



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 38 OF 2020

DR. ISSAC K. MUTIBOKO.....PLAINTIFF

VERSUS

JANE NYAKINYWA AVUGWI.....DEFENDANT

RULING

The Application

1. By a notice of motion dated **29/6/2020** and filed on **30/6/2020**, the plaintiff seeks the following orders:

(1) ...spent

(2) ...spent

(3) That pending hearing and determination of this suit an order of temporary injunction be issued restricting the defendant/respondent whether by herself, agents, servants and any other person from interfering, entering, leasing, sale and or in any other way with (1) acre out of LR No. 2116/942 - Title I.R. 58387 now known as Block 10/67 in Kitale Municipality.

(4) That the costs of this application be provided for.

2. The application is brought under **Order 40 Rules 1, 2 and 4** of the **Civil Procedure Rules 2010**.

3. The application is supported by the sworn affidavit dated **29/6/2020** by **Jonathan Makokha Kungu** and **Mercy Lunyagi Juma**, both said to be authorized by the plaintiff to sign the affidavit on his behalf. The application is grounded on the following grounds: that the plaintiff is the beneficial owner of **one (1) acre** out of **LR. No. 2116/942 - Title I.R.58387** now known as **Block 10/67** in **Kitale Municipality** which he purchased from the defendant; that the plaintiff has been in possession of the suit property since the year **2007**; that the defendant disappeared since the year **2013** and all the plaintiff's effort to reach her to complete the transfer became futile; that the defendant resurfaced in **January, 2020** making new demands not part of the plaintiff's original sale agreement of the year **2007** before she could effect transfer of title to plaintiff, being demands for plaintiff to pay for her transfer of title fees for $\frac{1}{4}$ an acre or pay rates; that the defendant has appeared with unknown people to the plaintiff's compound twice without notification claiming she would like to survey the land without involving the plaintiff; that unless an order of temporary of injunction is issued, the defendant may take advantage of the fact that the plaintiff is in Britain UK and cannot travel immediately back to the country due to Covid 19 restrictions and that it would be in the interests of justice that the application herein be allowed.

The Response

4. The defendant filed a replying affidavit dated **10/7/2020**. Her response is that she owns the suit land which measures **1.586 Ha**; that the plaintiff's agents entered into a portion thereof without her consent and she has not sold the land to the plaintiff as alleged and no payment of any monies as part or full purchase price of the suit land has ever been paid to her by the plaintiff; that the allegations of her disappearance are false and she has never met the plaintiff and she does not know him; that she recently took a surveyor to the land to identify the beacons to enable her fence the land as the original fence had been removed during the expansion of a public road; that she does not require permission from the plaintiff to survey the land and that in any event in the alternative the claim for specific performance of the alleged contract dated **26/3/2007** would be stale and time barred and the court has no jurisdiction to entertain the suit and the application.

Submissions

5. The plaintiff filed his submissions on **10/7/2020**. The defendant filed her submissions on **16/7/2020**. I have considered the application and the response as well as the filed submissions.

