



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 41 OF 2019

LUCY NJERI K. KIAMBUA.....1ST PLAINTIFF

SACINTA SISINA KIAMBUA.....2ND PLAINTIFF

VERSUS

JOSEPH GAKAMI NDUNGI.....DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' Notice of Motion application dated the 2nd May, 2019 brought pursuant to Order 51 and Order 40 Rule 1 of the Civil Procedure Rules. The Plaintiffs seek orders of injunction against the Defendant, his agents, servants, employees from cultivating, building, mining and or interfering with land parcel number NGONG/ NGONG/ 755, hereinafter referred to as the 'suit land', pending the determination of this suit.

The application is premised on the grounds on the face of it and the supporting affidavit of SASINTA SISINA KIAMBUA the 2nd Plaintiff where she deposes that together with the 1st Plaintiff, they are the registered proprietors of the suit land. She contends that on 5th July, 2008 the 1st Plaintiff entered into a Sale Agreement with the Defendant for the sale of two (2) acres out of the 2.43 hectares of the suit land at a consideration of Kshs. 1, 600,000/= with the purchase price to be paid in instalments upto which on completion, a transfer would be effected. She claims the Defendant breached the terms of the Sale Agreement and with no authority/ consent from the Plaintiffs unlawfully entered the suit land, took possession of the entire parcel. She explains that without consent of the Plaintiffs, the Defendant has proceeded and continues to waste, destroy as well as damage the suit land.

The application is opposed by the Defendant who filed a replying affidavit where he deposes that he entered into an Agreement with the 1st Plaintiff for purchase of 2 acres from suit land, paid the purchase price from June 2007 upto 5th July, 2008 which terms were condensed in a Sale Agreement dated 5th July, 2008. He avers that he entered into another Agreement with the 2nd Plaintiff on 7th February, 2011, for purchase of one acre from suit land and has to date paid a total of Kshs. 967, 500/= out of Kshs. 1, 800,000/=. He explains that the 1st Plaintiff had in January, 2008 permitted him to enter the entire suit land and he completed paying the purchase price on 27th April, 2010 but the 1st Plaintiff despite requesting for a further Kshs. 4,000/= to procure consent of the Land Control Board, failed to do so. He contends that after confirmation of the Grant for the estate of the late Nkaurrai Nkoroki that owned suit land wherein the two Plaintiffs' are beneficiaries, the said Plaintiffs have failed to transfer the three acres he purchased to him. Further, that through the Kajiado District Surveyor, he realized the area stated in the Certificate of Title as six (6) acres was not commensurate with the area on the Ground which is only 3.5 acres. He avers that despite seeking audience with the Plaintiffs and elders they have declined to transfer the portion he purchased to him. Further, the Plaintiffs reported him to the local administration for trespass but he was absolved of the same after he explained he was a purchaser and presented his documents. He reiterates that he holds the original title to the suit land and the Plaintiffs failed to follow the due process to obtain another one.

The Plaintiffs filed a further affidavit where they reiterated their claim and insisted the Defendant was a trespasser on the suit land. They insisted they acquired the new title to the suit land legally as they adhered to the due process. They contend that without obtaining consent of the Land Control Board, no subdivision or transfer was effected. Further, that the Defendant did not purchase the entire suit land and he is hence occupying the same illegally.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 2nd May, 2019 including the parties' respective affidavits and rivaling submissions, at this juncture the only issue for determination is whether the Plaintiffs' are entitled to orders of a temporary injunction pending the determination of this suit.

The Plaintiffs in their submissions contended that they had established a prima facie case as they are the registered proprietors of the suit land. Further, they obtained the title legally and will suffer irreparable injury which cannot be compensated by an award of damages if orders sought are not granted and the balance of convenience tilts in their favour. To buttress their averments, they relied on the following decisions: **Giella Vs Cassman Brown Company Limited (1973) EA, 358; Robert Mugo Wa Karanja V Ecobank (Kenya) Limited & Another (2019) eKLR; HCCC No. 135 of 1998 Insurance Company of East Africa Vs Attorney General & 3 Others; Joseph Mbugua Gichanga V Cooperative Bank of Kenya Ltd (2005) eKLR.**

