



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 36 OF 2019**

**EVANS MAJANI LIYOSI.....PLAINTIFF**

**VERSUS**

**BELICE MUHENGE AGOLA.....1<sup>ST</sup> DEFENDANT**

**JARED LUVAI NDAYALA.....2<sup>ND</sup> DEFENDANT**

**MUSA LITU NDAYALA.....3<sup>RD</sup> DEFENDANT**

**(Sued as the Administrators of the Estate of**

**DISHON NDAYALA AGOLA (Deceased)**

**AND**

**PETRO OIL KENYA LIMITED.....INTERESTED PARTY**

**RULING**

1. This is a ruling on two consolidated applications, one dated **24/4/2019** and another one dated **28/10/2019**.
2. The application dated **24/4/2019** (hereinafter also referred to as "*the first application*") which was filed in court on the same date has been brought by the plaintiff. It seeks the following orders:-
  - (a) ...spent
  - (b) **That there be a temporary injunction restraining the defendants by themselves, servants, agents, associates or any other person/parties claiming title through them from alienating, selling, transferring, leasing, wasting or in anyway whatsoever dealing/interfering with the suit property LR No. 2116/486 (I.R No. 23967) situated in Kitale Municipality Trans-Nzoia County/District pending the hearing and determination of this suit.**
  - (c) **That the court fix the application for inter-partes hearing.**
  - (d) **That costs be provided for.**
3. The applicant has brought the application under **Order 40 Rule 1 and 2 of the Civil Procedure Rules (2010) and Sections 3 and 3A of the Civil Procedure Act**. The application is supported by affidavits of the plaintiff sworn on **24/4/2019** and **27/6/2019** which reiterates the grounds at the foot of the application.
4. The interested party swung into these proceedings vide an application dated **28/10/2019** (hereinafter referred to as "*the second application*"). In that application it sought following orders:
  - (a) ...spent
  - (b) **That the interested party/applicant be enjoined in this suit**
  - (c) **that the court be pleased to issue a temporary injunction to restrain the plaintiff and the defendants, their agents,**

**servants and/or assigns from interfering with the interested party's tenancy pending the hearing and determination of this application and thereafter the suit;**

**(d) That the honourable court do issue such other directions and/or orders as the court may deem just and expedient to grant;**

**(e) That the costs be provided for.**

5. That application is brought under **Article 25 (c), 40, 50 and 159 of the Constitution of Kenya 2010 Sections A1, 1B, 3A and 3B of the civil Procedure Act and Order 1 rule 10 and Order 51 rule 1 of the Civil procedure Rules 2010**. It is supported by the sworn affidavit of **Benjamin Gathura Kingori** sworn on **28/10/2019** and another one sworn on **15/11/2019** by the same deponent. It is opposed by the plaintiff vide his affidavit of **David Nyakango Onyancha** sworn on **13/11/2019**. However the entire application appears to be in opposition to the first application.

6. The grounds upon which the first application is made are that the plaintiff is a *bona fide* purchaser of the entire suit property comprised in title **LR No. 2116/486(I.R No.23967)** situated in Kitale Municipality, Trans-Nzoia County; that the plaintiff has paid the defendants **Kshs. 37,600,000/=** leaving a balance of **Kshs.2,400,000/=** which is to be paid once the respondents execute transfer documents, surrender the original title deed with all the completion documents, and the transfer registered in favour of the applicant as per the terms of the agreement of sale of **26/7/2018**; that the defendants have become dodgy, evasive and have ignored to surrender all the completion documents to the applicant to register the transfer; that the applicant is ready and willing to pay the balance of **Kshs.2,400,000/=** to the defendants; that there is a valid, enforceable contract between the applicant and the respondents and that the suit property is special to the applicant in view of its site/location, proximity to Kitale town and is conducive for the petroleum and oils products business that the applicant wishes to venture into.

7. The grounds in the first application are amplified in the plaintiff's supporting affidavit of **24/4/2019** and **27/6/2019**. Exhibited by way of affidavit evidence is a copy of an agreement dated **26/7/2018** between the plaintiff and the **3** defendants in respect of the suit land drawn by Kidiavai & Co. Advocates and apparently signed by all the parties and also attested to by an advocate, a copy of a letter of offer dated **9/1/2018** to the Managing Director Petro Oil Kenya Ltd offering to sell the suit land to the interested party for **Kshs.35,000,000/=**, a copy of a letter dated **21/2/2018** from the interested party declining the offer and drawing attention to a certain lease between the parties while warning that the seller should not accept any other offer before giving the interested party an opportunity to match that offer; there is also a copy of the title to the property and letters of administration and a copy of demand letter dated **3/1/2019** to the defendants demanding completion documents.

8. In the affidavit dated **27/6/2019** the plaintiff deponed that a lawful sale agreement had been executed by the defendants and the purchase price was paid to the administrators as stated in that agreement, which consideration monies were shared amongst the beneficiaries of the estate; he referred to the contents of the agreement stating that the agreement was voluntarily executed; that the interested party was given a first priority to purchase the land but declined, thus paving the way for the purchase by the plaintiff.

9. In reply to the application the defendants filed a replying affidavit sworn on **21/6/2019** by the three defendants. In that affidavit the deponents state that the applicant has never paid any money for the suit land; that it was incumbent on all parties to procure consent from the tenants, the beneficiaries of a trustee as established by the succession court, and the court which consent the applicant never obtained. The deponent admits that the negotiations with the plaintiff resulted into three agreements but the price was not agreed on since the administrators and the beneficiaries could not agree.

