



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 380 OF 2011

ANTHONY NJOROGE IKAHU.....PLAINTIFF

VERSUS

ROSEMARY JANET WAMBUI.....DEFENDANT

RULING

The Plaintiff through an Notice of Motion dated 28th July 2011 and filed on 1st August 2011 is seeking a temporary order from this Court restraining the Defendant by herself or her agents, servants, or employees from disposing alienating, developing or in any other manner interfering with the Plaintiff's quiet possession of 0.100 hectares to be excised from Land Reference No. 3411 pending the hearing and determination of this application or until further orders of this court.

The gist of the Plaintiff's application is detailed in his supporting affidavit sworn on 28th July 2011, a further affidavit sworn on 14th December 2011, and submissions dated 14th December 2011. The Plaintiff stated that he bought the said parcel of land from the Defendant by way of a sale agreement dated 21st July 1998 a copy of which he has attached, and paid the full purchase price of Kshs 400,000/=. He claims to have been in possession of the suit property since the said sale. The Plaintiff avers that the Defendant has refused to transfer the suit property to him despite several demands to do so.

Further, that there is imminent danger of the suit property being sold. The Plaintiff has attached a copy of a letter of offer by the Defendant to one Stephen Kiarie dated 10th June 2011, purporting to offer on sale the suit property for a sum of Ksh.4,500,000/=. The Plaintiff submitted that the Defendant was also estopped from claiming that Savanna Surveyors had no authority or consent to transact on her behalf.

The Defendant responded in a replying affidavit sworn on 9th November 2011 and in submissions dated 25th April 2012. The Defendant stated that based on the representations of one Mr. F. N. Kariuki who was the proprietor of M/s Savanna Land Surveyors, she executed the sale agreement dated 21st July 1998 and issued receipts for an amount of Kshs.400,000.00 in the name of the Plaintiff, in the honest belief that the Plaintiff was to hold the suit property on Mr. F N Kariuki's behalf.

The Defendant also stated that there was an understanding between her and M/s Savanna Land Surveyors that one plot would be given to the said surveyors as payment upon undertaking the survey and sub-division of the suit property and selling of the sub-divided plots. She averred that the said surveyors did not complete their professional work, hence they were in breach of the agreement.

The Defendant further averred that the suit property was sold by M/s Savanna Land Surveyors without her knowledge, and the Plaintiff was in the process of having it registered in his name on an alleged

transaction that had been done by a party who had no proprietary rights. She also denied having been paid any consideration by the plaintiff for the purchase of the suit property, nor having had any dealings with the Plaintiff over the suit property.

It was submitted by the Defendant that the alleged agreement with the Plaintiff is tainted with fraud, and as the mother title is in the Defendant's possession the balance of convenience tilted in her favour. The Defendant also relied on the decision of the Court of Appeal in **Kirkdale Ltd vs Mount Agencies Limited and 3 Others Nairobi Civil Appeals No 42 and 45 of 2008**, for the position that the Plaintiff could be easily compensated in damages if the injunction is refused.

The parties at the hearing of the application on 26th April 2012 relied on the pleadings and submissions filed, which I have read and carefully considered. At this stage all I am required to do is determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. I must answer this question in the affirmative because the Plaintiff has produced in evidence a copy of the sale agreement dated 21st July 1998 evidencing sale by the Defendant to him of the suit property, and the Defendant has produced copies of receipts evidencing payment of the purchase price which are dated 10th July 1998. All the other issues raised as to the context of the said agreement and the alleged fraud can only be determined after full trial and not at this stage.

The next question that I must then answer is whether damages would be an adequate remedy to the Plaintiff. Even though this issue was raised in the submissions, it is not specifically pleaded by the Defendant that she is able to compensate the Plaintiff in monetary terms. I am therefore not able to make any finding in this regard and find that the Plaintiff is entitled to the temporary injunction sought.

For these reasons the Plaintiff's application dated 28th July 2011 is allowed, and the Defendant by herself or agents, servants, or employees are hereby restrained from disposing alienating, developing or in any other manner interfering with the Plaintiff's quiet possession of the portion of the land parcel known Land Reference No. 3411 referred to or sub-divided as Plot No. 1 and measuring 0.100 hectares, pending the hearing and determination of this suit or until further orders of this court.

The costs shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____18th____ day of ____July____, 2012.

P. NYAMWEYA
JUDGE