The Defendant in his submissions insist the Plaintiffs have not established a prima facie as they received the full purchase price from him. Further, to rely on the absence of consent from the land control board is missing the point because from the date the 1st Plaintiff received the final purchase price she created a constructive trust with him for the two (2) acres. He insists the Plaintiffs have not demonstrated the injuries they stand to suffer as the 1st Plaintiff granted him possession of the two (2) acres of land and 2nd Plaintiff granted him possession of one (1) acre. To support his averments, he relied on the case of **Nguruman Limited V Jan Bonde Nielsen & 2 Others CA No. 77 of 2012 and Willy Kimutai Kitilit V Michael Kibet (2018) eKLR;**

In line with the principles established in the case of **Giella Vs Cassman Brown (1973) EA 358**, I will proceed to decipher whether the Plaintiffs have established a prima facie case to warrant the orders sought for temporary injunction.

In the first instance as to whether the Plaintiffs have demonstrated a prima facie case with probability of success, the Court of Appeal while defining a prima facie case in the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** explained that it is a case in which on the materials presented to the court or tribunal, it will conclude there is an apparent infringement of the Applicants' rights.

The Plaintiffs claim they are the registered proprietors of the suit land and the Defendant has trespassed thereon and commenced wasting it. They admit that on the 5th July, 2008 the 1st Plaintiff entered into a Sale Agreement with the Defendant for the sale of two (2) acres out of the 2.43 hectares of the suit land at a consideration of Kshs. 1, 600,000/= with the purchase price to be paid in instalments upto which on completion, a transfer would be effected. They insist the Defendant breached the terms of the Sale Agreement and without authority/ consent from the Plaintiffs, he unlawfully entered the suit land, took possession of the entire parcel and has continued to waste, destroy and damage it.

The Defendant in response, explains that he purchased two (2) acres of the suit land from the 1st Plaintiff and paid the full purchase price. Further, that he entered into another Agreement with the 2nd Plaintiff for purchase of one acre from suit land and has todate paid a total of Kshs. 967, 500/=. He insists it is the 1st Plaintiff who permitted him to enter the suit land as he awaited for the transfer to be effected to him after confirmation of the Grant to the estate of the late Nkaurai Nkoroki that owned the suit land. Further, that through the Kajiado District Surveyor, he realized the area stated in the Certificate of Title as six (6) acres was not commensurate with the area on the Ground which is only 3.5 acres. He states that the Plaintiffs have declined to transfer the land to him despite Obtaining a Certificate for Confirmation of Grant and claim he has trespassed thereon.

Looking at the documents annexed to the various affidavits especially the Sale Agreements and Acknowledgments of payments, it is evident that there was indeed a transaction between the Plaintiffs and Defendant in respect to the suit land and they actually received consideration from him. The Plaintiffs claim they acquired a fresh title and have not explained why they failed to inform the Land Registrar that the Defendant had the original one in his custody. I note the Plaintiffs reported the Defendant for the acts of trespass with the local administration but they absolved him. From the averments in the respective affidavits, to my mind I find that the Plaintiffs are not being candid. They have not explained how the Defendant has been on the suit land from 2008 and they only filed a suit in 2019. Further, they have not informed Court if they refunded the Defendant his purchase price after they failed to transfer the three acres to him. They contend that no consent of the Land Control Board was obtained to enable it subdivide and transfer the land but do not state who was responsible for it. It is trite that injunctive reliefs are equitable remedies and a party seeking the same should come with clean hands. However, based on the facts before me including my analysis above as well as associating myself with the decisions I have cited, I find that the Plaintiffs have not demonstrated a prima facie case as against the Defendant to warrant the orders sought in the instant application.

Further, in line with the parameter set in the case of **Nguruman Limited Vs Jan Bonde Nielsen**, since the Plaintiffs has failed to prove a prima facie case, I need not proceed to deal with the two other limbs.

It is against the foregoing that I find the Notice of Motion application dated the 2nd May, 2019 unmerited and will proceed to dismiss it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN KAJIADO THIS 21ST DAY OF JUNE, 2021.

CHRISTINE OCHIENG

JUDGE