



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Suit 160 of 2009

JACOB CHEBIIPLAINTIFF/APPLICANT

VERSUS

HELLEN MARUSDEFENDANT/RESPONDENT

RULING

By a Sale Agreement entered into between the Plaintiff and the Defendant on 3rd March, 1996 the Defendant agreed to sell and the Plaintiff agreed to purchase one acre out of Plot No. 181 Inder Farm at a purchase price of Shs. 120,000/=. The Plaintiff paid a deposit of Shs. 13,000/= and it was agreed that the balance of the purchase price would be paid by instalments for a period of four (4) years. This was meant to assist the Defendant to pay school fees for his son's Secondary Education. The last instalment was paid in 1999. But the Defendant has since refused to transfer to the Plaintiff the said one acre he had purchased.

The Plaintiff filed this suit against the Defendant for:-

- (a) An order for permanent injunction restraining the Defendant, her servants and/or agents from trespassing into the suit land.
- (b) An order for specific performance compelling the Defendant to transfer the suit property to the Plaintiff and in default the Deputy Registrar to execute transfer in her place.

The Plaintiff also sought costs of the suit and any other relief that this Honourable Court may deem fit to grant. Simultaneously with the Plaintiff brought a Chamber Summons under Order XXXIX Rules 1 (a), 2, 3 and 9 and Section 3A and 63 (e) seeking orders:-

- (i) That this Honourable Court be pleased to issue a temporary injunction restraining the Defendant by herself, her agents and/or servants from trespassing, evicting, encroaching and/or in any other manner interfering with the Plaintiff's peaceful occupation and/or enjoyment of the land namely Plot No. 181 INDER FARM pending the hearing and determination of this application.
- (ii) That pending the hearing and determination of the Plaintiff's suit, the Defendant by herself, her servants and/or agents be restrained by way of an injunction from trespassing, evicting or in any other manner interfering with the Plaintiff's peaceful enjoyment of the suit premises pending the hearing and determination of this suit.

The application is based on the grounds as stated in the body of the Chamber Summons and also supported by an affidavit sworn by the Applicant.

In his affidavit he avers that on or about March, 1996 he entered into a Sale Agreement with the Defendant over the suit land being Plot No. 181 Inder Farm at a purchase price of Shs. 120,000/=; that it was a term of the Sale Agreement that the payment could be spread for a period of four (4) years specifically as school fees for the Defendant's child namely Benjamin Boit until he completed his Secondary Education which payments were completed in the year 1999; that he had taken possession of the suit land; that to facilitate the transfer of the suit property into his name, the Plaintiff had to incur further costs for valuation, sub division and consent to subdivide at the Land Control Board; that upon completion of the purchase price and obtaining the consent to subdivide he prevailed upon the Defendant to transfer the suit property to him but the Defendant has been reluctant to do so; that the Defendant has on various occasions interfered

with his quiet possession of the suit property and has now erected a fence across the access road to his property and thus preventing him from accessing the suit property; that since then the Defendant has continuously trespassed into the suit property, insulted, harassed and humiliated his servants, employees and the family; that since he took possession he has made tremendous developments and invested heavily on his suit premises; and that he has proprietary rights over the property absolute and the Defendant, her servants, agents and/or workers should be restrained by an order of this Court so as to allow the Plaintiff to have peaceful enjoyment of the suit property.

The Defendant/Respondent was served with this application but did not file any paper to oppose the application. The facts as gathered from the affidavit evidence on record and the pleadings which is conceded is that this is a transaction affecting agricultural land and that being the case the same should be governed by the provisions of the Land Control Act Cap. 302. Section 6 of the said Act provides that any sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with agricultural land which is situated within a land control area is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

There is no evidence that the land control board consent had been obtained in this transaction. In that respect Section 7 of the Act provides that if money has been paid in such transaction that becomes void under the Act, that money or consideration is recoverable as a debt by the person who paid it from the person to whom it was paid. The Act goes further to provide that where a controlled transaction or an agreement is avoided by Section 6, any person who enters or remains in possession of any land in such circumstances as to give rise to a reasonable presumption that the person enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence.

Mere possession or occupation could not in the circumstances confer any kind of title recognizable in law upon the applicant.

The law governing grant of injunctions is now well settled in our jurisdiction. As was enunciated in the celebrated case of **GIELLA –VS- CASSMAN BROWN 1973 EA 358** the applicant must satisfy the following conditions:-

- (a) the probability of success at the trial
- (b) irreparable loss which would not be adequately compensated for by damages; and
- (c) if Court is in doubt it is enjoined to act on a balance of convenience.

I am of the considered view that the applicant does not have an arguable case. This being an agricultural land and the applicant having not secured the land control board consent the claim for specific performance is not attainable for lack of land control board consent.

I am not persuaded that I ought to exercise my discretion in favour of the Applicant.

Accordingly, the Plaintiff's application is dismissed with no order as to costs.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF OCTOBER, 2009.

J. L. A. OSIEMO

JUDGE