REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

ELC CASE NO. 26 OF 2020

SIMON ABEL YANO.....1ST PLAINTIFF/APPLICANT

JOHN N. BERNARD.....2ND PLAINTIFF/APPLICANT

VERSUS

JAN CHRIS ESSELINK.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application dated 12th June, 2020 seeking for the following reliefs:

a) Spent.

b) That pending the hearing and determination of this Application inter-parties, the Respondent, whether by himself, his servants, agents and/or employees be barred by orders of temporary injunction from selling, charging, leasing, offering for sale, trespassing and/or in any other way dealing with that parcel Of land known as ELDORET MUNICIPALITY (ILULA) 6101/1 as per Title No. L.R 64947 and thereafter pending the hearing and determination of the main suit.

c) Costs of the Application be provided for.

The court granted an order of status quo to be maintained pending the hearing of this application inter partes. Counsel agreed to canvass the application vide written submissions which were duly filed.

APPLICANT'S CASE

Counsel for the applicant relied on the Giella Casman Brown case on the principles for grant of injunction and further cited the case of **Amir Suleiman v Amboseli Resort Limited [2004] eKLR Ojwang J** (as then was) held that;

> *'……..counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- " A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"…."*

Counsel submitted that it is the plaintiff/applicants' case that they entered into a sale agreement with the defendant/respondent on 20th December, 2018 for purchase of the suit land at a consideration of Kshs. 90,000,000/ of which they paid a deposit of Kshs. 50,000,000/ upon execution and the balance of Kshs. 40,000,000/ on 30th December, 2019.

Counsel submitted that the plaintiff wrote a demand letter to the defendant demanding the completion of the agreement but he never responded and that the plaintiffs will lose their purchase price if the defendant sells the suit land to a third party.

Mr. Mathai relied on the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR** where the Court of Appeal stated:-

> *"A Court of Law cannot rewrite a contract between-the parties. The parties are bound by the terms of their contract unless coercion, fraud or Undue influence are pleaded and proved.*

Counsel further cited the case of **FINA BANK LIMITED vs SPARES & INDUSTRIES LIMITED [2000] eKLR** where the court held that:

> *"It is clear beyond peradventures that save for those special cases were equity might be prepared to relieve a party from a bad bargain it is ordinary no part of equity function to allow a party to escape from a bad bargain."*

Mr. Mathai submitted that the intentions of the parties were clear from the agreement entered by the parties dated 20th December, 2018 and that the plaintiffs are entitled to orders of injunction as they have established a prima facie case.

On the issues of damages counsel cited the case of **Francis Githinji Karobia v Stephen Kageni Gitau [2017] eKLR** where Kimau J stated that:

> *"this court notes that land being unique in nature and character damages in certain instances would not constitute an adequate remedy."*

Counsel therefore urged the court to find that damages would not be adequate remedy and that the balance of convenience tilts in favour of the plaintiffs.

RESPONDENT'S CASE

Counsel for the respondent relied on the replying affidavit filed by the respondent and stated that the respondent is the registered owner of the suit land in Eldoret Municipality, Uasin Gishu District known as Land Reference No. 6101/1 comprised in certificate of title registered as IR 64947 and more particularly delineated on Land Survey Plan No. 156721 annexed to the transfer registered as I.R No. 19224/6 measuring approximately 24.21 Ha otherwise known as Tembelio/lllula LR. No. 6101/1 which is conclusive evidence of ownership hence the absolute and indefeasible owner thereof.

Counsel relied on the provisions of Section 26 of the Land Registration Act No. 3 of 2012 provides that;

> **"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission shall be taken by all courts as primafacie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements**

Counsel cited the case of **Michael H. K. Lang'at v Muigai Commercial Agencies Ltd & 3 others [2014] eKLR** where it was held:-

> *"Firstly, I find that the plaintiff has not established a prima facie case for reason that he is no longer registered as the owner of the suit property, which is now registered in the name of the 1st defendant who produced evidence of its title to the same. The plaintiff therefore has no current right or interest in the suit property capable of being protected or preserved.*
>
> *The suit property having already been transferred and registered in the names of the 1st and 2nd defendants, title would only be defeasible if it is established that title to the same had been acquired by either fraud or illegal, unprocedurally or through a corrupt scheme. The 1st plaintiff has not established any of these infractions that had been committed by the 1st and 2nd defendants in the acquisition of the suit property, and thus any claim against their title would be bound to fail. "*

Mr. Korir submitted that the respondent being the owner of the suit land and the process of registration having been done procedurally is the bona fide and legal owner which is indefeasible. That it was the respondent's evidence that he has never offered for sale the suit land to anyone including the plaintiffs.

