REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Civil Case 6 of 2007

JOHN BARASA KASEMBELI…………….............……..PLAINTIFF.

VERSUS

SHADRACK OTIENO MUTACHO……….................DEFENDANT.

R U L I N G.

The plaintiff has moved the court through a chamber summons which is expressed as having been brought pursuant to the provisions of Order 39 rules 1, 2 and 3 of the Civil Procedure Rules, as read together with sections 3 and 3A of the Civil Procedure Act.

The plaintiff is seeking an interlocutory injunction to restrain the defendant from trespassing, working, ploughing, interfering planting or in any other manner dealing with the Settlement Trustees Plot No. 57 at Chemichemi Settlement Scheme. The said plot will hereinafter be cited as the suit property.

It is the plaintiff's case that he was the sole allottee of the suit property, which is said to be 5.5 acres.

That notwithstanding, the defendant is accused of harassing the plaintiff, on the grounds that he had some legal interests in the suit property. The nature of the alleged legal interests is said to be that of a purchaser of 2 acres, out of the suit property. However, the plaintiff denies the defendant's assertion that he bought the 2 acres from the plaintiff, in 1989.

Furthermore, the plaintiff contends that on 12th april, 2003, he sold some 2 acres, (out of the suit property) to a Mr. Maurice Nabutola. It is the plaintiff's case that the said Maurice Nabutola was in possession of the 2 acres which he bought from the plaintiff. However, as the suit property was still charged to the Settlement Fund Trustees, as security for a loan borrowed by the plaintiff, he had not yet transferred to Mr. Nabutola, the 2 acres, even though Mr. Nabutola had paid the full purchase price of Ksh. 240,000/=.

This case is said to have been prompted by the defendant's action of lodging a complaint with the police, that the plaintiff had failed to transfer to the defendant, the 2 acres which the defendant alleges to have bought in 1989, for the sum of Ksh. 14,000/=.

According to the plaintiff, the complaint lodged by the defendant resulted in the arrest and incarceration of the plaintiff, for one day.

The police are then said to have directed the plaintiff to the office of the District Officer, the said officer ordered the plaintiff and Mr. Maurice Nabutola not to set foot on the suit property.

Feeling that the defendant's use of the provincial administration and the police was unjustified, the plaintiff decided to institute these proceedings.

He says that he never sold any land to the defendant in 1989. He also denies ever receiving any payment from the defendant.

In any event, says the plaintiff, if any land was sold to the defendant in 1989, such a transaction would be void, for lack of consent from the Land Control Board.

It was for those reasons that the plaintiff prayed for an interim injunction, because he feels that he would otherwise suffer irreparable loss and damage.

It is also the plaintiff's view that the balance of convenience rests in favour of the grant of the injunction.

On his party the defendant views the matter from a totally different perspective. First, he filed 3 affidavits to answer to the factual issues.

Then he submitted that the plaintiff lacked the locus standi to bring this suit or the application before me. His basis for that contention was that the plaintiff had already sold the 2 acres to Mr. Maurice Nabutola. Therefore, as far as the defendant was concerned, upon the execution of the sale agreement on 12th April, 2003, the property vested in the purchaser.

For that reason, the defendant believes that the only person who had any locus to enforce any rights relating to the 2 acres was Mr. Maurice Nabutola.

In my considered view, provided that the plaintiff remained the registered proprietor of the suit property, he was still entitled to bring an action to enforce rights relating to the said property.

Although I am not deciding the issue at this stage, I nonetheless see no reason why the plaintiff could not be declared the sole and exclusive allottee of the suit property, if he should adduce sufficient evidence to prove the requisite facts.

On the other hand, as the plaintiff has conceded that the person who was in occupation of the 2 acres was Mr. Maurice Nabutola, I am unable to comprehend how the plaintiff could obtain an order to restrain the defendant from interfering with the plaintiff's quiet user and occupation of the said two acres.

The defendant has produced documentary evidence which appears to back his contention that his brother, Joseph Wanjala, bought two acres of land from the plaintiff, for a sum of Ksh. 49,000/= in the year 1989.

The defendant has sworn an affidavit to explain that his brother, Joseph A. Wanjala, was his agent; and his said brother has also sworn an affidavit to confirm that that is the position.

What's more is that the plaintiff does not deny having signed an application for the consent of the Saboti/Kwanza Land Control Board, for the sale of two acres of land. The purchase price indicated on the application is Ksh. 50,000/=. And the application is dated 7th December, 1991.

To my mind, the said documentary evidence is more consistent with the story told by the defendant, than the story of the plaintiff.

But without the requisite consent from the Land Control Board, the sale to the defendant would, on a prima facie basis, appear to be void.

But whether or not the sale to the defendant was void, the fact that he had been in occupation since 1989, (if such fact is proved), would imply that the defendant may yet sustain his claim by virtue of adverse possession.

In **SAMUEL MIKI WAWERU VS. JANE NJERI RICHU (2007) e KLR**, the Court of Appeal unanimously held that where a purchaser or lessee in a controlled transaction is allowed to be in possession of land, by the vendor or the lessor, pending completion; if the transaction thereafter becomes void under the Land Control Act, for lack of consent of the Land Control Board, such a transaction is terminated by operation of the law. Thereafter, the continued possession, if not illegal, is adverse from the time the transaction becomes void.

In the light of that legal position, it would matter not that the purchaser, pursuant to the terms of the documents annexed to the defendant's replying affidavit, was one Joseph A. Wanjala.

Another issue raised by the defendant was to the effect that the plaintiff would not suffer any irreparable loss, if the injunction was not granted in terms of the application.

