



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. E027 OF 2020

PRISCILLA MUSYOKA MUSEMBI (*Suing as the legal representative of the Estate of*

JOHN MUSYOKA MUSEMBI (deceased).....**PLAINTIFF**

VERSUS

FREDRICK KINYUNGU NGONZI.....**DEFENDANT**

RULING

1. Before the court are two Applications. The first Application dated 26th November, 2020 was filed by the Plaintiff in which he is seeking for the following reliefs:

a) That an order of injunction do issue pending hearing and determination of the suit herein restraining Defendant, his agents, servants and/or contractors from entering, remaining on, fencing, putting up structures, digging holes, cultivating, ploughing, terracing, planting trees or crops, grazing, cutting down trees, clearing natural vegetation or in any other way interfering with land parcel No. Machakos/Mua Hills/154.

b) That the Officer Commanding Machakos Police Station (OCS) and officer in charge of Mua Hills Post do ensure compliance.

c) That costs of this Application be paid by the Defendant/Respondent.

2. The second Application is dated 21st December, 2020 and was filed by the Defendant. In the Application, the Defendant is seeking to set aside the interim order of injunction issued herein on 15th December, 2020.

3. The Application dated 26th November, 2020 was supported by the Affidavit of the Plaintiff who has deponed that he is the legal representative of the deceased and that the deceased is the registered sole absolute proprietor of all that parcel of Land known as Machakos/Mua Hills/154 measuring 7.6 Hectares (19 acres) or thereabouts.

4. The Plaintiff deponed that by a written Sale Agreement dated 3rd August, 2015, the deceased agreed to sale to the Defendant fifteen (15) acres of the suit land at an agreed purchase price of Kshs. 24,750,000 payable by the Defendant to the deceased within ninety (90) days from the date of the Agreement.

5. According to the Plaintiff, it was a term of the Agreement that upon payment of the purchase price, the deceased would apply for and would obtain the requisite mandatory statutory Land Control Board's consent to sub-divide the land and transfer the fifteen (15) acres to the Defendant and that the consent was to be obtained within the statutory period provided for in the Land Control Act, that is six (6) months.

6. The Plaintiff deponed that the Defendant breached the Agreement by failing to pay the agreed purchase price within the stipulated period; that indeed by 31st December, 2018, the Defendant had only paid a total of Kshs. 9,000,000 and that the Defendant was to take possession of the aforesaid 15 acres upon completion of payment of the purchase price.

7. The Plaintiff deponed that it was an express term in the Agreement that the innocent party would be at liberty to take all the necessary legal steps against the defaulting party for the breach and seek the appropriate legal redress; that due to the breach, the deceased did not apply for the Land Control Board consent and that the Sale Agreement therefore became null and void and all monies paid to the deceased became recoverable as a debt to the estate.

