



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Suit 48 of 2010

1. ANGELINE KINYA NCHEERI
2. LOISE MBERENYA
3. JULIUS LARAMA
4. FLORENCE OKARI
5. STELLA NGOLO
6. JUSTUS S. NGOLO
7. SELINA JERUTO KIGEN
8. KIRIAMBURI WOMEN'S GROUP
9. ISIAH GITONGA IMAITA
10. NANCY GAKII IMAITA
11. MOSES WAIGANJO KAMAU
12. PATRICK WAMBUGU THIRA
13. USHINDI PLAZA LIMITED
14. OLIVE HOLDINGS LIMITED.....PLAINTIFFS

V E R S U S

1. JOSEPH MUSAU KALUNDE
2. UBORA HOUSING CO – OPERATIVE SOCIETY LIMITED.....DEFENDANTS

R U L I N G

1. The Plaintiffs seek by **chamber summons dated 3rd March 2010** two injunctive reliefs pending disposal of the suit as follows -

(i) to restrain the Defendants from “further transferring or carrying out any transaction on land parcel **L.R. No. 12715/42 (Grant No. L.R. 44336)**...(situated in Machakos District...”; and

(ii) to restrain the Defendants from interfering with the Plaintiffs’ quiet possession of the said suit land.

2. The application is brought under **Order XXXIX, rules 1, 2, 3 and 9** of the old **Civil Procedure Rules** (the **Rules**). **Section 3A** of the **Civil Procedure Act, Cap 21** is also cited.

3. The grounds for the application as stated on the face thereof include -

(i) That each Plaintiff purchased from the 1st Defendant a plot on the suit land by separate sale agreements dated 14th June 2009.

(ii) That in February 2010 the Plaintiffs learnt that the 1st Defendant had fraudulently and irregularly transferred the suit land to the 2nd Defendant in total disregard of the subsisting sale agreement with and payments made to the 1st Defendant by the Plaintiffs.

(iii) That whereas the Plaintiffs complied with their respective sale agreements the 1st Defendant was in breach of the sale agreements.

(iv) That the Plaintiffs have made “serious investments” on their respective plots, some of them residing thereon with their families, and they stand to suffer irreparable loss.

4. There is a supporting affidavit sworn by the 1st Plaintiff. It sets out the evidential basis for the grounds for the application.

5. The Defendants have opposed the application, the 1st Defendant by his **replying affidavit filed on 9th April 2010** and the 2nd Defendant by **replying affidavit also filed on 9th April 2010**. The 2nd Defendant’s replying affidavit is sworn by one JOSEPH MATU GACHANJA who has described himself as the Secretary to the 2nd Defendant.

6. The grounds of opposition emerging from the replying affidavits include-

(i) That it was the Plaintiffs who were in breach of the sale agreements.

(ii) That the sale agreements were thus rescinded by the Plaintiffs’ own breach.

(iii) That thereafter the 1st Defendant lawfully sold part of the suit property to the 2nd Defendant.

(iv) That the 2nd Defendant was a purchaser for value without notice of the Plaintiffs’ alleged dealings with the 1st Defendant over the suit land.

(v) That the Plaintiffs did not move to protect their alleged interests in the suit land and were indolent, and are thus not entitled to the equitable reliefs sought as against the 2nd Defendant.

7. The application was canvassed by way of written submissions, and I have considered the respective submissions filed on behalf of the three parties, including the cases cited.

8. This being an application for temporary injunction pending disposal of the suit, the Plaintiffs must satisfy the principles set out in the well-known case of **Giella - vs- Cassman Brown Ltd [1973] EA**

358. They must first demonstrate a *prima facie* case with a probability of success. Secondly, they must demonstrate that they stand to suffer irreparable loss unless the injunctive relief sought is granted. Irreparable loss is loss that cannot be made good by an award of damages.

9. If the court is unable to decide the application upon these two principles, then it must do so upon a balance of convenience. In other words, considering all the circumstances of the case, would it be more convenient to the parties (and hence in the interests of justice) to grant or deny the orders sought?

PRIMA FACIE CASE

10. The Plaintiffs' respective cases are that they purchased by separate individual written agreements their respective plots in the suit land. Various sale agreements have been exhibited in the supporting affidavit. They have the usual particulars of parties, the property sold, consideration, terms of payment, completion date, etc.

11. The sale agreements have been admitted by the 1st Defendant who has accused the Plaintiffs of breach of the same. The Plaintiffs on the other hand accuse the 1st Defendant of breach. It will be a matter of evidence at the trial of the action who was in breach. That is not an issue that can be properly adjudicated upon at this interlocutory stage.

12. It is also apparent that the 1st Defendant put the Plaintiffs into possession.

13. Upon the material now before the court, and as against the 1st Defendant, I am satisfied that the Plaintiffs have demonstrated a *prima facie* case with a probability of success.

14. What about as against the 2nd Defendant? The 2nd Defendant has pleaded that it was a bona fide purchaser for value without notice of the Plaintiffs' alleged interest in the suit land. No affidavit evidence has been placed before the court to demonstrate that the 2nd Defendant knew, or ought to have known, of the sale agreements between the Plaintiffs and the 1st Defendant. It appears that the Plaintiffs had enough time to lodge against the title necessary caveats to safeguard their interests. They did not so do.

15. The 2nd Defendant appeared to have paid fully the purchase price for the portion of the suit land sold to it by the 1st Defendant, and the same was transferred to it.

16. I am thus not satisfied that the Plaintiff's have demonstrated a *prima facie* case as against the 2nd Defendant.

IRREPARABLE LOSS

17. The Plaintiffs' were buying plots of land for stated considerations. Any purchase price paid can be refunded if the court so finds. Damages for breach of sale agreements can be awarded. Such damages would no doubt take into account any developments effected upon the plots of land, or any appreciation in value thereof.

18. It appears to me that any loss that the Plaintiffs' may suffer is eminently capable of being remedied by an award of damages.

19. In the event, I find no merit in the chamber summons dated 3rd March 2010. The same is dismissed with costs to the Defendants. The interim orders now in place are hereby lifted. Those will be the orders of the court.

20. The delay in preparation of this ruling is deeply regretted. The same was caused by my poor state of health the last few years. Thank God I have now fully recovered.

DATED AT NAIROBI THIS 7TH DAY OF AUGUST 2012

H.P.G. WAWERU

JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH

DAY OF SEPTEMBER 2012

ASIKE-MAKHANDIA

.....

JUDGE