



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 66 OF 2019

PAUL KINUTHIA RUTHA.....PLAINTIFF/APPLICANT

VERSUS

BERNADETTA WAMBUI WANYOIKE....1ST DEFENDANT/RESPONDENT

THE REGISTRAR OF TITLES.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion** Application dated 5th April 2019, by the Plaintiff/Applicant seeking for orders that;

- 1. That this Honourable Court be pleased to issue a inhibition order over all that land parcel known as L.R No.7497/66 in terms of Section 68 of the Land Registration Act No. 3 of 2012 pending the hearing and determination of this suit.***
- 2. That a temporary injunction do issue restraining the 1st Defendant by herself, her servants agents and/or employees from building, trespassing, alienating, selling, interfering, occupying or otherwise dealing with all that land known as L.R No.7497/66 or any part thereof pending the hearing and determination of the suit fled herein.***
- 3. That a mandatory injunction do issue directing the 1st Defendant to remove the barbed wire fence which she erected on the boundary s of L.R No.7497/66 and 7497/64 on or about 16th March 2019 and in default thereof the Plaintiff be at liberty to remove the same and recover the expenses from the 1st Defendant.***
- 4. That a temporary injunction do issue restraining the 2nd Defendant from registering, any instrument disposing or creating any interest over L.R 7497/66 or any part thereof pending the hearing and determination of this suit.***
- 5. That the Plaintiff be at liberty to collect and secure all the building materials which he had purchased and kept on L.R No. 7497/66.***
- 6. That the Plaintiff be at liberty to harvest the cash/food crops which he had planted in L.R 7497/66 as and when the harvest falls due and to continue tilling the land pending the hearing and determination of this suit.***
- 7. That the O.C.S Kikuyu Police Station do provide the necessary security and maintain the peace during the service and enforcement of any orders granted herein.***
- 8. That the costs of this Application be provided for.***

The Application is premised on the grounds that vide a written agreement the Plaintiff/Applicant purchased **5 acres** of land from the 1st defendant/Respondent which the said land was to be excised from **L.R 7497/9**. That the 1st Defendant/Respondent delivered possession of the **5 acres** to the Plaintiff/Applicant and he has been in quiet occupation since **2007**, and has developed the said land which value has appreciated. However the 1st Defendant/Respondent has only delivered **1.75 acres** to the Plaintiff/Applicant and invaded the **3.25 acres** and purported to fence it notwithstanding the fact that the Plaintiff had planted trees and other crops as well as bringing in building materials.

In his **Supporting Affidavit**, the Plaintiff/Applicant averred that he bought **5 acres** from the 1st Defendant at a cost of **Kshs.800,000/= per each acre** to which he took a credit facility with **Waumini Sacco** totalling to **Four Million Kenya Shillings (Kshs.4,000,000/=)**. He averred that when they entered into a **Sale Agreement**, they factored a lengthy completion period as he was not aware of when his financier would release to him the amount of **Ksh.2,500,000/=** being the balance of the purchase price. However, he paid the sum of **Kshs.1,500,000/=** to the 1st Defendant/Respondent, who delivered vacant possession of the entire **5 acres** and he went into occupation and since taking

possession, he carried out extensive developments. It was his contention that in **September 2009**, he received the second tranche of **Kenya Shilling Two Million Five Hundred Thousand (KShs.2,500,000/=)** but when he tried to give the 1st Defendant/Respondent the said amount, she became evasive and refused to receive the monies. He then sought legal advice from the **Law Firm of Kamangu & Co Advocates**, who wrote to the 1st Defendant/Respondent informing her that the balance of the purchase price was available for collection, but she refused to heed to the said letter.

He contended that in **April 2010**, he received a Certificate of title for **plot No.7497/64(I.R 135817)** measuring **1.75 acres** and he expected that in due course the 1st Defendant/Respondent would transfer the remaining **3.25 acres**, to him and he remained in occupation of the land to date. That in the beginning of **2019**, he decided to carry out other developments, but on the **16th of March 2019**, he found strangers in this compound erecting barbed wire fences and informed him that they had been hired by the 1st Defendant/Respondent, since he was only entitled to **1.75 acres**. He reported the matter to the Police but they refused to intervene and when his Advocates conducted a search, it revealed that the 1st Defendant/ Respondent had transferred **L.R 7497/66**, to herself from the Estate of her deceased husband and that she was never keen on meeting her obligation despite the Plaintiff/Applicant having borrowed from a financial institution and repaying the loan at an interest of 12%.

