



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

Environmental & Land Case 167 of 2010

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

ELC CASE NO.167 OF 2010

JOHN PATRICK MACHIRA.....1ST PLAINTIFF/APPLICANT
DIANA WAIRIMU MACHIRA.....2ND PLAINTIFF/APPLICANT

VERSUS

HEZEKIEL WAINAINA KAMAU.....DEFENDANT/RESPONDENT

RULING

The plaintiffs entered into a Sale Agreement dated 14th December, 2009 with the defendant in respect of a parcel of land known as title No. Nyandarua/South Kinangop/9166 which is a sub-division of title No. Nyandarua/South Kinangop/8671 for a consideration of Ksh.825,000/=.

The plaintiffs proceeded to pay a sum of Kshs.180,000/= as part of the purchase price. It then transpired that the defendant wanted to sell the same parcel of land to someone else for a sum of Ksh.1,100,000/=.

Consequently, the 1st plaintiff caused a caution to be registered against the title and also demanded that the defendant completes the Sale Agreement. It is now the plaintiffs' case that the defendant has moved the District Land Registrar, Nyahururu to remove the said caution. This compelled the plaintiffs to move to court against the defendant demanding *inter alia* that the defendant be compelled by an order of specific performance to complete the sale by executing the transfer in favour of the plaintiffs in line with the Sale agreement dated 14th December, 2009 aforesaid. The plaintiffs also claimed vacant possession of the suit property forthwith.

Alongside the said plaint, the plaintiffs moved the court by way of Chamber Summons under Order XXXIX Rules 1a, 2A, and 3(1) of the Civil Procedure Rules and Sections 1A, 1B, 3A, and 63(c) & (e) of the Civil Procedure Act for injunction orders against the defendant, his agents, servants, employees and or any other persons claiming title under him to be restrained from alienating, selling, disposing off, trespassing, charging or in any manner whatsoever dealing with the suit property known as title No. Nyandarua /South Kinangop/9166 pending the hearing of this suit.

On 12th April, 2010 Mwera J. granted interim orders that remained in place until the application was argued *inter partes* before me. The application is opposed by the defendant who has filed an affidavit in reply to the application. Both learned counsel have also filed written submissions which I have on record together with some authorities which I have read.

The reasons advanced for seeking the injunction orders are captured from the plaint aforesaid which refer to the Sale Agreement, the deposit paid and the fact that the defendant wishes to sell the said parcel of land to another person. In addition, the 1st applicant is said to have bought ten other parcels of land from the defendant, his sons and a daughter and the present suit property adjoins the said ten parcels. The present suit property is therefore said to be of immense value to the applicants because, it was to be consolidated with the other ten parcels to make one adequate space ideal for commercial development for both business and residential.

It is the plaintiffs' case that the defendant has refused to complete the transaction and unless an injunction order is granted the caution shall be removed and the said suit property shall be disposed off and thus rendering the applicants' suit herein futile.

On the other hand, the defendant says that it is the applicants who have breached the agreement and in particular the 1st plaintiff who has been very hostile to and uncooperative with the defendant. It is also his case that the agreement is uncertain and frustrated and that the plaintiffs have refused to assist the defendant to apply for the Land Control Board consent to complete the transaction. Above all, the plaintiffs have not established a prima facie case with a probability of success.

For the plaintiffs to succeed they must establish a prima facie case with a probability of success and show that, if the order is not granted, they may suffer irreparable loss that may not be adequately compensated by award of damages. If the court is in doubt it will decide the matter in a balance of convenience.

Going through the submissions filed by both learned counsel, the approach is as if the parties have already given evidence in the main suit. For good reason therefore, I shall not address the authorities that have been cited because this may prejudice the positions of the parties herein. The agreement between the parties has been admitted by the defendant. Other than the allegations that it is uncertain and has been frustrated by the plaintiffs, there is no other allegation that goes to vitiate the terms therein.

At first, one would have expected the parties herein to have settled the issue considering that they have had similar transactions amongst them before, but that is not the point. Looking at the pleadings by both parties, I believe the best order that commends itself is the preservation of the subject matter that is in dispute herein. To that extent, I find that the plaintiffs have established a *prima facie* case with a probability of success and that they are entitled to injunction orders sought in terms of prayer No.3 of the Chamber Summons dated 12th April, 2010. The costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered at Nairobi this 10th day of November, 2010.

**A. MBOGHOLI MSAGHA
JUDGE**