Counsel urged the court to find that the plaintiffs have not established a prima facie case with a probability of success. On the second limb , counsel submitted that the purported sale agreement between the Plaintiffs/Applicants and the Defendant/Respondent if at all there was one is vitiated by fraud and as such is invalid and unenforceable.

Further that it is the respondent's case that the mark impressed on the execution part of the purported sale agreement is neither his nor is it in his handwriting and that the same is a well calculated scheme by the Plaintiffs/Applicants to fraudulently defeat his legal title over the suit property through forgery.

Counsel also submitted that the Defendant/Respondent has commenced criminal proceedings against the Plaintiffs/Applicants herein for the offence of forgery and uttering a false document, by lodging a complaint at Eldoret Police Station under OB No. 40/6/8/2020 and the same is pending investigation by the Directorate of Criminal Investigations (DCI). Counsel therefore urged the court to find that the plaintiffs have not proved a prima facie case against the respondent hence the application should be dismissed with costs.

ANALYSIS AND DETERMINATION

This is an application for injunction and the issues for determination are as to whether the applicant has established a prima facie case with a probability of success, whether damages are an adequate remedy and where the balance of convenience lies in case the court is in doubt.

On the first issue as to whether the plaintiffs have established a prima facie case, the applicants claim that they entered into a sale agreement with the respondent over the suit land and deposited Kshs. 50,000,000/- as part of the consideration., however they have not attached any

proof of this payment. Kshs. 50,000,000/- is a colossal sum of money therefore in order to prove that there was part performance of the contract, it would have been prudent to provide evidence of any such transaction. Was the money paid in cash or was it paid into a bank account. Even though the agreement states that it was paid upon execution, it does not state the mode of payment.

The validity of the sale agreement is in question and there is a complaint at the DCI to investigate the same as to the authenticity of the signature which was appended to the agreement. At this preliminary stage the court cannot delve into the merits of the case but is not precluded from expressing a prima facie view of the matter as was held in the case of **Thomas Nyakamba Okong'o -Vs- The Co-operative Bank of Kenya Ltd [2012]eKLR**. Where the court held as follows: -

> *"In determining this application, I am well aware that at this stage the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true."*

The respondent has deponed that he has reported the matter to the DCI for investigations as the signature on the agreement does not belong to him and that he has never sold or offered the suit land for sale to anyone including the plaintiffs.

The plaintiff also admit that the respondent is the registered owner of the suit land and that in the purported sale agreement they had not paid the full purchase price. I find that the plaintiffs have not established a prima facie case with a probability of success.

On the second limb on the issue of damages being an adequate remedy, in the case of **Nguruman Ltd v Jan Bonde Nielsen and 2 Others [2014] e KLR** the Court of Appeal reiterated the principles to be considered with respect to interlocutory injunctions. The court observed that:

> *"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already settled by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:*
>
> *In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:*
>
> *a) establish his case only at a prima facie level*
>
> *b) demonstrate irreparable injury if a temporary injunction is not granted.*
>
> *c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."*

The Court further stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. Such that, it is not enough that the Applicant establishes a prima facie case, he must further successfully establish irreparable injury, that is injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the adequacy of damages, the court will consider the balance of convenience. Conversely, where no *prima facie* case is established, the court need not consider irreparable injury or balance of convenience. The court emphasized that the standard of proof is to *prima facie* standard.

The applicants have not proved that they will suffer damages if an order of injunction is not issued. Further that they cannot be compensated by way of damages. I find that the application lacks merit and is therefore dismissed with costs to the respondent.

DATED* and *DELIVERED* at *ELDORET* this *13TH DAY* OF *October, 2020

DR. M. A. ODENY

JUDGE