



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(NAIROBI LAW COURTS)

Civil Suit 2304 of 2007

PAUL KIIHIKO KINYANJUI.....PLAINTIFF

VERSUS

GEOFFREY KIIRU MACHARIA.....1ST DEFENDANT

DAVID KARANJA THUO

T/A D.K. THUO & COMPANY ADVOCATES...2ND DEFENDANT

RULING

1. Paul Kihiko Kinyanjui, who is the plaintiff/applicant, filed this case, on 22nd November, 2007. The plaintiff sued the defendant Geoffrey Kiiru Macharia (the 1st defendant), and David Karanja Thuo t/a D.K. Thuo and Company Advocates. The plaintiff's claim was for a declaration that the registration of transfer of LR No. Dagoreti/Riruta/1437 (hereinafter referred to as the suit property), in favour of the 1st defendant was fraudulent; an order compelling the Chief Lands Registrar to cancel the fraudulent entries pertaining to the suit property, and revoke or annul the title deed fraudulently obtained, and issue a correct title in favour of the plaintiff. In the alternative, the plaintiff prayed for an order that the accounts be taken and moneys due to the plaintiff from the 1st defendant be paid immediately or upon such terms that the court may order.

2. Filed simultaneously with the plaint, was a chamber summons in which the plaintiff sought an order of temporary injunction restraining the defendants from trespassing upon, alienating, further charging, evicting or interfering with the plaintiff's peaceful and quiet possession of the suit property, pending the hearing of the application or further orders of the court.

3. A temporary order of injunction was granted ex-parte on 22nd November, 2007 pending the inter-parte hearing of the application. The orders were subsequently extended on several occasions until 31st January, 2008 when the parties agreed by consent not to have the orders extended. Attempts were made at settlement and the matter was mentioned several times thereafter, but no settlement was ever reached nor was the application ever heard interpartes.

4. The plaintiff has now come to this court under certificate of urgency by way of a chamber summons filed on 16th June, 2010, in which the plaintiff seek similar orders as the chamber summons which was filed on 22nd November, 2007. In addition, the plaintiff seeks an order:

“That the defendant having disobeyed an earlier order in regard to the same parcel of land a permanent injunction that the defendant respondent jointly and severally or by themselves, their servants, their agents, their representatives or otherwise whatsoever, be restrained from trespassing upon, alienating, charging, evicting, interfering with the plaintiff's peaceful and quiet possession of LR No. Dagoreti/Riruta/1437 until the hearing and determination of this suit and or imperpetuity”.

5. The plaintiff reiterates that although he entered into a sale agreement with the 1st defendant for transfer of the suit property, the 1st defendant did not honour the agreement. The suit property was however transferred to the 1st defendant who charged it to Equity Bank. The plaintiff maintains that the orders of interim injunction which were granted by the court were ignored by the defendant. He contended that efforts to have his application heard were fruitless. He urges the court to grant the prayers sought as the defendant has issued a notice to the plaintiff's tenants to vacate the suit property.

6. The 1st defendant has sworn a replying affidavit objecting to the application. The 1st defendant maintains that the plaintiff has concealed

material fact. Such facts include the facts that the defendant is the proprietor of the suit property and the fact that the plaintiff has expressly conceded that he has no claim against the defendant as he has received the full price. The defendant maintains that the plaintiff has not come to this court with clean hands and that the application is an abuse of the court process.

7. I have given due consideration to this application. I have also perused the entire court record. I find that the application is an abuse of the process of the court. This is because the previous application which was filed on 22nd November, 2007 which is similar to the current application has not been disposed of. Secondly, the application before the court is incompetent because the applicant is seeking a permanent injunction in an interlocutory application. Thirdly, although the application was filed under certificate of urgency, the applicant has not exhibited any urgency in dealing with this matter. This is because, as already observed, his previous application remains pending. Although he alleges that the defendant breached the interim orders, no application was brought to court for contempt against the defendant.

8. Finally, the plaintiff is seeking an order of injunction. Such an order can only be issued where the plaintiff has satisfied the court that he has a prima facie case with probability of success, and that if the order of injunction is not granted, the plaintiff will suffer irreparable loss. In this case, the plaintiff admits that there was an agreement between him and the 1st defendant for the sale of the suit property. The plaintiff maintains that the defendant is in breach of that agreement. Even assuming that the plaintiff is able to establish his allegation, his remedy lies in damages and the suit for recovery of the agreed consideration. The plaintiff's loss is not therefore irreparable.

9. For the above reasons, I find no merit in the chamber summons dated 16th June, 2010 and do therefore dismiss the application with costs.

Dated and delivered this 8th day of October, 2010

H. M. OKWENGU
JUDGE

In the presence of: -
MS Chelagat H/B for Kimeria for the plaintiff/applicant
Kinyanjui for the defendants
Kosgei - Court clerk