs.8m which can be refunded and the respondent has taken possession. The balance of convenience is in his favour. With those discrepancies in the applicant's application, no mandatory injunction can issue.

The application for injunction fails and is dismissed with costs. The interim orders are accordingly discharged.

Dated, Signed and Delivered at Nakuru this 29th day of March, 2012.

**W. OUKO
JUDGE**