



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL SUIT 24 OF 2012
JOHN MUGAMBI M'MWAMBI.....1ST DEFENDANT/APPLICANT

VERSUS

JOSEPH KARUTI MIKWA.....1ST DEFENDANT/RESPONDENT

STEPHEN KITHURE MURIMI.....2ND DEFENDANT/RESPONDENT**

R U L I N G

The plaintiff/applicant filed this suit on 13th June, 2012 against the two defendants seeking an order of deregistration of 2nd defendant as the owner of land parcel No.URINGU/111/413 with an alternative prayer for permanent injunction against the defendant's restraining them from interfering with the plaintiff's ownership and possession of the suit parcel of land with further prayer for an order directing the 1st defendant to sign transfer documents in favour of the plaintiff to have URINGU/III/413 transferred to the plaintiff. Contemporaneous with the filing of the suit, the applicant filed a notice of motion pursuant to order 40 Rules, 1, 2 and 3 of the of the Civil Procedure Rules and Section 68 of the Land Registration Act, 2012 seeking to be granted an order of inhibition, inhibiting the 1st and 2nd defendant/respondents and the land Registrar Nyambene/Maua from further transacting/dealing with the suit land pending hearing and determination of the main suit and further a temporary order of injunction against the defendants by themselves and their agents from evicting, disposing, entering or in any other manner interfering with applicant's ownership and possession of the suit parcel No.URINGU/111/1621 and 1622 being subdivisions of the original parcel No.URINGU/111/413 pending hearing and determination of the main suit.

The grounds in support of the application are stated on the face of the application. The application is supported by annexed supporting affidavit and supplementary affidavit of the applicant. The application on the other hand is opposed. The respondents swore replying affidavits in opposition to the application. The respondents further filed list of authorities in opposition to the applicant.

When the application came up for hearing this court heard oral submissions by Mr. Kijaru the learned Advocate for the applicant and Mr. Rimita, learned Advocate for the respondents.

This court has carefully considered the said submissions. It has also read the pleadings filed by the parties herein in support of their respective opposing positions.

The issue for determination by this court is whether the applicant has laid sufficient basis for this court to grant orders of inhibition and orders of injunction against the defendants/respondents. The court has noted the issue in dispute between the applicant/plaintiff and the 1st defendant is specific performance of contract related to sale of an agricultural land URINGU 111/143. In dealing with enforcement of contract of sale of Agricultural Land this court is required to take into consideration the legal requirement that the applicant must fulfill. The conditions are set out under Section 6 and 8 of the Land Control Act

(Cap.302). Besides the above the applicant has to demonstrate that he has a prima facie case with probability of success.

In the present application, the facts of the applicant's case is that the applicant bought the suit land from the 1st defendant on 4th June, 2005 as per sale agreement annexure "JMMI".

That the applicant took possession and extensively developed the land. That the 1st defendant/respondent subsequently refused to transfer the land to the applicant and sold the same land to the 2nd defendant/respondent.

Meanwhile in 2006 the applicant relocated to Australia and left his Attorney Isaya Mukana to manage the suit parcel, who averred that the applicant had entered into sale agreement with 1st defendant/respondent on 1/9/2003 purchasing 0.8 acres and in 2005 purchasing additional 0.88 acres leading to execution of an agreement on 4th June, 2005.

On the other hand, the respondents averred that both himself and the applicant were defrauded by the applicant's agent leading to his rescinding of this contract. That at all material time when negotiations started the applicant was overseas and that respondent was in 2003 given cheque for Kshs.30,000/- to cash at KCB when 1st defendant/respondent went to cash the same he was told it had been stopped. That the 1st defendant/respondent kept the cheque and in January, 2009, he was only paid Kshs.5,000/-. Respondent attached copy of the cheque as annexure "JKI". The respondent averred that the balance has never been paid by the applicant's agent leading to cancellation of first agreement and signing a fresh one dated 4th June, 2005 which was to be sent to Australia to the plaintiff/applicant so as to pay the full purchase price. That though the agreement was served no money was paid to the 1st defendant/respondent.

The 1st respondent rescinded the contract and continued to use the land. In 2010 the 1st defendant/respondent sold the land to the 2nd defendant/respondent and the land was transferred to 2nd defendant/respondent. The 2nd defendant/respondent took possession and fenced the land and he has been cultivating the same. The 2nd defendant averred that since the purchase of the land he has been in occupation and he had agreed to compensate the 1st defendant/respondent for his crops and trees which he found on the land. The 2nd defendant was also able to cause subdivision of his land into two portions to enable him use one as collateral for intended loan from a bank. The 2nd defendant/respondent averred that the suit property was transferred to him after he appeared before the Land Control Board for consent and after he had done search in lands office and found the same was clean with no caveats or cautions and that he bought the same in good faith. He further averred that at no one time was the applicant in occupation of the suit land as alleged.

Under Section 68 of the Land Registration Act, 2012(No.3 of 2012) it is provided:

"68. (1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered."

