



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE 30 OF 2011

ONESMUS NGILA KIMANYI.....APPLICANT

VERSUS

THOMAS MULI MAKALI.....RESPONDENT

RULING

1. The Application before the Court is dated **09/02/2011** (“Application”). It is a Notice of Motion by the plaintiff, **Onesmus Ngila Kimanyi** (“Applicant”) seeking, in the main, injunctive relief against the defendant, **Thomas Muli Makali** (“Respondent”) respecting the parcel of land described as Plot No. **16** held in **Malili Ranch Company Limited** (“Plot No. 16”).
2. The Applicant’s claim is sketched out in the Supporting Affidavit sworn on **09/02/2011** and in the Complaint on which the Application is predicated. It can be easily stated. It is that he entered into an agreement to purchase Plot No. **16** from **Benjamin Kiluvu Munguti** (“Mr. Munguti”) on 26/06/2006 by a written agreement of even date (“Kimanyi Sale Agreement”). The Applicant has annexed the **Kimanyi Sale Agreement** to his affidavit. It is his further claim that pursuant to this agreement, and after due payment of the deposit and mandated installments, he took possession of Plot No. **16**. More importantly, the Applicant has evidenced a payment receipt of a transfer he says he effected following the agreement. By its terms, the receipt ostensibly issued by **Malili Ranch Limited** says the payment of **Kshs. 20,000/=** was made by the Respondent on **04/02/2011** “for transfer of Agricultural Plot No. **16** from **Benjamin Kiluvu Munguti** Share No.1290.”
3. The Applicant states that despite legitimately purchasing Plot No. 16 from **Mr. Munguti** and successfully transferring it to himself, the Respondent started, in the period immediately preceding the filing of the suit and this Application, interfering with his possession and ownership of Plot No. 16. In particular, he complains that the Respondent has started depositing construction materials on the land, and has, in fact, began construction. He also has threatened the Applicant. An extract from the Occurrence Book at **Salama Police Station** details what the Applicant describes as “trespass” by the Respondent.
4. The Respondent, of course, has a dramatically different story. He said that he purchased all of the five ordinary shares held at **Malili Ranch Limited** by **Mr. Munguti** on **26/12/1996**. This was done vide a written sale agreement of even date (“Makali Sale Agreement”). Unfortunately, the Respondent has evidenced the **Makali Sale Agreement** in its original language of Kikamba without providing an English translation. It is the Respondent’s claim that the 5 ordinary shares evidenced in a copy of the Share Certificate (No. **1290**) attached to the Replying Affidavit of the Respondent are the ones that eventually translated to **Mr. Munguti** balloting two parcels of land – Agricultural Plot No. **16** (which is the subject matter of this suit) and Commercial Plot No. **2368** (“Plot No. 16”).
5. The Respondent’s claim is that by purchasing **Mr. Munguti’s** entitlement under Share Certificate No. **1290**, he became entitled to both Plot No. **16** and Plot No. **2368**. He says that he agreed with **Mr.**

Munguti that **Mr. Munguti** would retain possession of some portion of Plot No.16 since he (the Respondent) was not ready to develop it then. They further agreed that **Mr. Munguti** would facilitate the transfer to him.

6. The Respondent claims, further, that despite finishing paying the purchase price as per the Makali Sale Agreement, **Mr. Munguti** refused to transfer the shares (and the land) to him. As a result, over the years, the Respondent has instructed at least three different lawyers to fire off letters to Mr. Munguti or the Company to abide by the Makali Sale Agreement and transfer the shares to him. There are copies by **D.M. Ndungi & Co. Advocates** dated **06/09/2010**; one by **Jean Kiarie & Co. Advocates** dated **20/02/2007**; and yet another one by **V.V. Mule & Co. Advocates** dated **13/06/2005**. To secure his interests, the Respondent also filed a civil suit at Makueni Law Courts being Makueni SRMCC No. 2006. It is unclear what happened to that suit: the Respondent does not attach any court documents respecting the suit. I think this is an error on the part of the Respondent's attorneys. But it is not seriously contested that it was, in fact, filed.

7. This, then, brings us to the law. The law on issuance of injunctive relief at the interlocutory stage is now well settled in Kenya. The analysis begins with the three principles stated in the case of *Giella v Cassman Brown* [1974]E.A. 358:

- a. In the first instance, the Applicant must demonstrate a *prima facie* case with a probability of success ("First *Giella* factor");
- b. In the second instance, the Applicant must show that he will suffer irreparable harm if the injunction does not issue ("Second *Giella* factor");
- c. In the third instance, the Court will balance the convenience or the equities of the parties if it is still in doubt. It follows that the "doubt" in this third principle refers to "doubts" about the potential of the Applicant's case succeeding on its merits ("Third *Giella* factor").