It was his contention that he had been advised by his Advocates that since the 1st Defendant/Respondent delivered vacant possession and he has been in active occupation **for 12 years**, his equitable interest in the said land has never abated and a constructive trust arose once the 1st Defendant/Respondent registered the land in her name. He urged the Court to allow his application as the land has high sentimental value and is of huge economic importance and alienation will inflict irreversible loss which cannot be compensated.

The Application is opposed and the 1st Defendant/Respondent swore a **Replying Affidavit** on the **13th of May 2019**, and averred that it was an understanding of the parties that the property would be surveyed and subdivided in order to excise the **5 acres** of the property to the Plaintiff. That the said property was subdivided, but she was informed by the County Government officials that there was need to carve out public roads to access the property and she immediately informed the Plaintiff through her Advocates vide a **letter dated 17th November 2009**, confirming that the sale of the **5 acres** would not be practically possible. They then offered the sale of **2 acres** which was equivalent to the deposit that was paid. She averred that the parties then executed a transfer document to transfer **2 acres** less $\frac{1}{8}$ equivalent to the amount paid by the Plaintiff. That she then delivered vacant possession of the **1.75 acres**, and the Plaintiff/Applicant has been in occupation and that he has never complained on the issue of the transfer of the remaining **3.25 acres** and the parties have been in clear understanding as it is clear from the **Sale Agreement** that the purchase price was payable on or before completion date and failure to which she would transfer a portion of the property equivalent to the amount. She contended that the Plaintiff/Applicant has to date not paid any balance of the purchase price and therefore his claim is an afterthought.

The Plaintiff/Applicant filed a **Further Affidavit** and averred that the two access roads leading to the parcel of land were already in existence at the time of the execution of the sale agreement and that further there is no proof of the alleged communication by the County Government of the need to carve out two access roads. It was his contention that the transfer of the $\frac{1}{8}$ acre was done in **2016**, and he still remained in occupation and the letter sent on **6th October 2009** to the 1st Defendant/Respondent was a completion Notice which failed to fulfil.

The Application was canvassed by way of written submissions to which this Court has now carefully read and considered. The Court has also considered the annexures thereto.

The Plaintiff/Applicant in this instant has sought for temporary and mandatory Orders of injunction. The issue for determination is **whether or not the Plaintiff/ Applicant is entitled to the orders sought**.

In determining whether or not the Plaintiff/Applicant is entitled to the orders of temporary injunction as sought in the Application, the Court is guided by the principles as set out in the case of **Giella...Vs...Cassman Brown Co. Ltd 1973 EA 358**, wherein the Plaintiff/Applicant has to establish that:-

- a) **The Applicant must establish that he has a prima facie case with probability of success.**
- b) **That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c) **When the Court is in doubt, to decide the case on a balance of convenience.**

A *prima-facie* case was described in the **Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, to mean:-

“In civil cases, it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

Has the Plaintiff/Applicant established that there is a *prima facie* case with a probability of success? In the case of **Naftali Ruthi Kinyua ... Vs... Patrick Thuita Gachure & another [2015] eKLR**, the Court of Appeal held that:-

“It is well established that, in order to secure the injunctive relief sought, the appellant must first establish a *prima facie* case with a high chance of success. In this case, the appellant must show that he owned the suit property, or had a valid claim, which would be capable of defeating a third party claim in respect of the same property.”

In this instant case, it is not in doubt that the Plaintiff/Applicant and the 1st Defendant/Respondent entered into a **Sale Agreement** for sale of **5 acres**. It is apparent that upon the execution of the **Sale Agreement**, the 1st Defendant/Respondent only transferred to the Plaintiff/Applicant **1.75 acres** of the land and failed to transfer the rest of the suit property as per the sale agreement though the Plaintiff/Applicant had always been in occupation of the **5 acres** of the suit land. It is therefore not in doubt that the Plaintiff/Applicant has a valid claim to the land as there exist evidence that the 1st Defendant/Respondent was to sell to him **5 acres** and only **1.75 acres** of the land has been transferred to him. The Plaintiff/Applicant has also alleged that the 1st Defendant/Respondent failed to transfer to him the rest of the land being **3.25 acres** as had been agreed by the parties. Whether or not the 1st Defendant/Respondent should transfer the remainder of the suit property, is an issue that can only be determined at the main trial.

