



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANGA

ELCA NO E002 OF 2021

ANTONY MAINA NDUATI.....APPLICANT /APPELLANT

VS

SAMUEL MWANGI NDUATI.....1ST RESPONDENT

ITUDA LIMITED.....2ND RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated the 15/2/2021 against the Respondents seeking the following orders;

a. Spent

b. That a temporary order of injunction be and is hereby issued restraining the 2nd Respondent by himself, servants, agents and or employees from trespassing, occupying, staying on and or interfering in any way with the Plaintiff's quiet possession, use and occupation of the suit property being all that piece of land known as LOC.16/KIGORO/2428 pending the *inter-partes* hearing of this application.

c. That a temporary injunction be and is hereby issued restraining the 2nd Respondent from transferring, alienating, selling, charging or in any way dealing with the subject property being all that piece of land known as LOC. 16/KIGORO/2428 AND LOC. 16/KIGORO/2429 pending the inter-partes hearing of this application.

d. That a temporary order of injunction be and is hereby issued restraining the 2nd Respondent by himself, servants, agents and or employees from trespassing, occupying staying on and or interfering in any way with the Plaintiff's quiet possession, use and occupation of the suit property being all that piece of land known as LOC.16/KIGORO/2428 pending hearing of the Appeal.

e. That a temporary injunction be and is hereby issued restraining the 2nd Respondent from transferring, alienating, selling, charging or in any way dealing with the subject property being all that piece of land known as LOC 16/KIGORO/2428 AND LOC 16/KIGORO/2429 pending the hearing of the Appeal.

f. The costs of this application be provided.

2. The application is supported by the grounds annexed to the said application and the supporting affidavit of the Applicant dated the 15/2/2021. In it he deponed that on the 28/8/2014 he entered into an agreement of sale for the purchase of $\frac{1}{4}$ of an acre of land to be excised from parcel No LOC16/KIGORO/1737 with the 1st Defendant and paid the full purchase price. That it was part of the terms of the agreement that the 1st Defendant that he would subdivide the suit land and transfer the portion of $\frac{1}{4}$ acre to him.

3. It was his case that the 1st Defendant failed to transfer to him the portion of the land he purchased and instead sold the whole parcel of land to the 2nd Defendant in 2018 without excising his portion. He termed the transfer illegal and fraudulent. That he took steps to inform the 2nd Defendant of his claim on the suit land before the completion of the said transfer. That he sought help from various Government offices including in particular the office of the Deputy Commissioner- Gatanga sub County when it was agreed that the 2nd Respondent would transfer the portion of $\frac{1}{4}$ of an acre to him instead of paying the 1st Defendant the sum of Kshs 500,000/-. He has annexed an agreement marked AMN-2 in support. That following the said agreement he and the 2nd Respondent proceeded to subdivide the suit land into two portions measuring $\frac{1}{4}$ and $\frac{3}{4}$ of an acre each. That he paid the survey fees with respect to the portion of $\frac{1}{4}$ acre which he is claiming. That his

portion was registered as parcel LOC.16/KIGORO /2428 but registered in the name of the 2nd Respondent who has since refused to transfer to him.

4. That he filed suit in the lower Court SRMCC No 4 of 2019 against the Respondents seeking orders of cancellation of the subdivisions created by the 2nd Respondent and the 1st Respondent to be ordered to subdivided and transfer ¼ of acre to him.

5. He states that the Court agreed with him and granted him orders which cannot be enforced because the suit land is not in the name of the 1st Respondent but in the 2nd Respondent. That aggrieved with the said judgement he has filed an Appeal and in addition sought orders of injunction against the Respondent which is a subject of this motion.

6. The application is opposed by the Respondent through the replying affidavit of David Itume Mukuna on behalf of the 2nd Respondent. The deponent states that he purchased the suit land from the 1st Respondent upon carrying out due diligence. That later the 1st Respondent admitted to him that he had earlier sold the suit land to the Applicant which agreement was breached by the Applicant when he failed to pay the purchase price. That he later offered the Applicant the portion of ¼ acre to purchase from him but he failed to do so. In furtherance of the offer he subdivided the suit land into two portions; parcels 2425 and 2429. That before the dispute was resolved the Applicant filed the suit in the lower Court. That he has changed his mind and is no longer keen to sell the portion of the land to the Applicant. That the Applicants remedy is in pursuing a refund from his brother the 1st Respondent.

7. In his further affidavit dated the 6/5/2021 and filed on the 7/5/2021 the Applicant reiterated the contents of his supporting affidavit and added that the 2nd Respondent is lying to the Court and insisted that the agreement AMN-2 was signed by the 2nd Respondent and he cannot attempt to dishonour it now. That it was the basis of the agreement that he went ahead to subdivide the suit land into two portions measuring 1/4/ and ¾ acres respectively. That the 1/4/ acres was to be transferred to him to settle his claim.

