



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 3 OF 2011

DORCAS KAPTUIYAH CHELANGA & ANOTHER.....PLAINTIFF

VERSUS

NELSON MWANZIA KIVUVANI.....DEFENDANT

RULING

1. Dorcas Kaptuiya Chelanga and Catherine Salama Katana (the Plaintiffs) in a Plaint dated and filed on the 7th January, 2011 seek a permanent injunction to restrain the Defendants from entering, alienating and or interfering with Plot No.L.R.12715/518 (the suit property) and an order compelling the first and second Defendants to issue respective titles to the Plaintiffs for the individual sub-plots of the suit property. It is the Plaintiff's case that the first Defendant, being the registered owner of the suit property, by an agreement dated the 31st May, 2006 agreed to sell to the second Defendant a total of thirty four (34) plots to be excised from the suit property at an agreed price or sum of KShs.6,840,000. That it was a term of the said agreement that upon payment of the deposit thereunder, the second Defendant would be allowed to offer for purchase the aforesaid thirty four (34) plots and that the first Defendant would procure and extract individual titles for the sub-plots.

2. The Plaintiffs further contend in paragraph 10 of the plaint as follows:-

“10. On various dates between the months of July, to October, 2006 the Plaintiffs relying on the presentations entered into sale agreements with the 2nd defendant for purchase of individual plots at an agreed purchase price of KShs.300,000 (Three Hundred Thousand) per plot and made full payments as follows:-

(i) Dennis Luka Okelo	Plot No.1	KShs.300,000
(ii) Margaret Mukami Nyaga	Plot No.3	KShs.300,000
(iii) Nancy Wairimu Kibui	Plot No. 4 & 5	KShs.600,000
(iv) Dorcas Kaptuiyah Chelanga	Plot No.6	KShs.300,000
(v) Timothy Kihara Ndaraya	Plot 12, 13, 14 & 15	KShs.1,200,000
(vi) Jackqueline Wambui Kibui	Plot 20 & 21	KShs.600,000
(vii) Sabina Wakio Maghnga	Plot 22 & 23	KShs.600,000
(viii) Otwani Justus Aufridus	Plot 29	KShs.300,000
(ix) Richard Ouma Owuor	Plot 30	KShs.300,000
(x) Catherine Salama Katana	Plot 31	KShs.300,000
(xi) Caroline Lilo Mramba	Plot 32	KShs.300,000
(xii) Philip Juma Wanyama	Plot 33	KShs.300,000
(xiii) Joyce Njoki Mwangi	Plot 34	KShs.300,000”.

3. The Plaintiffs further aver that upon payment of the full purchase price, they were granted possession of their respective

sub-plots of the suit property in the year 2006 and some members (purchasers thereof) proceeded to develop and erect permanent houses which they live in to date. The Plaintiffs assert that the Defendants have failed to register and/or transfer title to the Plaintiffs and set out particulars of breach of contract in paragraph 15 of the Plaint. The Plaintiffs are apprehensive of eviction by the Defendant and have therefore sought redress from the court.

4. The Plaintiffs also took out a Notice of motion under order 40 rules 2(1), and 3(3) of the Civil Procedure Rules, 2010, on the 7th January seeking the following two (2) main orders:-

“2. That pending the hearing and determination of this application, the 1st, 2nd and 3rd Defendants, their servants and or agents or otherwise be restrained from demolishing the houses erected thereon disposing, alienating, transferring and/or otherwise interfering with the Plaintiff’s/Applicants’ possession and interest in the sub plots excised from LR.12715/518.

3. That temporary injunction to issue to the Defendants, and their servants and/or agents to restrict them from interfering in any way with the Plaintiffs/Applicants quiet possession of their individual sub-plots suit property.

5. The supporting affidavit is sworn by the first Plaintiff on the 7th January, 2011. Mrs. Chelanga repeats essentially, the averments made in the plaint which I have summarized in paragraph 1, 2 and 3 hereinabove but adds the following in paragraph 7 – 13 inclusive of her affidavit:-

“7. That further in all this time the 1st Defendant has always been aware that we were in occupation of the suit property.

8. That I was later surprised when the 1st Defendant by himself and/or through his agents together with the 3rd Defendant came to the property on the 28th of December, 2010 and demolished the fence and temporary structures I had erected around my house saying that I was illegally on the land (Annexed herewith and marked DKC 5 demolished structures).

9. That he also further stated that he would be back to demolish the entire buildings and structures erected on the subject matter suit property in order to evict me and the other owners of the land.

10. That this came as a complete surprise to us as we had fully paid up the entire purchase price and what I had been waiting for was the title to be transferred to our individual names (annexed herewith and marked CSK6 are copies of the receipts given to me by the 2nd Defendant in acknowledgement of my payment of the purchase price).