This Court has seen the sale agreement that clearly states that the 1st Defendant/Respondent was to transfer to the Plaintiff/Applicant the **5 acres** and that the completion dated was five years. The Court also notes that there was a letter sent out to the 1st Defendant/Respondent requiring her to collect the balance of the purchase price. The allegations by the 1st Defendant/Respondent that the County Government officials had informed her that the property was to be used as a road reserve have not been backed by any evidence. Even so, it is this court's opinion that at this stage the Court is not required to go to the merits of the case. At this stage all that the Court need to establish is whether the Plaintiff/Applicant has a valid claim and therefore has established a *prima facie* case. Consequently, the Court holds and finds that by the material presented before it, there seems to be a valid claim and that a right of the Plaintiff/Applicant that may have been violated and therefore the 1st Defendant/Respondent has to rebut the same. Therefore, the Court finds that the Plaintiff/Applicant has established a *prima facie* case, with probability of success at the trial.

On the Second limb of whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, it is apparent that the Plaintiff/Applicant has been in possession of the suit land, having taken possession upon execution of the agreement in the year 2007 and has lived on the suit land. It is trite that a crystallized right which is violated cannot be equated to compensation by damages. See the Case of *Niaz Mohammed Janmohammed...Vs...Commissioner for Lands & 4 Others (1996) eKLR*, where the Court held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought”.

Equally in this case, the Court finds that if the Applicant's rights are infringed, no amount of money can compensate such infringement as pointed out by the Plaintiff/Applicant who has been in possession and even tilted the suit property. Therefore the Court finds that the Applicant has established that he is likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages.

On the Third limb, the Court is not in doubt. However, if the Court is to decide on a balance of convenience, the same will tilt in favour of maintaining the status quo and the *status quo* herein is by directing the Respondents to desist from carrying out any dealings in the suit property until the suit is heard and determined. Thus the *status quo* herein should remain what was in existence before the Respondents allegedly unlawful actions. See the case of *Agnes Adhiambo Ojwang...Vs...Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 o 2000*, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

Apart from the temporary injunction, the Plaintiff/Applicant has also sought for various other orders that include a mandatory injunction directing the 1st Defendant/Respondent to remove the barbed wire fence that had been erected on the boundary. The considerations for granting interlocutory Mandatory injunctions were well stated in the case of *Kenya Breweries Ltd & Another ...Vs... Washington O. Okeyo [2002] eKLR* where the Court of Appeal stated:-

“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which read:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’”

Has the Applicants herein established existence of exceptional circumstances as was stated in the case of *Kenya Breweries Ltd & Another....Vs.... Washington O. Okeyo, Civil Appeal No.332 of 2000 1EA 109*, (supra):

It is not in doubt that the Plaintiff/Applicant got possession of the suit land in the year **2007** and as such he was allowed possession and all the rights that appertained to the suit property. Further it is also not in doubt that the agreement allowed the Plaintiff **5 acres**. The Plaintiff has alleged that he entered into the suit property and has developed it and has further tilled the land and planted crops to which he has urged the Court to allow him harvest the said crops as and when they are ready. This allegations have not been denied or controverted by the 1st Defendant/ Respondent and the Court will take it to be the gospel truth. As it is not in doubt that the Plaintiff/Applicant had all the rights to be in the suit land and exercise all the rights and privileges that appertain to it, it is this Court's findings that there have been special circumstances that have been provided by the Plaintiff/Applicant to warrant the grant of the orders sought.

It is therefore only fair and just to allow the Plaintiff/Applicant to collect his building materials and harvest his crops when they are ready for harvest as he had planted them while he had all the rights to do so.

The Upshot of the foregoing is that the Plaintiff/Applicant has established that he is deserving of the orders sought in the application herein.

Having now carefully read and considered the instant Application, the **Supporting Affidavit**, the annexures thereto and the written submissions, the Court finds that the Plaintiff/Applicant **Notice of Motion** Application dated **5th April 2019**, is merited and the same is allowed entirely in terms of **prayers No.3, 5, 6, 8, 9, 11 and 13** of the said Application.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of January 2020.

L. GACHERU

JUDGE

23/01/2020

In the presence of

Mr. Luseno holding brief for Mr. Kibiku for Plaintiff/Applicant

Mr. Oigara for Mr. Macharia for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Lucy - Court Assistant.

L. GACHERU

JUDGE

23/01/2020