



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 240 of 2009

DANIEL KARURU MWAURA & 12 OTHERS.....PLAINTIFFS

**VERSUS
EDWARD KANJABI
SAMUEL B. MBUGUA**

T/A MEMBLEY HOUSING SCHEME.....DEFENDANTS

RULING

1. There are two applications and a preliminary objection for determination. Both the Plaintiffs and the Defendants are seeking injunctive orders against each other. The Plaintiffs filed a chamber summons application dated 25/5/2009 seeking an injunction against the Defendants restraining them from repossessing, re-demarcating, demolishing the fence and/or any structure erected by the Applicants, selling, offering for sale, transferring, charging, mortgaging and/or dealing in any manner whatsoever with all the twenty (20) plots Nos. 313, 314, 315, 316, 319, 320, 321, 322, 323, 324, 325, 327, 328, 331, 334, 337, 338, 339, 340, 341 comprised in L.R No. 10901/46 situate behind Kenyatta University, pending the hearing of the application and the main suit. The application is premised on grounds listed therein and a supporting affidavit sworn on 25/5/2009 by Daniel KaruruMwaura that the Plaintiffs entered into a sale agreement with the Respondent to purchase 20 plots (outlined hereinabove). That the Plaintiffs have made part payment of the purchase price, they are willing to complete their part of the contract and that they are in occupation of the property. That the Respondents have threatened to demolish the developments carried out in the suit plots and refund the monies received from the Plaintiffs. The Plaintiffs further aver that it was an express term in the agreement that the size of the plots shall be 1/8 of an acre at a consideration of Kshs. 100,000/-

At the ex-parte stage of the application this Court (Hon. Osiemo) ordered that there be status quo maintained pending the hearing of the application *inter-partes*.

2. In opposition to the application the Respondents filed a Replying Affidavit sworn on 26/6/2009 by Edward RuriiKanjabi. The Respondents aver that they are the registered owners of L.R No. 10901/46 which is comprised in Certificate of Title No. I.R. 57470. That the measurement of the suit plots allocated to the Plaintiffs is 10 meters by 18 meters. The Respondents aver that the allegation that the suit plots were an 1/8 of an acre is untrue and further that the Kshs. 100,000/- purchase price was “the proposed provisional price of each plot” which meant that Respondent reserved the right and had the discretion to vary the selling price, which they did in 2003 to Kshs. 130,000/- The Respondents aver that there was no valid agreement between the parties, the Plaintiffs were not entitled to take possession of the suit plots before paying the full purchase price. The Respondents reiterated that there was no valid or binding contract that existed between the parties as there was no *ad idem* on the terms of the subject matter i.e the size of the suit plots and the purchase price.