6. The sole issue that arises in the instant application is whether a temporary injunction should issue against the defendant restraining her and her agents from interfering, entering into, leasing, selling or in any other way with **one (1) acre** out of the suit land. Attached to the application is a copy of an agreement dated **26/3/2007** between the plaintiff and the defendant by which **one (1) acre** was apparent sold to the plaintiff for **Kshs.1,600,000/=**. It is apparently executed by the vendor in the presence of an advocate. It is also apparently executed by the purchaser's agents in the presence of the same advocate. It is witnessed by two persons whose identity cards are given thereon.
7. The respondent faults the applicant for not demonstrating payment of the purchaser price or part thereof. In the plaint the plaintiff avers that he paid an amount which is not disclosed and took physical possession of the property and has made several development thereon. The photographs attached to the plaint but which are not annexed to the supporting affidavit show some upcoming permanent structures, presumably on the suit land. However I do not find any evidence of payment either partial or full in respect of the suit land pursuant to the agreement. The initial paragraphs of the plaint are also quite defective in so far as the issue of payment is concerned. However I have noticed that at **paragraph 6** the plaintiff avers that the transfer documents got lost in the year **2013** and the transfer process therefore stalled and that the defendant travelled to the United States of America the same year only to resurface in **January, 2020** with fresh demands.
8. In this court's view the defendant's response to the application is also defective in that she glosses over the issue of the plaintiff's entry into possession of the land by simply saying that his agents entered the suit land without consent. She does not give any date of such entry or what legal step she took to have the said plaintiff's agents evicted on the land prior to the commencement to this suit. She appears not to have made a report of trespass to the police against either the plaintiff or his agents. I am however convinced that the plaintiff is in possession of the portion of land that he claims, in that his agents are on the ground. However, there is a paucity of evidence regarding the fact of payment of the consideration and the manner of such payment. The agreement merely states the purchase price and that on the payment of all the consideration to the vendor or her advocate she would at the purchaser's expense execute a transfer of the property agreed to be sold in favour of the purchaser or his nominees and the purchaser would at his discretion grant such extension of the date of completion to enable the finalization of subdivision of the land. That is quite a relatively open ended agreement in my view.
9. In this court's view this was a transaction that did not involve a clear cut and express transfer to the plaintiff because there was a pending subdivision process whose time of finalization, being subject to bureaucratic red tape could not be foretold. The presence of the plaintiff on the suit land is therefore evidence that there was a transaction between the parties.
10. The plaintiff has sought an order of specific performance which is an equitable remedy. The defendant, relying on that fact and the absence of evidence of payment for the suit land, argues that both the suit land application are defective. However this court must remind itself that at the nascent stage of every suit especially commenced with urgency, much may be inadvertently omitted which when later pleaded by way of amendments, or addressed by way of evidence, may make the pleading perfect. It is the duty of the court to apply the oxygen principle and keep a suit alive if only for the purpose of an *inter partes* hearing and determination of its merits, for as it was said in the case of **Kenya Bureau Of Standards V Societe Generale De Surveillance SA [2005] eKLR**, by Nyamu J, quoting the dicta of Megarry J in the case of **John V Rees [1970] CH. 345**:
- “It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. “When something is obvious, ‘they say, ‘why force everybody to go through the tiresome waste of time involving in framing charges and giving an opportunity to be heard? The result is obvious from the start.’ Those who take this view do not, I think do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with open and shut cases which, somehow, were not, of unanswerable charges which, in the event were completely answered; of inexplicable conduct which was fully explained: of fixed and unalterable determinations that, by discussion suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.”**
11. The court having upheld the right of each party to be heard in the substantive suit, it is incumbent on them to bring forth evidence to substantiate their respective claims lest they do not obtain judgment in their favour at the suit's conclusion.
12. The test for the grant of a temporary injunction was set out in the case of **Giella -vs- Cassman Brown 1973 EA 358**. The three limbs are whether the applicant has established a *prima facie* case and whether he or she would suffer irreparable loss that may not be compensable by way of damages and, finally, that if the court is in doubt it may rule on a balance of convenience.
13. It would appear that the plaintiff's presence on the suit land has spanned at least **7 years** and there are structures on the suit land. There must be a proper explanation for his presence on the land and I therefore find that he has a *prima facie* case.
14. It is however not clear that the plaintiff may suffer loss that would not be compensable by way of damages and this being a case in which this court has doubt as to the true risk of loss, must rule on the application on a balance of convenience. Convenience lies in ordering the maintenance of *status quo* on the suit land pending the hearing and determination of the main suit which shall be expedited.
15. I therefore order that the both parties shall maintain the *status quo* in respect of the suit land and title till the hearing and final determination of this suit.
16. The plaintiff shall file and serve his documents upon the defendant within **30 days** of this order and the defendant shall file and serve her documents within **30 days** of being served by the plaintiff.
17. This suit shall be mentioned on **7/10/2020** by way of teleconference for the purpose of fixing a hearing date.

Dated, signed and delivered at Kitale via electronic mail on this 30th day of July, 2020.

MWANGI NJORGE

JUDGE, ELC, KITALE.