



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 92 OF 2005

FELISTUS MULIRO NANJALA PLAINTIFF/APPLICANT

VERSUS

ROBERT KOECH 1ST DEFENDANT/RESPONDENT

ROSALINE JEMELI KOECH 2ND DEFENDANT/RESPONDENT

YUSUF KIPTUM KOECH 3RD DEFENDANT/RESPONDENT

RULING

This is a Chamber Summons dated 25th October 2004 purported to have been brought under Order 39 rules 1, 2, and 9 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap.21). It seeks for four orders, two of which have been spent: -

1. (Spent)

2. (spent)

3. That pending the determination of the suit herein, the defendants, by themselves, agents or servants be and are hereby restrained by an injunction from selling, disposing of, transferring, charging,

mortgaging, offering as security, leasing, constructing on, depositing materials on, interfering with the structures thereon put up by the plaintiff, evicting the plaintiff or in any manner whatsoever interfering with quiet enjoyment and possession of the plaintiff of the parcel of land Eldoret Municipality Block 21 (King'ong'o)/444 and Eldoret Municipality Block 21 (King'ong'o)/3253.

4. That costs be borne by the defendants. The application has grounds on the face of the Chamber Summons, and is supported by an affidavit sworn on 26th October 2004 by Felistus Muliro Nanjala, the applicant. The applicant also filed a supplementary affidavit purported to have been sworn on 14th January 2004 and filed on 17th November 2004. It was a response to the affidavit of the 1st and 3rd respondents sworn on 8th November 2004.

The application is opposed. A replying affidavit sworn on 8th November 2004 by Yusuf Kiptum Koech the 3rd respondent was filed in opposition to the application. Also an affidavit sworn on 8th November 2004 by Robert Koech the 1st respondent was filed. When the application came up for hearing on 21st April 2005, Mr. Kuloba for the applicant submitted that the applicant was seeking for injunctive orders. He submitted that the main suit was for specific performance of a contract. The plaintiff was a personal

representative of the deceased Francis Namanda Maruti (Francis), her late husband. The deceased Francis had paid the whole of the purchase price for a plot which he purchased at Eldoret from the 1st respondent.

The 1st respondent had not denied the payment of the purchase price. However, when the applicant succeeded in obtaining letters of administration for the estate of the late Francis, the 1st respondent refused to transfer the $\frac{1}{4}$ acre plot to her. The applicant therefore referred the matter to the Soy Land Disputes Tribunal which dealt with it. However, the 1st respondent filed a case in to the High Court in Kisumu which decided that the Land Disputes Tribunal did not have jurisdiction to entertain the matter.

When the sale agreement between Francis and the 1st respondent was signed, the 1st respondent was the owner of plot No.442 and 444. He agreed to sell part of plot No.442 to the deceased Francis. However, he gave possession to Francis of land at plot No.444 on which the deceased Francis and his family lived since 1997 and developed the same. The 1st respondent later purported to transfer plot No.444 to the 2nd and 3rd respondents, who were his wife and child respectively. This was an attempt to defeat the agreement for sale. Therefore in terms of section 28 of the Registered Land Act (Cap.300) the applicant filed a case in court to ascertain the rights of the parties. The 1st respondent also subdivided plot No.442 and sold it to a third party. New numbers were given to the subdivided plots. The 1st, 2nd and 3rd respondents were now threatening to evict the applicant thus making it necessary for the grant of injunction to prevent waste.

In asking for specific performance of contract, the applicant had shown that the deceased Francis had performed his part of the contract. However, now the 2nd and 3rd respondents had become the registered owners of plot No.444. On the contents of the 3rd respondent's replying affidavit that the applicant sold the land that was bought by the deceased Francis, he submitted that she did not have capacity to do so, as she had not obtained letters of administration then. He sought to rely on section 80 of the Law of Succession Act (Cap.160). Secondly, the applicant had not obtained title and therefore she could not sell the land.

He submitted further that the applicant had established the requirements necessary to justify the grant of a temporary orders of injunction. She had shown that she had a prima facie case with probability of success. Secondly, an award of damages would not be adequate compensation as she had developed part of the land and the loss could not be easily quantified. Also, on the balance of convenience, it would be better to grant the injunction as the applicant was currently on the land. Section 3(3) of the Law of Contracts Act (Cap. 23) recognized occupation in part performance, as evidencing a contract. He sought to rely on the case of Geilla –vs- Cassman Brown [1973] EA 358 and the case of Kenya Commercial Finance Company Limited –vs- Afraha Education Society (2000) I EA 86.