3. The Plaintiffs filed a Supplementary affidavit sworn on 6/7/2009 in response to the Replying Affidavit dated 26/6/2009. The Plaintiffs reiterated that the suit plots were 1/8 of an acre each at a purchase price of Kshs. 100,000/- and that the Respondents did not communicate the revision of the purchase price and/or the sizes of the suit plots. They also reiterated that there were valid sale agreements that were binding on the parties that were capable of conveying legal rights upon the Plaintiffs.
4. The Respondents filed a Notice of Preliminary Objection dated 17/3/2010. Therein they stated that the suit offends the statutory provision of the Law of Contract Act Cap 23 Laws of Kenya. Further that the action brought by the Plaintiffs is barred by the Statute of Limitations of Actions Act, Cap 22 Laws of Kenya.
5. The Respondents filed a Notice of Motion application dated 9/2/2012 seeking an order of injunction restraining the Plaintiffs from erecting fences and/or structures and/or cultivating on or otherwise wasting, damaging or alienating the suit parcel or any part of the Respondents' parcel of land L.R No. 10901/46 pending the hearing and determination of the application or until the disposal of the suit. They also sought an order directing the Plaintiffs to remove any fence and structures they have erected upon and uproot any crops they have planted on L.R No. 10901/46 pending the hearing and determination of the application or until the disposal of the suit. The application is premised on the grounds that the Plaintiffs have lagged in prosecuting their application dated 25/5/2009. That the Plaintiffs in taking advantage of their position, they have unilaterally moved to annex a large tract of the Defendant's parcel of land claiming it to be the suit parcel and thereupon cultivate maize crop and erect temporary unapproved iron sheets structures. That they have proceeded to fence off the said are which they have appropriated themselves, and through these unlawful acts, the Plaintiffs have blocked off other plot users from accessing the plots and also hampered the Defendants in the exercise of their proprietary rights and orderly management of the scheme. The Plaintiffs being trespassers, the actions ought not to be permitted to prevail over the indefeasible rights of the registered proprietor. In the Supporting Affidavit of sworn on 9/2/2012, the Respondents reiterated the content of their application. The gist of this application according to the Defendants is that the Plaintiffs have, during the pendency of the suit, sought to modify the *status quo* by annexing a huge tract of L.R No. 10901/46 claiming to be the suit parcel.
6. In opposition to the application dated 9/2/2012, the Plaintiffs filed a Replying Affidavit dated 20/2/2012. The Plaintiffs maintain that at the time of filing suit, they had already taken possession of the suit plots. That the *status quo* order that was granted is in force and is pending the hearing and determination of the application. The Plaintiffs allege that the Defendants are the ones who have violated the status quo order. That sometimes on 7/6/2012 the Defendants trespassed into the suit plot and purported to point out to 3rd parties the said suit plots. They contend that the application herein is meant to circumvent the status quo order that is in force not only to interfere with the suit plots but to also offer the same for sale to 3rd parties.
7. The two applications together with the Preliminary Objection were canvassed by way of written submissions. I have read the submissions and considered the authorities attached thereto.

The issues for determination are whether,

- i. There is a contract between the parties within the provisions of Section 3 of the Contract Act
- ii. Was there *ad idem* between the parties with respect to the terms of the agreement?
- iii. Are the application forms an agreement/contract, and part payment done, can they confer legal rights upon the Plaintiffs?

8. Both parties are asking this Court to grant injunctive orders against the other. There is a *Status Quo* order in force having been granted by this Court on 25/5/2009. The Defendants accuse the Plaintiffs to have taken advantage of the said order and have thus become unwilling to prosecute their application of

25/5/2009 and that they have appropriated themselves a huge tract of land on the pretext that the same are the suit plots hence interfering with the Defendants' proprietary rights. On the other hand, the Plaintiffs accuse the Defendants of flouting the *status quo* order by trespassing on the suit plot and pointing the said plots for sale to 3rd parties. It is their contention that the injunction sought by the Defendant is a way to circumvent the status quo order and hence dispose off the suit plots. It is not in contention that the suit plots form part of L.R No. 10901/46 of which the Defendants are the registered proprietors. It is also not in contention that the Plaintiffs are the intended purchasers of the suit plots and that they have made part payments.

9. After carefully considering these applications (dated 25/5/2009 and 9/2/2012) the affidavits thereto and the Preliminary Objection filed by the Defendant, I find that both parties have raised weighty issues which can only be fully articulated during the hearing. Some of these issues have been stated in this ruling. Orders of this court are not issued in vain and this court is displeased with the conduct of the parties at disobeying the status quo order issued by this court on 25/5/2009. I decline to grant the prayers sought in both applications and do order that the status quo be maintained until any further orders by this court. With furtherance to the Status Quo, I hereby direct that no new activities shall be carried out within the suit plots other than the harvesting of the crops planted therein. There shall be no disturbance with matters touching on boundaries and any disposition of interest of the suit plots should not be carried out under any circumstances whatsoever. Further I direct that this suit shall be set down for hearing within 6 months of the date of this ruling. The parties should comply with the provisions of order 11. Costs of both applications shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 21st day of November 2012

R. OUGO

JUDGE

In the Presence of:-

.....For the Plaintiffs/Applicants
.....For the Defendants/Respondents
.....Court Clerk