



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

Civil Case 84 of 2009

EVANS JUMA MATUNDA.....PLAINTIFF

VERSUS

ELIAKIM WASHINGTON OLWENY.....1ST DEFENDANT

NORAH OLWENY.....2ND DEFENDANT

DR. RIRO MWITA MOSES.....3RD DEFENDANT

RULING

The applicant has simultaneously with this suit brought an application dated 18th March, 2009 for temporary injunction against the three respondents to restrain them from:

“2.....entering, trespassing or crossing into properties titles numbers (sic) Njoro Ngata Block 9/23 and Njoro Ngata 9/22 (Mwanganza) belonging and occupied by the plaintiff or interfering in any way with the plaintiff’s quiet enjoyment of the said parcels of land pending the full hearing and determination of this application.”

The second prayer strangely seeks an order of permanent injunction in similar terms as those sought in the above prayers but pending the hearing and determination of the suit.

H.C.C.C.NO.84/09

It is the applicant’s contention that he purchased the two parcels of land from the 1st and 2nd respondents in 2004 at a consideration of Kshs.640,000/=. That he paid Kshs.100,000/= upon execution of the agreement and the balance on divers dates with the final payment being on 29th November, 2005. That upon execution of the agreement he occupied the two parcels of land and began to develop them. That the 1st and 2nd respondents have failed to formally transfer the two parcels of land to him. In January/February, 2009 the applicant learnt that the 3rd respondent was also laying a claim on the suit land. It is the applicant’s belief that the transfer of the two parcels to the 3rd respondent by the 1st and 2nd respondents was illegal and fraudulent.

The 1st and 2nd respondents have filed grounds of opposition in which they challenge the application on the grounds that it is vexations, frivolous and otherwise is an abuse of the court process. The 3rd respondent on his part has filed a replying affidavit and avers that sometime in June, 2006 he entered into a sale agreement with the 1st and 2nd respondent for the purchase of parcels of land Nos.Njoro/Ngata

Block 9/22 (Mwangaza) and Njoro/Ngata 9/23 (Mwangaza) at a consideration of Kshs.600,000/= and vacant possession was immediately given to him. Payments were by installments from 30th June, 2006 to 14th February, 2007.

In May, 2007 the 1st respondent delivered to the 3rd respondent two title deeds for the two parcels of land. The 3rd respondent further avers **H.C.C.NO.84/09** that he was not aware of the earlier transaction between the applicant and the 1st and 2nd respondents.

The principles upon which a temporary injunction may be granted are very well known. In the application before me, I must consider whether or not the applicant has made out a *prima facie* case with a probability of success on the trail. An order of temporary injunction will normally not issue unless the applicant might otherwise suffer irreparable injury.

But should the court be in doubt, then it must decide the matter on a balance of convenience. See **Giella V. Cassman Brown & Co. Ltd.** (1973) EALR 358.

Although the consideration of those principles are sequential, the courts have traditionally considered the three separately. However, the most fundamental thing is that, in considering the question of *prima facie* case, the court is not expected to make any definite findings either of fact or law, for the obvious reason that that is the province of the trial court. A *prima facie* case is one in which the court is satisfied from the material presented before it, that the applicant's right may have been violated as to require the respondent to explain or rebut the allegation. See **Mrao Ltd. Vs. First American Bank of Kenya Ltd. & 2 others** (2003) KLR 125.

The applicant's case at the trial will be that he had a written agreement for sale of the two parcels of land by the 1st and 2nd respondent. That he made full payment of consideration, occupied and **H.C.C.NO.84/09** began to develop the two parcels of land. That five years later, the 3rd respondent laid claim on the same parcels. He will also be calling evidence that the sale of parcels of land to the 3rd respondent by the 1st and 2nd respondents are fraudulent. Based on these facts he will be asking the court to declare the two parcels of land as his and that the purported sale to the 3rd respondent as fraudulent and therefore the certificate of title issued to the latter be declared null and void. He therefore will be seeking that the same be cancelled and the 1st and 2nd respondents to be compelled to executed transfer documents in his favour.

He will also be seeking permanent injunction. Without going into the merits of the applicant's case at this stage, I am satisfied that he has demonstrated that he paid the purchase price several years before the purported sale to the 3rd respondent. I am also persuaded that only transfer by the 1st and 2nd respondents was outstanding. Conversely the 1st and 2nd respondents have not shown how the application is frivolous or vexatious having admitted in their defence the existence of a sale agreement with the applicant. The 3rd respondent on the other hand has not explained the form of transaction that existed between him and the 1st

and 2nd respondents. A sale of land at a consideration of Kshs.600,000/= could not have been done verbally.

Again it is unclear what parcels of land he was purchasing from the annexed receipts which depict three parcels, namely Njoro/Ngata Block

1, Njoro/Ngata Block 9 and Njoro/Ngata Block 9 (Mwangaza). No nexus has been drawn between the above plots and the two parcels of land in question in this matter.

For these reasons, I am persuaded that there is a *prima facie* case.

On the question of damages, the phrase used in the case of **Giella Vs. Cassman Brown** (Supra) is that:

“an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.”(emphasis supplied)

Adequacy (emphasis supplied) of damages is not automatic. The applicant is categorical that he uses the suit property. This has not been seriously challenged. The balance of conveniences is in his favour. I will, for these reasons, grant a temporary order of injunction in terms of prayers 3 of the chambers summons with the modification that the order will remain in force until the hearing and determination of this suit.

Costs to the applicant.

DATED and DELIVERED at NAKURU this 21st day of July, 2009.

W. OUKO

JUDGE