8. It is the Plaintiff's case that in view of the aforesaid breach, the deceased did not put the Defendant in possession, vacant or otherwise, of the suit land; that the deceased fell ill and was hospitalised in January, 2019 and died on 8th March, 2019 and that when the Defendant learnt that the deceased was sick and hospitalised, he deposited a sum of Kshs. 5,000,000 into the deceased bank account without the deceased's knowledge and authority, which amount has remained in the deceased's bank account to date.
9. The Plaintiff finally deponed that after the deceased's death and burial, the Defendant wrongfully and unlawfully trespassed on the suit land and that on or about December, 2019, the Defendant hived off and fenced a big portion thereof and unlawfully constructed a wooden structure which he has been visiting from time to time.
10. The Application was strenuously opposed by the Defendant vide his Replying Affidavit and Grounds of Opposition dated 14th January, 2021. The Defendant deponed that vide a Sale Agreement dated 3rd August, 2015, the deceased sold to him 15 acres of the suit property for a consideration of Kshs. 24,750,000.
11. According to the Defendant, he paid a sum of Kshs. 6,850,000 to the vendor as a deposit upon execution of the Agreement for sale and that he consistently paid other instalment amounts to the tune of Kshs. 14,950,000.
12. The Defendant deponed that the vendor and the Plaintiff wilfully failed, neglected and/or refused to disclose to him that the land was cautioned or that there existed a court case in relation thereto being *Machakos High Court Civil Suit No. 32 of 2003, John Musyoka Musembi vs. Joseph Kyanya Kyengo* wherein the vendor was represented by the firm of Nzei & Company Advocates, the Plaintiff's counsel on record herein.
13. It is the deposition of the Defendant that the vendor and the Plaintiff are dishonest people who had habitually obtained monies from would be purchasers under the pretext of selling them a portion of the land only to subsequently seek to void the transactions citing non-compliance with certain provisions of the law and that although the Land Control Act requires that consent to be applied for within six (6) months, it still gives the High Court discretion to extend the period if sufficient reasons are provided.
14. The Defendant deponed that it was actually the vendor who breached the Agreement for sale by wilfully neglecting and/or refusing to disclose the existence of a caution on the land which barred them from sub-dividing or transferring the suit property; that the vendor dissuaded him from terminating the Sale Agreement stating that the caution was due to a small dispute over a 5 acres' portion of the suit land and that the vendor allowed him to use and develop 10 acres of the land.
15. It was the deposition of the Defendant that sometimes in January, 2019, the vendor informed him that Machakos HCCC No. 32 of 2013 had been decided in his favour and asked for a sum of Kshs. 5,000,000 and that he deposited the sum of Kshs. 5,000,000 in the deceased's account bringing the total amount paid to the vendor to Kshs. 14,950,000.
16. The Defendant stated that time was not of the essence in the Agreement for Sale and neither the vendor nor the Applicant served him with a completion or recession notice; that he had fully settled on the 10 acres piece of land and enjoyed quiet possession since 2016 and that he has developed the 10 acres piece of land by constructing a borehole, a four bedroomed family home and established a farm for cultivation.
17. Both Applications were canvassed by way of written submissions. Counsel for the Plaintiff submitted that the Defendant is in breach of the terms of the Sale Agreement since he has only paid a total of Kshs. 14,900,000 of the purchase price leaving a balance of Kshs. 9,100,000 and that the Sale Agreement was null and void for failure to obtain the mandatory Land Control Board consent.
18. Counsel submitted that as a consequence of the foregoing breaches and legal omissions, the Plaintiff had repudiated the sale transaction and was now demanding vacant possession of the property and that any sum of money paid by the Defendant in the attempt to purchase the property was recoverable as a civil debt.
19. The Plaintiff's counsel referred the court to the case of ***National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd and Prof. Samson K. Ogeri Civil Appeal No. 95 of 1999*** where the Court of Appeal held that a court of law cannot re-write a contract between parties and that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.
20. The Plaintiff's Counsel submitted that it was not in doubt that failure to obtain the Land Control Board consent rendered the sale null and void and that the transaction was a controlled transaction requiring consent. Counsel relied on the case of ***Gabriel Makokha Wamukota vs. Sylvester Nyongesa Donati (1987) eKLR***.
21. It was submitted by the Plaintiff's counsel that Section 22 of the Land Control Act prohibits the entering and remaining in occupation of a property where consent is required but has not been obtained; that the Defendant was guilty of the offence of entering and remaining in the suit property and that an injunction do issue over the suit land
22. The Defendant's counsel referred this court to the case of ***Charter House Investments Ltd vs. Simon K. Sang and others, Civil Appeal No. 315 of 2004***; that the Defendant did not enter the transaction with the deceased with a view of being defrauded and that the court should uphold the sanctity of the Agreement for sale and ensure that parties complete their parts of the bargain.
23. On the issue of whether a mandatory injunction can issue, the Defendant's counsel referred the court to the case of ***Nation Media Group & 2 others vs. John Harun Mwau [2014] eKLR***, where the Court of Appeal stated as follows:

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances...A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we

have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

24. Counsel submitted that there are no special circumstances demonstrated by the Plaintiff to warrant the grant of an injunction in the present case because the Defendant has been in occupation of the suit land since 2016.

25. Having considered the pleadings, the Affidavits and the submissions, the only issue that arises is whether the court should issue an injunction.

26. The test for granting of an interlocutory injunction was considered in the ***American Cyanamid Co. vs. Ethicon Limited (1975) A AER 504*** case in which the court provided that for an injunction to issue, the Applicant must satisfy three elements, namely:

i) There must be a serious/fair issue to be tried;

ii) Damages are not an adequate remedy;

iii) The balance of convenience lies in favour of granting or refusing the application.

27. These are the same grounds that had been postulated earlier on in the case of ***Giella vs. Cassman Brown (1973) EA 358*** as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages, and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience.

28. What amounts to a *prima facie* case was explained by the Court of Appeal in ***Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*** as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

29. In ***Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR***, the Court of Appeal analyzed the grounds upon which the court can grant temporary orders of injunction as follows:

*“...These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See ***Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001] Vol. 1 EA 86***. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”*

30. In the same case, the Court of Appeal stated that the party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained; the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

31. In considering whether or not a *prima facie* case has been established, the court is not required to hold a mini trial and must not examine the merits of the case closely. All that the court has to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation (*See the Nguruman case*).

32. This suit was commenced by way of a Plaint and an Application for an injunction dated 26th November, 2020. In the Plaint, the Plaintiff is seeking for a declaration that the Sale Agreement dated 3rd August, 2015 between the deceased and the Defendant regarding the suit property has become null and void for want of the consent of the Land Control Board and payment of the purchase price.