8. Applying this analysis to the facts at hand, should an injunction issue here? I think not. I think the Plaintiff fails on the First *Giella* factor. It appears to me, on the face of it, this is not one of the many cases we have seen in Kenya of two perfectly innocent purchasers of the same interests in land who find themselves in a rats' race engineered by a clever and conniving fraudster. Such cases present knotted problems of determining who might prevail in a legal battle that is often located at the intersection of law and equity: first purchase versus first registration; legal registration versus actual possession; original legal title against a later title lawfully issued; and so forth. In my view, the situation is different here.

9. I have carefully analyzed the claims of the Applicant and carefully perused the documents he has evidenced. To say the least, as I should at this point since I should form no more than a provisional conclusion as to the potential of the Applicant's case prevailing on its merits, I am compelled to entertain doubts as to the worthiness of belief in the Applicant's story. The following aspects of the Applicant's narrative inspire healthy skepticism:

- a. First, the timeline in the Kimanyi Sale Agreement raises eye brows: The agreement purports to have been executed on **26/06/2006** but appoints a completion date of **02/05/2011**. It also says the initial deposit (of **Kshs. 306,000/=**) was to be paid upon execution and then three equal installments of **Kshs. 71,333/=** were to be paid between **March – May 2011**. Curiously, the present suit and Application were filed on **10/02/2011**. All these seem quite odd and the Applicant has offered no explanation for these oddities in the transaction.
- b. Second, by the very terms of the Kimanyi Sale Agreement, the sale would not be complete until **02/05/2011**, yet the Applicant somehow managed to effect transfer on **04/02/2011** before the completion date. Again, no explanation was offered for this peculiarity in the transaction. Typically, the transfer occurs after the completion date and it is the last action that happens to protect the vendor's interests in the property.

c. Third, it is equally curious that the purported transfer occurred so close in time to the filing of this suit: the transfer was done on **04/02/2011**. This suit was filed on **10/02/2011**.

d. Fourth, it attracts genuine wonder how the Applicant and Mr. Munguti could have entered into a sale for Plot No. **16** on **26/06/2006** when the balloting document which the Applicant has placed in evidence shows the balloting and allotment for the parcels did not occur until **27/07/2006** (see annexure "NK 3" in the affidavit of the Applicant). As the Respondent points out, it appears that there was no such entity as Plot No. **16** in **Malili Ranch** on **26/06/2006** over which the Applicant could enter into a sale agreement with Mr. Munguti. Yet, the Kimanyi Sale Agreement explicitly refers to Plot No. **16**.

10. While all these aspects of the Applicant's case invite doubts about his account, I find the Respondent's claims to Plot No. **16** more plausible. The attached agreements and acknowledgements of receipt of monies (while, unfortunately, in Kikamba) seem more credible especially when they are buttressed by the stream of demands by the Respondent that **Mr. Munguti** consummates the transaction. I am unable to say that the Respondent faltered or failed in any way to press and assert his claim. On the contrary, he has done everything he can to give notice to **Malili Ranch Limited** that he is the *bona fide* purchaser of **Mr. Munguti's** former interests in the Company. Hence, even if I were to hold the Applicant a *bona fide* purchaser also, I would still have held that the equities are more in favor of the Respondent here: he made every effort to notify the world of his purchase; he did not falter or fail to assert his claim for an unreasonable period of time; he did not act inequitably in any way; and he was prevented from effecting transfer by the actions of **Mr. Munguti**.

11. Turning to the Second *Giella* factor, the Applicant has placed credible materials to show that he is in possession of Plot No. **16** and that the Respondent is only now attempting to acquire possession. The extract from the Occurrence Book establishes this, and it remains unchallenged. However, it is not clear what quality of possession the Applicant has on the property and what irreparable harm would be suffered if the injunction prayed does not issue. The Applicant does not place on record any material that demonstrates the degree of irreparable harm he is likely to suffer.

12. I should pause here to note that what is before the Court is the Applicant's application for injunctive relief. While the Court will decline to issue the sought injunction, there is no corresponding leave for the Respondent to enter or take possession of Plot No. **16**. Available evidence suggests that it is the Applicant or **Mr. Munguti** who have possession. Unless possession is acceded to voluntarily by both parties, this ruling does not authorize the Respondent to achieve possession by force or any other means. If the Respondent wants vacant possession of the Plot No. **16**, he must understand that he cannot achieve it by use of brute, extralegal force. He must follow due process of the law to achieve it if at all he is entitled.

13. In the end, the Application dated **09/02/2011** is hereby dismissed with costs and any orders dependent thereon are automatically vacated.

DATED at MACHAKOS this **13TH** day of **MARCH 2012**.

J.M. NGUGI
JUDGE

DELIVERED at MACHAKOS this **19TH** day of **MARCH 2012**

ASIKE-MAKHANDIA
JUDGE