On 21st April 2005 Mr. Kathili for the 1st respondent submitted that if the court granted the orders sought, it would be oppressive to the respondents. Firstly, though the late husband of the applicant bought $\frac{1}{4}$ an acre, the injunctive orders were sought for $1\frac{1}{2}$ acres. He submitted that it was not in dispute that the 1st respondent entered into an agreement to sell to the late husband of the applicant part of plot No.442, that was $\frac{1}{4}$ of an acre. It was disputed however that the 1st respondent gave the buyer plot No.444. The applicant wanted to give the impression that she was in occupation of plot No.444. There was no evidence that she was given plot No.444 by the 1st respondent. If that was the case, she would not have sold plot No.442 to one Reagan Magoti.

At the time that the 1st respondent subdivided plot No.444, he had the legal rights to do so. No connection had been shown between plot No.442, which was bought by the late husband of the applicant, and plot Nos. 3252 and 3253. Therefore the application must fail.

He submitted also that the applicant had not asked for cancellation of title in the suit. She should also have joined the Commissioner for Lands as a party if her claim was that titles were wrongly issued.

Mr. Terer for the 2nd and 3rd respondents associated himself with the submissions of Mr. Kathili. He added that the applicant had not satisfied the prerequisites for granting of the orders sought. The suit was for specific performance between the applicant and the 1st respondent on plot No.442. When the late

husband of the applicant and the 1st respondent entered into an agreement for the sale of plot No.442, plot No.444 was in existence. The 1st respondent could not be ordered to specifically perform an account of plot No.444, which he did not sell. The applicant had not established a prima facie case against the 1st respondent to justify the granting of orders of an injunction.

Besides, the applicant herself sold the land that was bought by her late husband to one Reagan Magoti. There was in fact a civil suit pending filed by the 2nd and 3rd respondents, for the eviction of Reagan Magoti from part of plot No.444. It was not true that the applicant was in occupation of plot No.444. In fact the one who was in occupation of part of the plot was Reagan Magoti. In any event the agreement for sale for plot No.442 was frustrated by operation of law as consent of the Land Control Board was not obtained.

He further submitted that the applicant did not stand to lose anything if the orders sought were not granted, as she was not in occupation of plot No.444. There was no evidence that the transfer of plot No.444 by the 1st respondent to the 2nd and 3rd respondents was fraudulent. There was no evidence of threats to evict her from plot No.444. He also submitted that the applicant had come to court seeking equitable reliefs but she had not come with clean hands. She did not disclose that there was in existence another suit in respect of plot No.444 between the 2nd and 3rd respondents and Reagan Magoti. This was Eldoret CMCC. No.1075 of 2001. This is an application for orders of temporary injunction. The considerations to be taken into account by the court in determining whether or not the grant orders of a temporary injunction are as set out in the case of Geilla –vs- Cassman Brown & Co. Ltd. [1973] EA 359. The court has to consider firstly whether the applicant has a prima facie case with probability of success. Secondly, an injunction will normally not be granted unless the applicant will suffer irreparable injury, that is that an award of damages will not be adequate compensation. Thirdly, if the court is in doubt, it will decide the application on the balance of convenience.

In determining this application I have to warn myself that I should not make orders that determine the substantive suit. Now, has the applicant established a prima facie case with probability of success? She filed a suit by way of plaint. The plaint was dated 26th October 2004 and was filed on 27th October 2004. The applicant sued Robert Koech, Rosaline Jemeli Koech and Yusuf Kiptum Koech. She avers in the plaint that she is the personal representative of her deceased husband Francis, who died in 1998. That her deceased husband bought ¼ of an acre of land from Robert Koech (the 1st respondent) in 1997 at a consideration of Kshs.165,000/= which consideration was fully paid upon signing a sale agreement.

That after her husband's death she obtained letters of administration in order to have the 1st respondent transfer the ¼ acre plot to her. That land was in Eldoret town and did not require consent of the Land Control Board under the Land Control Board Act (Cap.302). That, though the sale agreement referred to parcel number Eldoret Municipality Block 21(King'ong'o) 442, the actual land that was sold was Eldoret Municipality Block 21(King'ong'o) 444, as both plots belonged to the 1st respondent. The family of the applicant had been in possession of ¼ acre from 1997 and had put up residential houses. That sometime in December 2003 the 1st respondent subdivided the land parcel number Eldoret Municipality Block 21(King'ong'o) 442 into two portions and sold part of it to

Anna Moraa Kenduiywa and retained 0.26 hectares. That in July 2003 the 1st respondent in collusion with the 2nd and 3rd respondents fraudulently transferred parcel number Eldoret Municipality Block 21(King'ong'o) 444 to 2nd and 3rd respondents to defeat the applicant's claim.

