

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 53 of 2005

FRANCIS GITHINJI KAROBIA.....PLAINTIFF

VERSUS

STEPHEN KAGENI GITAU.....DEFENDANT

RULING

This is an application made by the plaintiff pursuant to provisions of **Order XXXIX Rules 1, 2 and 9** of the **Civil Procedure Rules**. The plaintiff seeks an order of temporary injunction to restrain the defendant, his agents or servants from constructing the proposed new road of access to plaintiff's property LR. No.8110/6 and from interfering with existing road of access to that property, or from changing or interfering with parcel No. 8110/5, the plot in dispute in this suit and further from implementing the proposed amendment of the subdivision scheme of LR No. 8110 approved by the Commissioner of Lands on 14th May 1999 pending the hearing and determination of the suit. He further prayed for the *status quo* in respect of parcels Nos.LR 8110/4, 8110/5, 8110/6 and 8110/7 be maintained in accordance with the subdivision scheme approved by the Commissioner of Lands on 14th May 1999. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Francis Githinji Karobia, the plaintiff. The application is opposed. The defendant filed a replying affidavit in opposition to the application.

At the hearing of the application, I heard submissions made by Mr. Murage on behalf of the plaintiff. He submitted that the plaintiff had a purchaser's interest in parcel No. LR 8110/5 having entered into a supplementary agreement to purchase the same from the defendant. He submitted that the subdivision scheme of parcel No. 8110 was approved by the Commissioner of Lands on 14th May 1999. He explained the defendant had refused to complete the sale agreement in respect of parcel No. LR 8110/5, and in order to defeat the plaintiff's claim over the said parcel of land, the defendant had prepared another subdivision scheme whose effect would be to completely alter the character of the said LR 8110/5. He further explained that after the initial subdivision scheme was approved by the Commissioner of Lands, a deed plan was prepared and approved demarcating the road of access to parcel No. LR 8110/6. He urged the court to grant the injunction sought so that the *status quo* on the grounds as it exists presently may be maintained pending the hearing and determination of the suit. He reiterated that the defendant should not be allowed to construct a road on the suit land other than in the manner provided by the subdivision scheme of 1999. Mr. Murage submitted that the defendant had refused to abide by the observations made by Okwengu J in her ruling delivered on 25th April 2008 which directed that the *status quo* on the ground be maintained pending the hearing and determination of the suit. He explained that the defendant had attempted to change the initial subdivision scheme approved by the Commissioner of Lands with the sole aim of frustrating the plaintiff's suit. He submitted that the plaintiff had established a prima facie case and should in the circumstances be granted the injunction sought.

The application is opposed. Mr. Onsembe for the defendant opposed the application. He submitted that LR. No.8110/5 was no longer in existence on the ground and therefore there was no basis upon which this court would grant the injunction sought. He submitted that the plaintiff had failed to lay any basis in law to persuade the court that it was entitled to specific performance of the supplementary agreement in respect of parcel No. LR. 8110/5. He maintained that the new subdivision scheme had already been approved and in fact the defendant had completed the construction of the new road. He explained that it was incorrect for the plaintiff to claim that the new subdivision scheme interfered with the character of LR. No. 8110/5 since the same only affected a portion of land owned by the defendant. He reiterated that the plaintiff was guilty of laches since the new subdivision scheme had already been approved by the relevant authorities, and in fact the defendant had already completed constructing the new road. He explained that the defendant was not bound by the comments made by Okwengu J in her ruling since the same were *obiter*. He maintained that the plaintiff had failed to establish a prima facie case to entitle this court grant the injunction sought. He submitted that since the plaintiff had already pleaded for a specific amount that he was claiming in the alternative to the prayer for specific performance, damages would be an adequate remedy. He argued that the balance of convenience tilted in favour of the defendant, and therefore the application for injunction should be dismissed with costs.