8. Parties elected to canvass the application by way of written submissions which I have read and considered.

9. The Applicant submitted that it is not in dispute that he has been in occupation of the suit land since August 2014. That the Court acknowledged that he is entitled to the suit land and proceeded to order the 1st Respondent to transfer the land to him, an order that is now said to be in vain because the land is registered in the name of the 2nd Respondent. That the orders are incapable of being enforced in that regard. That unless the orders of injunction are granted the 2nd Respondent may dispose of the suit land rendering the Appeal nugatory.

10. On whether the has an arguable Appeal, he submitted that the memorandum of Appeal filed is not frivolous but one that has high chances of Appeal. That the preserve the substratum of his Appeal, the Court should allow the application.

11. On possible prejudice, he argued that the 2nd Respondent stands to suffer none save for what can be compensated by way of costs.

12. The Respondents filed their written submissions on the 10/6/2021. They submitted that the parcels Nos LOC.16/KIGORO /2428 and 2429 are subdivisions of parcel LOC.16/KIGORO /1737 which parcel belonged to the 1st Respondent and sold to the 2nd Respondent. The Respondents maintain that there was no privity of contract between the Applicant and the 2nd Respondent. That the 2nd Respondent purchased land from the 1st Respondent for value and if the Applicant has any claim the same should be directed to the 1st Respondent for purposes of claiming a refund or proffering a criminal case for obtaining money by false pretenses as he was sold a non-existent land.

13. Finally, that the Applicant has not met the threshold of grant of a temporary injunction as set out in the case of **Giella V Cassman Brown & Co Limited (1973) EA 358**.

14. Having considered the application, the rival affidavits and the written submissions the key issue is whether the application is merited.

15. Order 42 Rule 6 of the Civil Procedure Rules empowers this Court to grant injunctive orders in exercise of its Appellate jurisdiction. It states as follows;

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its Appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an Appeal from a subordinate Court or tribunal has been complied with”.

16. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are:

“that firstly, 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, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.”

17. The Court of Appeal in **Mrao vs First American Bank of Kenya Ltd & Two Others C.A. No. 39 OF 2002 (2003 EKLR)** defined a prima facie case in the following terms;

“A prima facie case in a civil application include but is not confined to a genuine and arguable case. It is a case 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”.

18. In the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 others EKLR** the Court of Appeal stated as follows;

“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 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....All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation....The Applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it, the Applicant’s case is more likely than not to ultimately succeed.”

19. As to whether the Applicant has proved any prima facie case, the Applicant states that he is aggrieved by the Judgement of the Court delivered on the 11/2/2021 in which the Court acknowledged that the Applicant was entitled to ¼ of the land sought and ordered the 1st Respondent to transfer the said land to him. His argument is that since the land is registered in the name of the 2nd Respondent the orders are incapable of being enforced. That if the orders of injunction are not granted against the 2nd Respondent, the 2nd Respondent might sell the land before his Appeal is heard thus rendering it nugatory.

20. The Respondents on the other hand argue that the Applicant is not deserving of the orders on four fronts; that the Applicant transacted with the 1st Respondent and has no privity of contract with the 2nd Respondent who is a purchaser for value; secondly that the Applicant has not indicated the location of the ¼ acre that he is seeking on the larger suit land- that his claim is over undefined parcel of land; thirdly that he is seeking to injunct both parcels of land thus maliciously. Fourthly that his remedy lies in refund and or a criminal case against the 2nd Respondent for obtaining monies by false pretenses.

21. I have read the pleadings, the judgement and the grounds of Appeal. The Appellant is challenging the decision of the Court in not granting prayer a) which was to cancel the subdivisions and registration of the two parcels of land and order the 1st Respondent to transfer a ¼ of acre to him. It is not in dispute that the Court found that the Applicant is entitled to the land. This in my view is not a frivolous Appeal and so as not to render the whole nugatory, the view of the Court is that the Applicant has demonstrated a prima facie case. The role of the Court at this stage is not to determine the merits or otherwise of the Appeal as this is reserved for the Appellate Court to determine.

22. With respect to irreparable harm, it is clear that if the injunction is not granted the possibility of a successful Appeal amounting to a paper judgment is high. It is in the interest of justice that the substratum of the application is preserved to avoid such a situation.

23. The application is accordingly allowed in the following terms;

a. That a temporary order of injunction be and is hereby issued restraining the 2nd Respondent by himself, servants, agents and or employees from trespassing, occupying staying on and or interfering in any way with the Plaintiff’s quiet possession, use and occupation of the suit property being all that piece of land known as LOC.16/KIGORO/2428 pending hearing of the Appeal.

b. That a temporary injunction be and is hereby issued restraining the 2nd Respondent from transferring, alienating, selling, charging or in any way dealing with the subject property being all that piece of land known as LOC 16/KIGORO/2428 AND LOC 16/KIGORO/2429 pending the hearing of the Appeal

c. Costs shall be in favour of the Respondents.

24. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 24TH DAY OF JUNE 2021

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kingangi HB for Kirimi for the Appellant

Kimathi for the 1st & 2nd Respondents

Court Assistant: Alex