



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Environmental & Land Case 177 of 2011

EDWARD MWANGI MACHARIA KAGIO.....PLAINTIFF

VERSUS

ROSE KIELEKYO DEFENDANT

AND

JOSEPH NGANGA NDUNGU.....INTERESTED PARTY

RULING

The Plaintiff has filed an application by way of a Notice of Motion dated 20th April 2011 which is supported by an affidavit he swore on the same date, and he is seeking the following two substantive orders from this Court:

1. A temporary injunction restraining the Defendant either by herself, officers, agents, servants, employees or in any other manner howsoever from taking possession or constructing, leasing, parting possession with or in any other manner howsoever dealing with that parcel of land known as L.R. No. 6845/170 Embakasi – Utawala Village (hereinafter referred to as the suit property), or any other part thereof pending the hearing and determination of the suit.
2. A mandatory Injunction against the Defendant either by herself, officers, servants, employees or in any other manner howsoever to remove from the suit property all fixtures and fittings introduced therein pending hearing and determination of the suit.

The grounds for the application are that the Plaintiff is the lawful and beneficial owner of the suit property, and that he bought the same from Njiru Githunguri Farm in 1998. The Plaintiff has attached a letter from the said Githunguri Njiru Farm (1966) Ltd. dated 20th March 2001 certifying the said sale. The Plaintiff states that he thereafter entered into an agreement with the Defendant in 2003 for the purchase of two plots namely plots 15 and 17 comprised in the suit property for the price of Kshs 325,000/=. Further, that the Defendant was to pay the sum of Kshs.290,000/= as deposit and the balance of Kshs.35,000/= within 30 days before the Plaintiff could commence sub-division and transfer of the title to the said two plots.

The Plaintiff claims that the Defendant in breach of the said agreement failed to pay the balance of the purchase price, as a result of which the Plaintiff repudiated the contract and entered into another contract with a different purchaser. However that in March 2011, the Plaintiff discovered that the Defendant had

moved into the said plots, taken possession of the same and illegally commenced construction. The Plaintiff states that he stands to suffer losses and exposure to legal suits if the Defendant is not restrained by way of injunction from constructing or continuing in possession.

The Defendant's response is in a replying affidavit she swore on 28th June 2011, wherein she confirms the Plaintiff's statements as to the agreement to purchase the two plots and the agreed purchase price. She however avers that it was verbally agreed that balance of the purchase price of Kshs.35,000/= would be paid in exchange for titles in her name in respect of both the plots, and the provision of a drainage system with respect to plot 15. Further, that immediately upon the signing of the agreement and payment of part of the purchase price, she took possession of the two parcels of land and commenced development thereon which included planting of trees and fencing work.

The Defendant further states that she and her husband were summoned to the Chief's office, Mihang'o Location on 18th March 2011, after allegations made by the Plaintiff that they had illegally occupied his premises. The deliberations held at the Chief's office culminated in an Agreement that the balance of the purchase price would be forwarded to the Chief's office on 22nd March 2011 and the Plaintiff was to be paid in exchange for the title documents. The Defendant claimed that the said money was forwarded but not collected by the Plaintiff, who in a letter from his Advocates dated 31st March 2011 demanded that the Defendant vacates the suit property.

The Interested Party also filed a Replying Affidavit sworn on 19th October 2011, wherein he claims that he is the lawful owner of the suit property having purchased the same from the Plaintiff on the 25th October 2007 for a total price of Kshs.500,000/=. He was subsequently awarded a plot certificate by the Plaintiff, a copy of which he produced together with a copy of the sale agreement as evidence. The Interested Party states that he bought the suit property free of encumbrances, and that he had no knowledge of the Defendant's claim to the property at the time of purchase. He prayed that he be allowed to use the property without any interference from the Defendant.