I have given due consideration to the compating submissions in that respect. In doing so, I have benefited from the following words of the Hon. Bosire J. (as he then was) in **KENLEB CONS. LTD. VS. NEW GATITU SERVICE STATION LTD. & ANOTHER (1990) KLR 557** at page 558;

"***To succeed in an application for an injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application, but must also show he had a right, legal or equitable, which requires protection by injunction. He must also satisfy the three tests set out in the often cited case of GIELA VS. CASSMAN BROWN & CO. LTD. (193) E.A. 358; for the grant of an interlocutory injunction."***

The said three tests can be summarized as follows:-

(a) The applicant has to demonstrate that he has a prima facie case with a probability of success; and,

(b) Whether or not damages would be an adequate remedy to compensate the plaintiff.

(c) If the court is uncertain about the position on (a) or (b) above, the issue would be determined on the balance of convenience.

However, it has also been recognized that the foregoing requirements are not cast in stone. Therefore, the courts have appreciated the fact that an injunction may sometimes issue even if the plaintiff had not demonstrated that he would otherwise suffer irreparable loss. Or to put the issue in a different perspective, the mere fact that the defendant may be capable of raising such funds as may be capable of compensating a plaintiff is not reason enough to let the defendant have his way.

There may be instances in which the court could award an injunction in favour of the plaintiff, even if the defendant has the ability to otherwise compensate the plaintiff.

Ultimately, the true test is the justice of the case, as assessed by the court on a case by case basis. In other words, whilst applying the guiding principles set out in the celebrated case of **GIELA VS. CASSMAN BROWN & CO. LTD**. (supra), the court would not lose sight of its judicial discretion, which is meant to be applied to meet the justice of a case.

In this case, the defendant has not disputed the plaintiff's contention that he was the sole and exclusive original allottee of the suit property. Indeed, the defendant appears to concede that fact, because it was only by acknowledging the plaintiff's title to the said property that the defendant could lay his claim as a purchaser of a portion thereof.

In the circumstances, I hold that the plaintiff has demonstrated a prima facie case with a probability of success as regards his assertion as an allottee of the suit property.

However, whether the plaintiff had sold some two acres to the defendant or to Mr. Maurice Nabutola, the plaintiff has conceded having given up possession of that portion of the suit property. Even if the

defendant were held to be anything but a purchaser of the 2 acres, that would not give to the plaintiff an entitlement to a quiet user and possession of that portion of the property. I say so because by the plaintiff's own express admission, the person who was in possession was Mr. Maurice Wakhungu Nabutola.

In effect, the plaintiff has failed to demonstrate a prima facie case with a probability of success, as regards his claim for the user and possession of the two acres.

Furthermore, as the plaintiff has disclosed that the purchase price of the 2 acres was Ksh. 240,000/=, as at the time he sold the same to Mr. Nabutola, in April, 2003, I would agree with the defendant that the loss which the plaintiff would stand to suffer is easily quantifiable.

I therefore find that if the injunction sought is not granted, the plaintiff would not suffer irreparable loss. The person who might suffer losses appears to be Maurice Wakhungu nabutola, who is said to have taken possession of the two acres, upon execution of the Sale Agreement on 12th April, 2003.

However, as the said Maurice Wakhungu Nabutola was not a party to these proceedings, I cannot issue any orders for or against him.

Meanwhile, the defendant asked the court to strike out the plaintiff's affidavit because it contains alterations, which had not been countersigned by the plaintiff.

It is true that at paragraph 3 of the affidavit there is an addition, as follows;

"***(Annexed is a copy of the charge marked JBK 1A'***)

And at paragraph 4 of the affidavit there is an alteration to the typing, which seems to bear the year 1982; so that it now reads 1984.

Both the alterations were made by hand, in black ink. The colour of the ink used is significant because the signature of the plaintiff is in blue. That therefore suggests that the alterations were not made by the plaintiff. However, I cannot be certain about that.

But even if it is assumed that it was the plaintiff who made the said alterations, the legal position is that an affidavit constitutes evidence, and cannot therefore be amended.

In **GREENHILLS INVESTMENTS LIMITED VS. CHINA NATIONAL COMPLETE PLANT EXPORT COROPRATION (COMPLAN) t/a COVEC (2002) 1 KLR 384**, the Hon. Ringera J. (as he then was) held as follows;

"***The issue raised by grounds 7 and 8 is whether or not an affidavit can be amended and whether or not it should indicate by whom it was drawn and upon whom it is to be served. The decree-holder's advocate quite properly conceded that an affidavit cannot be amended. I say the concession was properly made because an affidavit is evidence and cannot be amended. In the premises I uphold the objection that Mr. Meharz Ehsani's affidavit having been amended is fatally defective and is for striking out. It is ordered that the same be struck out."***

Although the plaintiff submitted that the amendments had been made by him, as the affidavit was commissioned by a Commissioner for Oaths, I am afraid that that would not change the fact that an affidavit cannot be amended.

In any event, there is no evidence that the amendments, even if they were made by the plaintiff, were made by the plaintiff, were so made prior to the commissioning of the affidavit.

It must therefore follow that the affidavit of the plaintiff is for striking out, and I thus proceed to strike it out. Having done so, the plaintiff's application is left bare. It lacks the requisite material from which the

court could make a finding that the plaintiff had established a prima facie case with a probability of success. In the result, the application dated 22nd January, 2007 is dismissed with costs.

But notwithstanding the said dismissal, I feel obliged to emphasize that it is not right for any party to a civil action to utilize the services of the Provincial Administration or of the Police force, to enforce such rights as the said party may consider himself to be entitled to.

The responsibility of adjudication between any two or more parties, who lay claims to competing rights over the same subject matter, is the preserve of the judicial system.

Let the parties take heed.

Dated and delivered at Kitale this 21st day of March, 2007.

FRED A. OCHIENG.

JUDGE.