I have carefully read the pleadings filed by the parties to this application in support of their respective opposing positions. I have also considered the rival arguments made before me by Mr. Murage for the plaintiff and by Mr. Onsembe for the defendant. The issue for determination by this court is whether the plaintiff laid sufficient basis for this court to grant him the injunction sought. The principles to be considered by this court in determining whether or not to

grant the order of injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

Certain facts are not in dispute in this application. It is not disputed that the plaintiff purchased parcel No. LR.No.8110/6 from the defendant. According to the averments made by the plaintiff in his plaint, the defendant requested him to pay certain sums which the defendant then owed on account of a loan due to Standard Chartered Bank. Part of the consideration of the said settlement of the debt due to Standard Chartered Bank was to be offset in kind by the defendant transferring parcel No. LR. 8110/5 to the plaintiff. A supplementary agreement was entered between the plaintiff and the defendant. There is no dispute in regard to the sale of LR. No.8110/6. A dispute however arose in respect of the sale of LR. No.8110/5. According to the plaintiff, the defendant refused to transfer the said parcel of land to him despite the fact that he had paid the purchase consideration in full when he bailed the defendant out by repaying the debt that he then owed to Standard Chartered Bank.

It appears that pursuant to the two agreements, LR No.8110 was subdivided to create several plots which include LR. No. 8110/5, 8110/6 and 8110/7. A road of access, being LR 8110/4, was created to service plot No. LR 8110/6. According to the plaintiff, a subdivision plan reflecting the demarcation of the two parcels of land sold to him was approved by the Commissioner of Lands on 14th May 1999. The plaintiff annexed a copy of the said approved plan in the affidavit in support of this application. Pursuant to the said approval, a deed plan No. 228442 was drawn and approved by the Director of Surveys delineating the parcel of land which had been surrendered as a road of access to parcel No. 8110/6. The approval was granted on 24th December 1999. It appears that subsequent to this approval the defendant changed his mind and has since sought to obtain approval of another subdivision scheme whose effect would be to completely change the character of parcel No. LR 8110/5. It is apparent that the defendant embarked on this course of action in order to undermine the supplementary agreement that he entered with the plaintiff for the sale of the said parcel of land. It is on the basis of this course of action that the defendant has the temerity to depone in his replying affidavit that the said parcel of land i.e. LR 8110/5 is no longer in existence on the ground.

When the defendant sought to injunct the plaintiff from interfering with his proposed subdivision scheme that would have resulted in the amendment of the subdivision scheme approved by the Commissioner of Lands on 14th May 1999, Okwengu J, in dismissing the application, made the following observations:

“The defendant has denied the existence of any supplementary agreement in respect of LR. No. 8110/5. There is therefore a dispute regarding the beneficial ownership of that plot. Although the defendant has contended that he only intends to change the access road for the convenience of access to plots Nos. 8110/5, 8110/6 and 8110/R, it is evident from the map showing the amendment to the approved sub-division resulting in the change of the access road, that the realignment of the access road will change the character of plot No. 8110/5 as the plot will become bigger the area of the former access road being amalgamated to that plot. Given that there is a dispute regarding the ownership of this plot, it is desirable that this ownership dispute be resolved before that plot can be interfered with.”

I agree with Okwengu J that to allow the defendant to proceed with the proposed sub-division scheme would result in interference with the character of LR. No. 8110/5 which is the subject of this suit. I do hold that in the circumstances of this case, the plaintiff has established that he has a prima facie case. The *status quo* on the ground and at the land registry should be maintained, and particularly there should be no interference with the sub-division scheme approved by the Commissioner of Lands on 14th May 1999 pending the hearing and determination of the suit. Although it is conceded that the plaintiff in the alternative to his prayer for specific performance has quantified the amount that he would desire to be awarded in the event that his main prayer is not allowed, I think in view of the fact that the value of land has appreciated since the plaintiff and the defendant entered into the supplementary agreement, it is just and fair to give the plaintiff an opportunity to ventilate the main prayer in his suit at full hearing. This court notes that land being unique in nature and character, damages in certain instances would not constitute an adequate remedy.

I will allow the plaintiff's application dated 15th August 2008 in terms of prayers (c) and (d) of the application pending the hearing and determination of the dispute regarding the ownership of LR No.8110/5 by the court. The plaintiff shall have the costs of the application.

DATED at NAIROBI this 23rd day of OCTOBER 2008.

L. KIMARU

JUDGE