The parties at the hearing of the application on 28th May 2012 relied on the submissions filed. I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The Plaintiff in his submissions dated 15th November 2011 cited various authorities and addressed the issues of whether the Plaintiff was entitled to repudiate the contract between the parties, and whether the Defendant is a trespasser on the suit property.

The Plaintiff relied on the Court of Appeal decision of **Wambugu vs Njuguna (1983) KLR 172** for the position that non-payment of the balance of the purchase price was a fundamental breach which entitled an innocent party to repudiate the contract. He also relied on the decision of the Court of Appeal in **Edward Mugambi vs Jason Mathiu (2007) eKLR** wherein it was held that failure to pay a substantial portion of the purchase price was a breach of condition, which entitled the innocent party to discharge a contract. It was the Plaintiff's case that the balance of the purchase price was to be paid within 30 days of the payment of the first installment, and that in any case an eight year delay in paying the balance was inordinate. Further, that the Defendant had no right to the suit property and was a trespasser as the contract had been repudiated by the Plaintiff.

The above-stated arguments were reiterated by the Interested Party in submissions dated 22nd May 2012, who in addition argued that there is a *prima facie* case to demonstrate that he had acquired a bona fide interest in the suit which ought to be protected by way of injunction.

The Defendant in reply submissions dated 2nd March 2012 argued that the case of **Wambugu vs Njuguna (1983) KLR 172** is inapplicable as the Plaintiff has not shown that he has any title documents to the suit property and that the decision in **Edward Mugambi vs Jason Mathiu (2007)eKLR** was in favour of the Defendant who has paid a substantial portion of the purchase price being Kshs 290,000/=. Further, that the sale agreement did not stipulate the time within which the balance of the purchase price was to be paid and the Defendant was therefore not in breach, nor had any notice to terminate the contract of sale had been demonstrated.

It was also contended that the Interested Party had means of ascertaining that the Defendant was in possession of the suit property, and he was therefore not an innocent purchaser without notice. The Defendant submitted that the Plaintiff had not demonstrated a *prima facie* case with a probability of success and that the balance of convenience tilted in the Defendant's favour as she had already commenced construction on the suit property.

I am required to determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and to determine if the Plaintiff has in addition shown any special circumstances to entitle them to the mandatory injunction sought.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of a letter dated 17th April 2007 showing that they bought the land on which the suit property is situated. No title document was produced in evidence. The Plaintiff does not dispute receiving Kshs 290,000/= as payment for the suit property. The annexure relied upon by both the Plaintiff and the Defendant as the sale agreement provides no provisions as to the payment of the balance of the purchase price or termination of the said agreement. To this extent I find that the Plaintiff has not established a *prima facie* case.

To the extent that no *prima facie* case has been established, the second question as to whether the Plaintiff is entitled to the mandatory injunction sought becomes moot as the Court of Appeal as held in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. This is clearly not a clear case as the issues as to what the terms of the sale agreement were, whether there was a breach of contract to entitle the Plaintiff to repudiate the contract, and if there was a valid repudiation can only to be decided after a full hearing and not at this stage.

It is however my finding that both the Defendant and Interested Party have demonstrated a justifiable interest in the suit property in light of substantial payments made towards purchase of the same, and it is therefore necessary for the suit property to be preserved pending the resolution of the dispute herein. For this reason it is hereby ordered pursuant to sections 3A and 63(e) of the Civil Procedure Act that the *status quo* be maintained as follows:

1. That the Plaintiff, Defendant and Interested Party by themselves, their employees, agents, servants, and/or workers shall not construct on, sell, transfer or in any other manner dispose of or alienate the parcel of land known as plots No. 15 and 17 comprised in L.R. No. 6845/170 in Embakasi – Utawala Village, pending the hearing and determination of this suit or further orders of the court.
2. The Plaintiff and Interested Party shall not in any way interfere with the Defendant's possession of the said plots pending the hearing and determination of this suit or until further orders of the court.
3. The costs of this application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____25th____ day of ____September____, 2012.

P. NYAMWEYA

JUDGE