



PETER KAMAU MWANGI.....1ST
PLAINTIFF

JOSPHAT NYAKWARA.....2ND PLAINTIFF

MAUREEN ONDIEKI.....3RD PLAINTIFF

MICHAEL OKEYO CURTIS.....4TH
PLAINTIFF

AND 104 OTHERS

- VERSUS -

ESTHER MUMBI KARANJA.....1ST DEFENDANT

MARGARET WAIRIMU WANGUNYU.....2ND
DEFENDANT

RULING

1. This is the plaintiffs' notice of motion dated 3rd August 2011. The plaintiffs pray for injunction to restrain the defendants from subdividing, transferring or dealing with the property known as LR 7340/104 Ruai, Nairobi. The motion is brought under order 40 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act. There is an affidavit sworn by Peter Kamau Mwangi on 2nd August 2011. The deponent avers at paragraph 2 that he has authority of his co-plaintiffs to plead to the matters in the suit.
2. Although 4 plaintiffs are disclosed in the suit, it is pleaded that they have brought the suit for and on behalf of 100 others. The plaintiffs' case is that they bought some plots hived off the suit property at Kshs 12,500 each per subplot. They paid the full purchase price to the defendants. They have erected permanent and semi permanent structures on the land. The plaintiffs were thus surprised to learn that the mother title has not been transferred to the defendants. The plaintiffs are apprehensive that the defendants may dispose of their subplots to third parties. Those matters are buttressed further in the supplementary affidavit of the same deponent sworn on 15th August 2011 and a further affidavit sworn on 8th September 2011.
3. The motion is contested. There is a replying affidavit of Esther Mumbi Karanja sworn on 15th August 2011. The suit is attacked for non-compliance with procedures of instituting a representative suit. The authority and capacity of the plaintiffs to sue is challenged. The deponent concedes that her and the 2nd defendant trade in the name of Ruai Properties Developers and own the suit property. She states that the 1st plaintiff does not own any part of the suit land. The defendants' case is that the plaintiffs are liable for subdivision, surveying and conveyancing costs and fees. The defendants bought the suit land from Samuel Kamau Njogu. A transfer to the defendants only took place on 6th January 2010. According to the defendants, no transfer to the plaintiffs could have been effected before then. The defendants claim to have spent on behalf of the plaintiffs Kshs 9,547,200. That sum comprises subdivision costs, land rates

and legal fees. The plaintiffs have refused to reimburse the sums. In particular, the defendants deny that they are selling the plaintiffs' plots. The defendants submitted that the plaintiffs have not met the threshold for grant of interlocutory prohibitive injunction.

4. I have heard the rival submissions. I take the following view of the matter. When a litigant approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See *Kenya Hotels Limited Vs Kenya Commercial Bank and another* [2004] 1 KLR 80. See also the *Public Trustee Vs Nicholas Kabucho Murimi* HCCC ELC 610 of 2011 [2012] e KLR, *George Munge Vs Sanjeev Sharma & 3 others* HCCC ELC 677 of 2011 [2012] e KLR.

5. When I juxtapose those principles against the available evidence, I find as follows. The 2nd defendant Ruai Properties Developers is a business name registered under the Registration of Business Names Act on 15th January 1993. The 1st defendant and Margaret Wairimu Wangunyu are some of the partners or proprietors. This is clear from annexure PKM 1 to the further affidavit of the 1st plaintiff. From the sale agreement annexed dated 16th September 1992, the 1st plaintiff seems to have purchased from the defendants plots numbered 49 and 50 on the suit land. On that date, the suit property had not been transmitted to the defendants. I am prepared to accept at this stage that the 1st to 4th plaintiffs have a beneficial interest in the suit land. From a copy of the grant annexed to the replying affidavit, I am satisfied that on 6th January 2010, a transfer was made to Margaret Wairimu Wangunyu and Esther Mumbi Karanja.

6. The defendants are unequivocal that they are not selling the subplots owned by the 4 plaintiffs to any other person. They also concede that the 4 plaintiffs are entitled to possession. The plaintiffs have not presented cogent evidence to show that the defendants are about to sell the land or evict them. There is paucity of evidence in that regard. The substratum of the prayers for injunction thus collapses. The plaintiffs may have genuine apprehensions but the court cannot grant a discretionary relief on unfounded fears.

7. I also note that the 4 plaintiffs claim to act for over 100 undisclosed plaintiffs. True, there are witness statements and other documents filed that point to the identities of some of those parties. But that is also a tacit admission that the disclosed plaintiffs are representing a large and fluctuating body of persons. They seek reliefs to benefit all of those persons. The plaintiffs have not complied with order 1 rule 8 of the Civil Procedure Rules 2010.

8. Order 1 rule 8 of the Civil Procedure Rules 2010 provides as follows:

"8. (1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit".

9. On the face of it, the plaintiffs' suit is then fraught with serious procedural and technical difficulties. The present motion anchored on their suit is thus on a quicksand. That in turn prejudices the rights of the plaintiffs to a discretionary remedy. Fundamentally, it casts a long shadow of doubt on the

capacity of the plaintiffs to maintain the suit on behalf of the other persons.

10. I have also considered the nature of the transactions. The defendants were obviously buying the suit land from the original vendor for subdivision and resale to the plaintiffs and other persons. When the sale was made to the plaintiff as early as 1992, the defendants had not acquired the title. As I stated, transfer was only effected on 6th January 2010. I thus find that the expectations by the plaintiffs that they would not be liable for subdivision, survey, transfer, stamp duty and conveyancing charges for their subplots to be misplaced. But that will be a matter for the trial court upon tested evidence. From the evidence available at this stage, I have serious doubts that the burden for those costs should fall on the defendants.

11. In the end, I have found that the plaintiffs have failed to establish a strong *prima facie* case. They have also failed to rise to the threshold for grant of interlocutory prohibitive injunction. I order that the plaintiffs' notice of motion dated 3rd August 2011 be and is hereby dismissed with costs to the defendants.

It is so ordered.

DATED and DELIVERED at NAIROBI this 2nd day of August 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiffs.

Mr. B.M. Musyoki for the Defendants.