



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE 78 OF 2003

BENARD KIMEU MUTIE PLAINTIFF

VERSUS

FRANCISCA KAVULI MUTAVI

CLEMENT MUTUA MUTAVI..... DEFENDANT

MICHAEL KILONZO MUTAVI

RULING

The Chamber summons dated 19.2.2004 is brought pursuant to Order 39 Rules 1, 2, 2A and 3 of Civil Procedure Rules 13 A Civil Procedure Act. The plaintiff/applicant Bernard Kimeu Mutie prays for an order of injunction to restrain the defendants/respondents, their agents or servants from entering, trespassing or in any manner interfering with land title No. Makueni/Umoa/238 pending hearing of this suit. He also prays for costs of the application. The application is based on grounds that the plaintiff purchased the said land from the respondent and that from 22.10.03 the respondent have been cutting down trees and are constructing a house on the said land and that the applicant has a good case against the respondent's which has good chances of success. An affidavit was sworn by the plaintiff in support of the application. In the affidavit the applicant claims to have bought the said land on 12.1.1981 at a price of 20,000/-. He annexed a copy of the agreement. He paid Ksh. 18,000/- leaving a balance of Ksh. 1,200/- and that by then the land was registered in the names of the deceased Francis Mutavi Katuva the husband of first defendant. That the respondent has refused to accept the balance of Ksh. 1,200/- and shifted from the land to Kambu and that in 2003 she transferred the land into her name. That the respondent started to clear the land and to built a house and it is then he discovered that she had obtained a certificate for purposes of succession.

The third defendant/respondent filed a replying affidavit in opposition to the application. The respondent denies that the plaintiff has ever been the owner of the said land and that the purported sale agreement

only shows some moneys were given out but does not indicate to whom it was paid for what purpose and that the land is registered in the names of the defendants as per annexed copy of title.

The first defendant did not put in any papers in opposition to the application but adopted the submissions of the second and third respondents.

The applicant relies on a document annexed to his affidavit as a sale agreement between him and the respondents regarding the land in issue. I will agree with the respondents that the documents annexed does not amount to a sale agreement at all. It contains signatures and the names Francisca. It does not show that it is a sale agreement in respect of any property nor does it show the contracting parties. There is no evidence that it relates to the land in question.

It is the applicants contention that the registration of the land in the respondent's names was procured using a grant issued by act that had no jurisdiction to issue such grant. That allegation that a grant was issued by a competent court is made in the abstract. No such certificate of grant was attached to the application for the court to ascertain whether or not the grant was valid.

At paragraph 5 of the affidavit in support of the application it is deponed by the applicant that at the time he purchased the land in 1981, it was registered in the names of the deceased Francis Mutavi Katuva who was the husband of the first defendant. So far the applicant has not demonstrated that the first defendant had the capacity to enter into a sale agreement or deal with the deceased's estate in any way. In other words, there was no evidence that by 1981 the first defendant was an administrator of the said deceased's estate. As earlier noted, no letters of administration were annexed.

The land in question is agricultural land registered under the Registered Land Act Cap 300 Laws of Kenya. Under Section 6 of the Land Control Act any sale, transfer or disposition of agricultural land is void unless the control board in the area has given its consent. Such consent has to be given within 6 months of the making of the agreement. The applicant has not demonstrated that such consent has ever been obtained from the Land Control Board of the area in which the land is situate. Under Section 7 of Land Control Act, any money or consideration paid by the buyer in an agreement which becomes void is entitled to recover the said money or consideration as a debt. There is so far no evidence that the consent of Land Control Board was obtained by the parties to the agreement. If the agreement has become void for the lack of consent the only option would be for the applicant to recover his money as a debt.

The applicant, without evidence that he has complied with these procedures to a sale of land can not be said to be the owner of the land in question. If he has not shown that he is the proprietor, he has also not demonstrated that he will suffer irreparable loss if the injunction is not granted.

It is the applicants case that the land sale agreement was entered into in 1981. This is 2004. An injunction is an equitable remedy and has to be sought within reasonable time. The inordinate delay has not been explained by the applicant.

In the present case the respondents are registered proprietors of the disputed land. The balance of convenience tilts in their favour.

In sum the applicant has failed to establish a prima facie case with good chances of success or that he is bound to suffer irreparable loss if an injunction is not granted. The application for injunction is refused and disallowed. Costs to the respondents.

Dated at Machakos this 11th day of November 2004.

Read and delivered in the presence of

R. V. WENDOH

JUDGE