Consequent upon filing the suit, the applicant filed this application on 27th October 2004 under certificate of urgency. I have considered the documents filed and the submissions of counsel for the parties. It was the argument of counsel for the applicant that the applicant had a prima facie case with probability of success.

From the submissions and documents on record, it is not in dispute that the applicant is the personal representative of her husband. It is not in dispute that the applicant's husband bought and paid for ¼ an acre from the 1st respondent on plot number Eldoret Municipality Block 21(King'ong'o) 442. It is not in dispute that the deceased paid for the purchase price. The respondents argue that in fact the applicant sold

her husband's share of the land, plot number 442 to one called Reagan Magoti. A sale agreement dated 6th February 1999 was annexed to the replying affidavit of the 3rd respondent. Among the documents attached to that affidavit is a plaint in a suit Eldoret CMCC No.1075 of 2001 filed by the 2nd and 3rd respondents herein against Reagan Magoti's alleged trespass on 0.304 hectares on Eldoret Municipality Block 21(King'ong'o) 444. It was also stated in submissions by counsel for the respondents that the agreement of sale between the 1st respondent and the late deceased husband of the applicant was void, as no consent of the Land Control Board was obtained. Also that the respondent did not come to court with clean hands as she did not disclose the existence of the case Eldoret CMCC. No.1075 of 2001.

I have perused the documents in the file on the description of the subject plots. They all refer to plots within Eldoret Municipality. That description, together with the small size of the plots convinces me that the subject land is in the Eldoret Municipality and that the land is not agricultural land. Therefore in my view, the consent of the Land Control Board is not required. Nobody has even given an indication as to the actual Land Control Board that would have dealt with the subject plot.

Now, I turn to the issue of the applicant having sold the land at plot No.442 to a third party Reagan Magoti and moving to plot No.444. The applicant alleges that it was the 1st respondent who owned both plots and he allowed them to occupy and build on plot No.444 instead of plot No.442.

Having perused the documents on record, I am of the view that the deceased bought land which was to be subdivided. Therefore the deceased was not buying a particular $\frac{1}{4}$ acre plot. Whether he was shown a place in plot 444 to build by the 1st respondent or not, that will be a matter of evidence that will come out at the trial. The 1st respondent has not said that Reagan Magoti took possession of plot No.442, which is the plot that is said to have been sold to him by the applicant. Magoti was sued by the 2nd and 3rd respondents in respect of plot No.444. Those are also matters that can only be resolved in evidence to be given by witnesses and parties at the hearing. www.kenyalawreports.or.ke Felistus Muliro Nanjala v Robert Koech & 2 others [2005] eKLR 10 On the issue that the applicant has not disclosed the existence of case Eldoret CMCC No.1075 of 200, my observation is that she was not a party in that suit. The law did not therefore require her to disclose the existence of that case. The non-disclosure of that case cannot therefore be taken against her.

This being a land matter where different people have had sale agreements executed and also entered into occupation and done some developments, the issues raised on ownership, trespass, transfers etc can only be resolved at the trial through evidence. On the facts before me, I find that the applicant has established a prima facie case with probability of success. The substantive issues of dispute can only be resolved at the trial on the evidence from parties and witnesses.

On the issue as to whether an award of damages will be adequate compensation, my answer is in the negative. I do not think that the applicant will easily get any other land of equal value, place and the usage that she has already put on the land in question. Looking for another parcel of land to buy in this country can be difficult and to develop it is even more difficult. I have not been informed by either side, what amount of damages would be adequate compensation. On my part I consider that the applicant will suffer irreparable loss, if the orders of injunction prayed for are not granted. The fact that she has apparently been in occupation and carried out developments from around 1997, which is a considerable period of time, tilts the balance of convenience in her favour. In those circumstances I find that I will be justified in granting the orders of injunction prayed for.

For the above reasons, I allow this application and order that a temporary injunction do issue as requested in prayer (3) of the application pending the hearing and determination of the suit. However I order that the main suit be fixed for hearing by 31st December 2005, failure to which the injunctive orders granted herein will lapse on 31st December 2005. The costs of this application will be in the cause. Dated and Delivered at Eldoret this 9th Day of June 2005

George Dulu

Ag. Judge

In the Presence of: Mr. Fundi for the plaintiff/applicant

Mrs. Kittony for the defendants/respondents

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