11. That I was surprised by the turn of events as we had been led to believe by the Defendants conduct that we were in rightful possession of the property after having paid the entire purchase price.

12. That some of the other purchasers to the suit property have been staying on the said property for about 4 years while others who have constructed temporary structures on their property after possession.

13. That if allowed to carry through on his threats I together with the other members stand to suffer irreparable loss”.

6. Charles Kinyari, a Director of the second Defendant file a replying affidavit on the 13th January, 2011. He says that it was with the authority of the first Defendant that the second Defendant sold plots to the Plaintiff was together with the second Defendant have all along been waiting for Deed Plans to be processed by the first Defendant to facilitate the preparation of the instruments of transfer. He adds that his company has already instituted legal proceedings against the first Defendant - Machakos High Court Civil Case No.204 of 2010 seeking various reliefs pending arbitration of the matters in difference.

7. The first Defendant filed his grounds in opposition to the application on the 9th February, 2010. He says that the Plaintiff have not demonstrated a prima facie case against the first Defendant that there is no privity (*sic*) of contract between the first Defendants and the Plaintiffs; that the second Defendant used the alleged plots to the Plaintiff knowing that its contract with the first Defendant had lapsed on account of a fundamental breach on the second Defendant’s part; that the plaintiffs have trespassed on to the first Defendant’s land and erected some structures without the first Defendant’s authority; and that such structures were not approved by the third Defendant, hence the act of demolishing them is lawful.

8. These grounds are reiterated in the first Defendant’s own replying affidavit sworn on the 9th February, 2011. He contends that the agreement for sale dated the 31st May, 2006 between him and the second Defendant is null and void because of a fundamental breach on the part of the second Defendant who never paid the agreed consideration and further because many of the sub-plots alleged to have been sold were “sols” long after the said agreement had lapsed. He also contends in paragraph 11

that the dispute between him and the second Defendant can be resolved only by way of arbitration and so far the arbitration has not been done.

9. I have considered the application in light of the various affidavits and in conjunction with the written submissions filed on behalf of the Plaintiffs and the first and second Defendants respectively, the third Defendant having opted not to respond to the application despite having been duly served.

From the evidence of the supporting affidavit of the first Plaintiff, she has demonstrated that the Plaintiffs and other purchasers of sub-plots of the suit property, have purchased and paid for the same; that they have taken possession; that some of the purchasers have lived thereon for about four (4) years, they have erected permanent or temporary structures have been demolished. The second Defendant confirms this in the affidavit of Charles Kinyari dated the 13th January, 2011.

10. The first Defendant asserts that the Plaintiffs and any other purchasers in possession are trespassers and on his land unlawfully because the agreement for sale dated the 31st May, 2006 which would have formed the basis of the sales to the Plaintiffs is a nullity by reason of a fundamental breach and that there is in any event no privity of contract between him and the Plaintiffs. Clause (3) f of that agreement provides:-

“After signing this agreement and payment of the said deposit, the Purchaser shall be at liberty to sell the said sub-plots to raise the balance of the purchase price.”

In the face of this express provision and evidence that the deposit in terms of the agreement was duly paid – the first Defendant in his letter dated the 19th November, 2007 to the second Defendant concedes to receiving payment of KShs.2.8 million I reject the first Defendant’s denial that the Plaintiff are in possession without his knowledge and authority. It is also inconceivable that trespass would have moved on to the first Defendant’s land, remained in possession for a period of about four (4) years during which period some of them have erected permanent structures without the first Defendant seeking any legal redress.

11. I have also noted from the affidavit of Charles Kinyari Kamoche dated the 11th October, 2010 filed in support of Chamber Summons application of even date therewith in Machakos High Court Civil Case No.204 of 2010 that pursuant to clause 22 of the agreement for sale dated the 31st May, 2006, a sale arbitrator was appointed by the Chairman of the Charter Institute of Arbitrators Kenya Branch on the 17th October, 2007. Pending the outcome of that arbitration, it is not unreasonable for the Plaintiffs to seek interim reliefs to protect their rights.

12. In the result, and for the reasons given, I am satisfied that the Plaintiffs has made out a prima facie case with a probability of success. The application in the Plaintiffs’ Notice of Motion dated the 7th January, 2011 is therefore allowed and orders in terms of prayer Nos. 2 and 3 therein respectively be and are hereby granted until the hearing and determination of this suit The costs of the application will be in the cause.

Orders accordingly.

Dated and delivered at Machakos this 28th day of July, 2011.

P. Kihara Kariuki
Judge