10. As I have stated hereinbefore the application dated **28/10/2019** appears to be in opposition to the plaintiff's application. The interested party also filed a replying affidavit dated **26/11/2019** in respect of the application dated **24/4/2019**. The gist of the interested party's application and replying affidavit is as follows: that the interested party has a stake in the suit property pursuant to a lease agreement executed in **2003** for a ten year period; that in **2006** the lease was extended for another **20 years** till year **2023**; that the interested party is still in possession and occupation of the suit land pursuant to that agreement; that an order of specific performance may occasion the eviction of the interested party from the suit land yet the sale was allegedly in contravention of the interested party's right in the property; that the lease provided that the applicant was to be given notice of intention to sell and the price in order for it to exercise the first option to purchase the suit land in default of which the same could thereafter be sold to a third party; that the seller cannot purport to sell the suit land to third party without giving the interested party an opportunity to match the offer and therefore the sale agreement with the plaintiff is null and void; that the plaintiff was aware of the interested party's right over the suit land at the time of the execution of the sale agreement and that the interested party has invested heavily on the suit land. In the interested party's replying affidavit the same matters in the application are reiterated with the addition that the plaintiff is not entitled to equitable remedies, having come to court with unclean hands as he had known of the lease before purchase; that its constitutional rights to property risks being infringed should the injunction orders sought by plaintiff be granted; that no prima facie case has been made out by the plaintiff and that the balance of convenience tilts the interested party's favour by virtue of having been in possession of the suit land.

11. The plaintiff filed his submissions on **4/12/2019**. The interested party filed its submissions on **16/12/2019**. I have considered those submissions.

### **Determination**

#### **Issues for Determination**

12. The issues arising for determination in this application are as follows:

**a. Whether an interim injunction should issue at all and if so, whether in favour of the plaintiff or the interested party?**

**b. Who should pay the costs of the application? .**

The issues are discussed as hereunder.

**a. Whether an interim injunction should issue at all and if so, whether in favour of the plaintiff or the interested party?**

13. The plaintiff claims an interim injunction to safeguard his interests acquired by way of a sale agreement while the interested party seeks an injunction to protect his rights under the lease.

14. The defendants deny having received any funds from the plaintiff. They do not deny that there was a lease agreement with the interested party, or that his lease is yet to terminate by effluxion of time. However the plaintiff's position is that he has no intention of evicting the interested party from the premises.

15. In my view the only interest possessed by the interested party under **clause 2(a)** of the lease agreement dated **5/5/2003** which is relevant to the determination of the instant application is that of pre-emption.

16. Whereas the interested party alleges that the plaintiff has unclean hands by reason of proceeding with the agreement for sale while fully aware of its interest under the agreement the plaintiff avers that the interested party was accorded the first option to purchase and declined. However I am inclined to consider that the letters dated **9/1/2018** and **21/2/2018** as evidence sufficient to support the plaintiff's *prima facie* case against the interested party to the effect that the interested party was given a first option to purchase the suit land but declined. However I must stress that conclusive proof of the issue is dependent of the production of evidence at the main trial.

17. At present it is clear from the defendant's side that the interested party is in possession and that it was the plaintiff's duty to obtain the consent of the beneficiaries to the estate, the interested party and the court. That allegation is also expected to be proved by way of evidence at the hearing of the main suit.

18. What can be deciphered herein and protected by this court are two interests: the interest of the interested party under the lease agreement and the interest of the plaintiff under the purchase agreement.

19. The interested party's claim preceded the purchaser's, but it is noteworthy that a determination as to whether the right of the interested party's pre-emptive right may defeat the plaintiff's agreement with the defendants must await the hearing of the main suit.

20. Though the denial by the defendants of receipt of monies under the agreement is denied, this court is also aware of the need to put such a crucial issue to the test of evidence before reaching a conclusive determination of the same.

21. Nevertheless it is palpable that the interests of the interested party may be less endangered, if at all, compared to the interests of the plaintiff. I do note that the inclusion of the interested party's name in the sale agreement dated **26/7/2018** is persuasive that the agreement may not have been clandestinely entered into between the parties, and that, subject to exercise of diligence on the part of the plaintiff, there is a possibility that the interested party was consulted before that agreement was entered into.

22. However it is noteworthy that the orders sought by the plaintiff seek to inhibit disposal, including disposal by way of leasing out of the suit land. The lease that has already been entered into between the defendants and the interested party must be excluded from that order if it is to be issued. In my view the plaintiff's interests can only be secured from any new lease in favour of any other person other than the interested party.

23. In the end this court finds that only the plaintiff has established a *prima facie* case with a probability of success against the defendants and the interested party. I also find that due to the terms of the lease agreement and given the nature of the exhibited documents, the interested party has not established any *prima facie* case with a probability of success to warrant an injunction in its favour.

24. There is some doubt as to whether the plaintiff would suffer any loss that can not be compensated for by way of damages. However, he being at the moment the party who appears to have a greater stake in the suit land, at least going by the documents so far presented before court, it is better to rule on the application before me on a balance of convenience.

25. I therefore issue the following orders:

26. The plaintiff's application dated **24/5/2019** is granted in terms of prayer **no. 2** thereof.

27. The prayer **no. (c)** in the interested party's application dated **28/10/2019** is dismissed.

28. The costs of the two applications shall be in the cause.

**Dated, signed and delivered at Nairobi via Teleconference on this 14<sup>th</sup> day of May, 2020.**

**MWANGI NJOROGE,**

**JUDGE, ELC, KITALE.**

**Ruling read in the presence of :**

**Hon Mercyline Lubia, Deputy Registrar;**

**Mr Onyancha for the plaintiff/Applicant**

**Mr Mukhabani for the interested party/Applicant**

**N/A for the defendants.**

**MWANGI NJOROGE,**

**JUDGE, ELC, KITALE.**

**14/5/2020**