



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.459 OF 2010

JAMES GITINGU WAMAGATA.....1ST PLAINTIFF
JOSEPHAT MAINA MACHARIA.....2ND PLAINTIFF

VERSUS

DAVID MIGICHI KAGENI.....DEFENDANT

RULING

1. By an amended plaint filed on 14th October, 2010, James Gitingu Wamagata and Josephat Maina Macharia (hereinafter referred to as the 1st and 2nd plaintiffs respectively), have come to this court seeking judgment against the defendant David Migichi Kageni for the following:

(i) Pending the hearing and determination of this suit the honourable court be pleased to issue an order of injunction restraining the defendant by himself, his agents or servants from constructing, selling, transferring, alienating, disposing, leasing or in any way interfering with the suit land known as Dagoretti/Kinoo/4176 as to prejudice these proceedings.

(ii) A declaration that the defendant's transfer of a whole parcel No.Dagoretti/Kinoo/4176 to himself is unlawful.

(iii) An order nullifying the transfer on the defendant's title for the suit land Dagoretti/Kinoo 4176.

(iv) An order directing the subdivision of the suit property in two portions measuring 0.01 hectares in favour of the defendant and 0.01 hectares in favour of the 2nd plaintiff respectively.

(v) Costs of the suit.

2. The plaintiffs' claim is anchored on an agreement dated 26th September, 2008 executed between the 1st plaintiff and the defendant, in which the 1st plaintiff offered 0.01 hectares out of plot No.Dagoretti/Kinoo/4176 (hereinafter referred to as the suit property) to the defendant for sale. The whole area of the suit property was 0.15 hectares and it was agreed that the remainder of 0.05 hectares would revert back to the 1st plaintiff upon subdivision. The 1st plaintiff had earlier entered into an agreement with the 2nd plaintiff for sale of 0.05 hectares of the suit property. The 1st plaintiff intended to transfer the remainder of the suit property i.e. 0.05 hectares to the 2nd plaintiff.

3. The 1st plaintiff contends that the defendant in breach of the sale agreement and through fraudulent means, transferred the whole of the suit property to himself and has totally refused to surrender the remainder of 0.05 hectares to the 1st plaintiff. As a result the 1st plaintiff has been unable to complete his agreement with the 2nd plaintiff. It is for these reasons that the plaintiffs sought the orders in the plaint.

4. Filed contemporaneously with the amended plaint, is a chamber summons brought under Order 39 Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 63(c) and (e) of the Civil Procedure Act. In the application the plaintiffs seek interlocutory orders of injunction against the defendant pending the hearing of the plaintiffs' suit. The 1st plaintiff contends that as a result of the defendant's breach, he stands to suffer irreparable damage as the remainder of the suit property which he has already sold to the 2nd plaintiff may be alienated or sold to 3rd parties thereby exposing the 1st plaintiff to liability.

5. The defendant has filed a defence to the plaintiffs' suit in which he denies the plaintiffs' claim, maintaining that in relation to the sale agreement for 0.05 hectares, the defendant agreed with the plaintiff on 23rd October, 2008, that the plaintiff would transfer the remainder of the suit property i.e. 0.05 hectares to the defendant at an agreed price of Kshs.200,000/=. The defendant contends that the 1st and 2nd plaintiff fraudulently entered into a sale agreement for transfer of the same portion with the full knowledge that the 1st plaintiff had offered the remainder of the suit property for sale to the defendant. The defendant maintained that the 1st plaintiff duly executed the transfer out of his own free will, after due consideration of the purchase price was fully paid to the 1st plaintiff.

6. The defendant maintained that nullification of the title would greatly prejudice him and cause him substantial and irreparable loss and damage. This is because the defendant is a purchaser for value without notice, and has fully complied with the terms of the original sale agreement. The defendant has further invested on the suit property by renovating the existing dilapidated house and also constructing another house on the suit property. Further the defendant is in the process of constructing a drainage and septic system. He therefore urged the court to dismiss the application.

7. Following an agreement between the parties, written submissions were duly exchanged and filed and the court is now called upon to determine the application based on those submissions.

8. I have carefully considered the application, the affidavit in support and in reply as well as the annexures thereto. I have also considered submissions made. It is not disputed that the suit property which was 0.15 hectares originally belonged to the 1st plaintiff. It is further not disputed that there was an agreement entered into between the 1st plaintiff and the defendant for sale of 0.10 hectare of the suit property. Clause 7 of the agreement marked DMK4 annexed to the defendant's supporting affidavit shows that the whole of the suit property was to be transferred to the defendant who was in turn to transfer 0.05 hectare to the vendor who was the 1st plaintiff. This is consistent with the plaintiff's contention that 0.05 hectares was to revert back to him upon subdivision.

9. The defendant does not deny that the suit property was transferred to him by the plaintiff. However, the defendant contends that subsequent to the original agreement, the 1st plaintiff agreed to transfer the 0.05 hectares to him at a consideration of Kshs.200,000/=. The defendant has not exhibited any agreement in support of his contention. He relies on two receipts for payments of Kshs.100,000/= each to the 1st plaintiff, on 24th October, 2008 and 31st October, 2008. However, the receipt and the acknowledgement for payment talks about final settlement of the sale of portion of title No.Dagoretti/Kinoo/4176 i.e. the suit property. It makes no reference to the 0.05 hectares. Therefore, on the face of it the court cannot tell whether the payment was in respect to 0.10 hectares or the remainder of 0.05 hectares of the suit property.

10. I find that *prima facie* the plaintiff has established that the original agreement was for him to sell only 0.10 hectares to the defendant although the whole title was transferred to the defendant. Whereas, the defendant would be entitled to occupation and exclusive use of the 0.10 hectares

the interest of the 1st plaintiff in regard to the 0.05 hectares must be protected. Since the 0.05 hectares still forms part of one title in the suit property, it is only fair and just that an order of interlocutory injunction do issue restraining the defendant, his agents or servants from selling, transferring, alienating or charging the suit property pending the hearing and determination of the suit. For the avoidance of doubt, I hereby order that the defendant shall be at liberty to construct on his 0.10 portion of the suit property but shall not construct on the disputed portion of 0.05 hectares.

Those shall be the orders of this court.

Dated and delivered this 8th day of June, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Ndegwa H/B for Nduati for the plaintiffs
Advocate for the defendant absent
B. Kosgei - Court clerk