



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 370 OF 2009

MATHEW NYABENA.....PLAINTIFF

DELYNE BWARI NYAMARI.....PLAINTIFF

-VERSUS-

PETER MUSYOKI MALII.....DEFENDANT

RULING

The plaintiffs' Chamber Summons dated 27th October, 2009 was brought under ss.63 and 3A of the Civil Procedure Act (Cap.21, Laws of Kenya) and Order XXXIX, rules 1 and 2 of the Civil Procedure Rules. The application carried two substantive prayers –

- i. an injunction to restrain the defendant by himself or his employees or agents from selling, leasing, mortgaging, alienating, transferring, disposing or in any other way dealing with all that parcel of land known and described as Plot L.R. No. 2196/111/MN (original number 2193/4/111/MN CR. 24755, Plot L.R. 5049 (original No. 2196/1) 111/MN CR.45491 and Plot L.R.5050 (original 2196/1) 111 MN CR 45492 measuring 75 x 100 ft together with the three-bedroom house thereon with all improvements pending the hearing and determination of this suit;
- ii. a preservation order to be issued directing the Registrar of Titles to cease any further transactions by way of sale, mortgage, lease, sub-division or any other form of alienation in respect of CR.24755 for L.R. 2196/111/MN, CR. 45491 for L.R. 6279/111/MN (5049/111/MN and CR 45492 for L.R. 6280/111/MN (5050/111/MN) pending the hearing and determination of the case or further orders of the Court.

The grounds in support of the application were set out as follows:

- i. The plaintiffs and the defendant had entered into a sale agreement for the sale of half-portion of Plot No.2196/1/111/MN (original No. 2193/4/111/MN) CR 24755 on **2nd April, 2009**.
- ii. The defendant has refused, failed or neglected to fulfil his part of the sale agreement by securing a proper sub-division and Land Reference Number and deed plan of the purchased property.
- iii. The defendant has presented conflicting documents of title to the plaintiff and the deed plans thereof have been fake, hence the plaintiffs run the risk and/or imminent risk of being defrauded of Kshs.1,650,000/=.

- iv. The defendant is attempting the sale of the subject property to a third party to defeat the plaintiffs' interest.
- v. The plaintiffs have a *prima facie* case.
- vi. The plaintiffs will suffer a substantial and irreparable loss if an injunction is not granted.
- vii. The subject property is registered under the Registration of Titles Act, and the plaintiffs will rely on s.52 of the Indian Transfer of Property Act.

The detailed facts in support of the application are set out in the affidavit of **Mathew Nyabena**, 1st plaintiff, sworn on 28th October, 2009.

In contrast to the 1st plaintiff's detailed account of facts, the defendant on 20th November, 2009 swore a short affidavit in which he deponed, *inter alia*, that –

- i. “the plaintiffs [sometime] in or about 12th May, 2009 unlawfully and fraudulently caused a transfer of my parcel of land without my consent”;
- ii. “the plaintiffs fraudulently [drew] without my knowledge and/or authority [and] purported...to transfer [my] parcel of land...”
- iii. “the plaintiffs [presented] [a] purported instrument of transfer at the Lands Office knowing that the same was not genuine.”

Learned counsel, **Mr. Jengo** for the plaintiffs, submitted that his client had already won *ex parte* orders against the defendant, and he was asking for the same to be confirmed at the hearing *inter partes*.

Counsel presented the applicants' supporting affidavit with its annexures, and urged that the plaintiffs and the defendant had indeed entered a sale agreement for the subject land, once the purchase price had been agreed, with a deposit of Kshs.1,000,000/= being paid immediately at the time of signing the agreement. Although the agreement provided that the plaintiffs were to take possession immediately upon payment of the deposit, the defendant, to-date, had not given them possession; and since the agreement, a further payment of Kshs.650,000/= had already been paid – so that only the sum of Kshs.1.9 million remained outstanding.

Counsel argued that the defendant, who was under a contractual duty to effect sub-divisions of the subject parcel of land, had not yet done so but instead, has been presenting to the plaintiffs deed plans that were not genuine.

Counsel urged that pecuniary compensation would not provide sufficient recompense to the plaintiffs, if they lost the land for which they had contracted and made partial payment; and therefore the plaintiffs were praying for orders to preserve the subject-matter.

This Court takes note of the detailed and authenticated document of evidence in the form of the supporting affidavit. The Court takes note, as regards the defendant's affidavit, that it is cursory in character, and is made up of conclusions, rather than of perceived, factual evidence; the Court cannot attach much weight to such content, in an affidavit. On this account, it is the Court's perception that the plaintiffs do indeed have a *prima facie* case.

The Court takes into account that there exists a duly signed contract for the sale of land, between the parties, and also takes into account that the plaintiffs have already substantially paid up, under the said contract.

The plaintiff's prayers, and in particular prayers (c) and (d) of the Chamber Summons of 27th October,

2009 are hereby allowed.

The defendant/respondent shall bear the plaintiffs/applicants costs in this application.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 19th day of February, 2010.

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J.B. OJWANG

JUDGE