



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 607 OF 2011

GEORGE STEPHEN MUHORO.....
PLAINTIFF

VERSUS

CATHERINE WANJIKU & 5 OTHERS.....
.....DEFENDANTS

RULING

1. The Plaintiff/Applicant one **George Stephen Muhoro** was one of five parties who contracted to purchase that piece of land known as **L.R. NO. 194/16** Nairobi (suit land) from one **Sarah Mweru Muhu** at the agreed price of Kenya Shillings 93,000/= to be shared and paid proportionately to the size of the subdivision of the suit land per party. The contracting parties entered into a Memorandum of Understanding expounding each party's obligations/rights. Things did not work out for the Plaintiff/Applicant who has consequently taken out a Notice of Motion under the provisions of Section 3A of the Civil Procedure Act and Orders 40 rule 1 and 50 rule 1 of the Civil Procedure Rules praying for a temporary injunction restraining the Defendants/Respondents and/or their representatives from subdividing , selling, transferring, alienating or otherwise dealing with suit land until the suit is heard and determined.
2. That application is based on the grounds that despite agreements entered into between the parties in the suit the Defendants/Respondents had excluded the Plaintiff/Applicant and gone ahead to complete the sale and attempted to transfer the Plaintiff/Applicant's portion to third parties. The Applicant advanced the further ground that it was he who single handedly secured the sub-divisions of the suit land. He added that he would suffer damage if his portion was alienated.
3. In his affidavit in support of the application the Applicant deposed that it was he who during 2010 identified the suit land and negotiated the purchase price with the proprietor who is now the 6th Defendant/Respondent. He then approached the other Defendants and they agreed to pool together in the purchase of the suit land. He deposed further that he paid his 10% purchase price deposit and secured approval for subdivision only to learn that the defendants had acted contrary to agreements between them whereupon he proceeded to lodge a caveat on the suit land. The Applicant was later informed that he had forfeited his share of the suit land yet there was no such agreement. He annexed various supporting documents to his affidavit among them the Memorandum of Understanding, proof of payment of 10%

deposit, agreement for sale.

4. The 1st to the 5th Defendants/Respondents opposed the application and authorized the 1st Respondent to swear the Replying Affidavit for all of them deposing that the application was overtaken by events as the suit land had been subdivided and transferred and certain portions charged and so the orders sought are incapable of enforcement. The Respondents denied that it was the Applicant who secured the suit land or that he was kept in the dark about the progress of the purchase transactions. That it was when the Applicant did not pay the balance of the purchase price that the Defendants paid the same after giving the Applicant notice of their said intended action of paying for his share.
5. In her Replying Affidavit the 6th Respondent swore that it was not the applicant who negotiated the sale with her but that it was the 1st Respondent and who also was the advocate for all the parties having authority to act for them. The 6th Defendant swore that having sold the suit land and not having any claim in respect thereof she was wrongly joined in the suit land hence the reason no claim was made against her. She also had filed on her behalf grounds of opposition to the application.
6. In his supplementary affidavit the Applicant swore that a contractual relationship between himself and the 6th Defendant was created by the sale agreement that both of them amongst other parties had signed and that the 6th Defendant was obliged to transfer the Applicant's portion to him. He denied receiving any notice stating that the same was wrongly addressed.
7. Parties filed written submissions which were highlighted before me in court. I have considered such and the authorities I was referred to. The guiding principles would be those set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD (1973) E.A. 358** to wit, that the Plaintiff/Applicant to succeed must show that he has a prima facie case with a probability of success and that he would suffer damage not capable of being compensated by an award of damages if the orders sought are not granted and should the court be in doubt then it would decide the application on the balance of convenience.
8. On the 1st principle I would observe as follows; that prayer (b) of the application under consideration seeks restraining orders of events that have already taken place, to wit, subdivisions, selling and transfer which the applicant confirms in his own affidavit and more particularly in paragraphs 13,14,15 and 16 thereof. Moreover the Notice sent to the applicant was indeed sent to the correct Post Office Code as evident from the annexure marked CWN 1 even though the letter itself would appear to have been addressed to a different code. The court does not act in vain. Due to the applicant's own admissions and his further failure to contradict/traverse the Respondents' averments as to current Status Quo of the suit land, I would not hold that a prima facie case has been made out and more particularly because the Applicant did not show that he paid the balance of the purchase price and hence was not in breach of the sale agreement.

There was no attempt to show that loss such as would not be compensated by an award in damages would be occasioned the Applicant if the orders sought were not granted. In these circumstances the balance of convenience cannot be said to tilt in favour of the Applicant, even though I need not consider that principle as I am not in doubt about the first and second principles in the Giella case (Supra). Consequently the application under consideration fails and it is dismissed with costs.

DATED , SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2012.

P.M. MWILU
JUDGE

In the presence of:-

.....Advocate for Plaintiff/Applicant

..... Advocate for 1st to 5th Defendants/Respondents

..... Advocate for 6th Defendant/Respondent

.....Court Clerk

P.M. MWILU
JUDGE