33. The evidence before this court shows that the late John Musyoka Musembi (*deceased*) is the registered proprietor of a parcel of land known as Machakos/Muia Hills/154 measuring approximately 7.6 Hectares (*approximately 19 acres*). It is not in dispute that on 3rd August, 2015, the deceased entered into a Sale Agreement with the Defendant.

34. In the said Agreement, the Defendant agreed to purchase a portion of the deceased land measuring 15 acres for Kshs. 24,750,000. The Agreement states that the Defendant was to pay Kshs. 6,850,000 on the day the Agreement was executed and the balance of the purchase price being Kshs. 17, 900,000 was to be paid within (90) days from the date of the Agreement.

35. The Agreement further provided that the Defendant would only take possession of the purchased land and develop it after completion of the Agreement. The Agreement further provided that the vendor was to obtain all the relevant consents in order to have the 15 acres transferred and registered in his name.

36. Although the deposit of Kshs. 6,850,000 was paid by the Defendant, the balance of the purchase price was never paid within 90 days as

per the Sale Agreement. Indeed, in his Affidavit, the Defendant has stated as follows:

“42. That under the agreement for sale the ten (10) acre portion of land which I have occupied since 2016 is equivalent to Kshs. 14,950,000 which I have to date paid to the vendor and this court should compel the Applicant to excise the ten (10) acre portion of the Land which I now occupy and transfer the same to me.”

37. I have gone through the Defendant’s annexures and I have not come across an Agreement qualifying the Agreement of 3rd August, 2015. Indeed, there is no Agreement before this court to show that the vendor agreed to sell to the Defendant 10 acres of the suit property at a consideration of Kshs. 14,950,000. The Agreement of 3rd August, 2015 clearly stipulated the acreage of land that the Defendant was buying and the purchase price thereof.

38. Indeed, it is not clear on which basis the Defendant took possession of the alleged 10 acres of the suit property. I say so because the Agreement of 3rd August, 2015 clearly stipulates that the Defendant was to take possession of 15 acres of the suit property upon payment of the full purchase, which was Kshs. 24, 750,000. That amount has never been paid to date.

39. The Defendant has deponed that the vendor (*deceased*) assured him that the land he was buying was free of encumbrances, and that he later on learnt that the suit land was cautioned and had a dispute being Machakos HCCC No. 32 of 2003. If that is the position, then the Defendant’s option was to have the Agreement of 3rd August, 2015 rescinded for material non-disclosure and or misrepresentation and not to invade and take possession of the suit property.

40. It is trite that courts cannot rewrite contracts for parties. The Agreement that the Defendant entered into with vendor, who is now deceased, provided that he could only take possession of 15 acres of the suit property upon payment of the entire purchase price, which he has never done to date.

41. Other than the Defendant failing to pay the purchase price within the stipulated 90-day period as stipulated in the Agreement, the parties to the Agreement have never obtained the Land Control Board consent. This being a controlled transaction, the same is governed by the provisions of Section 6 of the Land Control Act. Section 6 (1) of the Act provides as follows:

“(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land 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.”

42. Under Section 7 of the Land Control Act, consideration paid for a transaction which becomes void for want of the consent of the Land Control Board is recoverable as a debt subject to Section 22 which provides as follows:

“Where a controlled transaction; or an agreement to be a party to a controlled transaction, is avoided by Section 6 and any person –

(a) pays or receives any money; or

(b) enters into or remains in possession of the land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.”

43. The evidence before this court shows that the Defendant has never complied with the terms of the Agreement dated 3rd August, 2015 or the provisions of Section 6 of the Land Control Act. Although the Defendant deponed that he took possession of a portion of the suit property in the year 2016, and has since put up a family house, he has not informed the court on which basis he took possession of the land.

44. Indeed, the evidence annexed on the Plaintiff’s Affidavit by way of photographs shows that the digging of holes around the suit property and the fencing of the suit property was carried out by the Defendant and his agents in December, 2020 and during the pendency of this suit. That being the case, and this being a court of law and equity, it is the Defendant who should give way and vacate the suit property pending the hearing of the suit.

45. In view of the unequivocal terms of the Sale Agreement of 3rd August, 2015, which terms the Defendant has not complied with, it is the finding of this court that the Plaintiff has established a *prima facie* case with chances of success. For those reasons, the Plaintiff’s Application dated 26th November, 2020 is allowed as follows:

a) An order of injunction be and is hereby issued restraining the Defendant, his agents, servants and/or contractors from entering, remaining on, fencing, putting up structures, digging holes, cultivating, ploughing, terracing, planting trees or crops, grazing, cutting down trees, clearing natural vegetation or in any other way interfering with land parcel No. Machakos/Mua Hills/154 pending the hearing and determination of the suit.

b) The Officer Commanding Machakos Police Station (OCS) and officer in charge of Mua Hills Post do ensure compliance with the above order.

c) The costs of this Application be paid by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 7TH DAY OF MAY, 2021.

O. A. ANGOTE

JUDGE