The court before granting an order of inhibition, against a registered parcel of land it must be satisfied that there is a real danger of the subject-matter of being disposed of before determination of the suit. The applicant must demonstrate he has a prima facie case with probability of success. That if preservative orders are not issued the property would be alienated or disposed of and that his case would be rendered nugatory. That he would also suffer irreparable loss and damage.

In the instant case the suit property has already been transferred to 2nd defendant/respondent who has deponed that he has no intention of alienating the land by way of sale. This has not been controverted by the applicant.

Under S.6 (1) and 8(1) of the Land Control Act,(Cap.302) it is provided:-

“6. (1) each of the following transactions -

(a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.....

“8. (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

The agreement between the applicant and the 1st defendant was over an agricultural land for which consent of the Land Control Board was required to be applied for and obtained within six months from 4th January, 2005. This has not been done. The contract between the applicant/plaintiff and the defendant/respondent has since become null and void. The applicant/plaintiff is only entitled to refund any money or other valuable consideration and not the land.

Section 7 of the Land Control Act provides:

“7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

Further under Section 4(a) of the Limitation of Actions Act(Cap.22) it is provided:-

“4. (1) the following actions may not be brought after the end of six years from the date on which the cause of action accrued-“
(a) actions founded on contract;

In this instant case cause of action orders of 4th June, 2005 six years expired on 4th June, 2011. This suit having been filed on 13th June, 2012 as submitted by Mr. Rimita Advocate for the defendants/respondents, I concur with him the suit is time barred. The contract dated 4th June, 2012 cannot therefore be enforced. The 2nd defendant/respondent on the other hand is in occupation of the suit land. The applicant having relocated to Australia in 2006 has never been in occupation. Prior to 2nd defendant's occupation the 1st defendant was in occupation.

The 2nd/defendant/respondent averred that when he bought the land there was no caveat or caution and he was a bonafide purchaser for value consideration without notice. He bought the land in good faith. I find that has not been controverted.

Under Section 53 of the Land Registration Act,2012(No.3 of 2012) it is provided:

“53. (1) if a person acquires or receives land in respect of which the court could make an order for restoration or for the payment of reasonable compensation, the court shall not make that order against that person if that person proves that the land was—
(a) Acquired or received in good faith and without knowledge of the fact that it has been the subject of a disposition to which this part applies, or
(b) Acquired or received through a person who acquired or received it in the circumstances set out in paragraph (a).
(2) Reference to knowledge in this section shall include actual, constructive and imputed knowledge.”

In view of the foregoing I find that the 2nd defendant/respondent acquired the suit land in good faith and without knowledge of the plaintiff/applicant’s claim. The 2nd defendant/respondent is now the registered proprietor of the suit property and he was not a party to sale agreement between the 1st defendant/respondent and applicant/plaintiff. The 2nd defendant/respondents right as a proprietor are protected by virtue of Section 25(1) (2) of the Land Registration Act, 2012(No.3 of 2012) which provides:-

“25. (1) The rights of a proprietor, whether acquired on first registration or subsequently forvaluable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

Before granting an injunction, the applicant must satisfy the tests for granting an interlocutory injunction. The tests for granting injunction are well settled as set out in the often cited case of **GIELLA –VS- CASSMAN BROWN & CO.(1973) 358**. The applicant must firstly show that he has a prima facie case with a reasonable probability of ultimately succeeding upon trial. Secondly, that in the event that injunction be refused he stands to suffer loss on damage of such a nature and magnitude that damages will not adequately compensate him. Lastly, that the comparative mischief likely to result to him should the injunction be refused outweighs that which result to the opposite party should it be granted.

The evidence before me show that there is no danger of the property being alienated nor is there any danger of the same being wasted or damaged. Charging of a property to secure repayment of a loan facility does not necessarily pose an immediate threat to alienation of the property.

On the other hand the applicant has failed to demonstrate that he has a prima facie case with reasonable probability of ultimately succeeding upon trial. The land in question is an agricultural land registered in the name of the 2nd defendant/respondent.

That when 1st defendant sold the land to applicant/plaintiff consent of the Land Control Board to transfer the land was required to be applied for and obtained within 6 months from 4th June, 2005. Consent was not obtained nor was there any application for consent made. No consent was applied for as required,

consequently by 4th December,2005 the agreement had become null and void. Under Section7 of the Land Control Act, the applicant is entitled to refund of any money or consideration he had paid pursuant to the agreement which had become null and void. The contract between the applicant/defendant and the 1st defendant is also time-barred. This means that on the evidence availed to the court by the applicant/plaintiff he has not established a prima facie case with probability of success.

The upshot is that the applicant's application is dismissed with costs to the respondents.

DATED, DELIVERED AND SIGNED AT MERU THIS 27TH DAY OF SEPTEMBER, 2012.

J. A. MAKAU

JUDGE

Delivered in open court in presence of:

1. Mr. Ndubi for the applicant(absent)
2. Mr. Kiogora h/b for Mr. Rimita for the respondents

J. A. MAKAU

JUDGE