



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 24 OF 2020

PROTUS MASIBO WATIBINI.....PLAINTIFF

VERSUS

THE BOARD OF MANAGEMENT

ST. BRIGID'S GIRLS HIGH

SCHOOL, KIMININI.....1ST DEFENDANT

THE CATHOLIC DIOCESS OF KITALE.....2ND DEFENDANT

AND

GETRUDE NAFULA Tsuma.....INTERESTED PARTY

RULING

1. The plaintiff brought an application dated 17/4/2020 under Section 3A, 63(c) and (e) of the Civil Procedure Act, Order 40 Rule 1(a) of the Civil Procedure Rules. She seeks the following orders:-

(1) ...spent

(2) ...spent

(3) That the County Surveyor Trans-Nzoia County be ordered to visit the site of the alleged trespass and establish the extent of the trespass and file a report in court.

(4) That the 1st defendant be restrained by themselves, their servants, workmen and agents or otherwise howsoever from continuing with the construction of a perimeter wall or any conducting any other form of construction on LR No. 6670 situate at Kiminini township pending hearing and determination of the suit.

(5) That costs of this application provided for.

2. The grounds upon which the application is made are that the plaintiff is a co-executor of the Estate of *Wenslaus Watibini*, deceased; that 2nd defendant holds forged agreements of sale of land; that the purported signature of the deceased on the agreements is not the known signature of the deceased; that the purported sale agreements were not executed and signatures of the transacting parties were not witnessed; that the 2nd defendant cannot justify the existence of two conflicting agreements relating to the same purported transaction; that the 2nd defendant cannot prove payment of the purchase price; that the 2nd defendant cannot justify the failure to purchase the land in the name of the 1st defendant; that the purported purchaser signed and stamped only on one of the agreements; that no survey was carried out to excise the part of the land on which the 1st defendant has trespassed and no beacons were placed on the ground to mark the extent of purportedly sold land. The plaintiff states that he is willing to pay the surveyor's costs to enable his visit the suit land.

3. The application is supported by an affidavit of the applicant dated 17/4/2020 and the plaintiff's supplementary affidavit dated 13/5/2020.

4. In reply to the application the 1st defendant filed an affidavit sworn on 30/4/2020 by **Inviolata Lukorito**, the Principal of the 1st defendant and also Secretary of its Board of Management. She filed a further replying affidavit dated 11/5/2020. Her response is that the 2nd defendant is the school's official sponsor; that it is within its mandate to purchase the land for the use of the school; that the suit property was bought in

2008 and the 1st defendant took possession thereof and has occupied it without any interruption by any person; that its use and occupation of the suit land is lawful and pursuant to a sale agreement between the 2nd defendant and the deceased and that the land was extensively developed with the deceased seller's consent; that the perimeter wall is for security purposes of the school and that the wall is built along the boundaries as confirmed by the surveyor in the presence of the plaintiff and his siblings.

5. The 2nd defendant filed a replying affidavit sworn on **30/4/2020** by **Rt. Rev. Maurice Anthony Crowley**, Bishop of the Catholic Diocese of Kitale. In his reply he reiterated the matters in the affidavit of the 1st defendant as set out hereinabove; he added that the land was purchased for **Ksh 1,550,000/=** which was paid in full to the deceased in his lifetime; that the defendants were given vacant possession, occupation and use of the suit land which they fenced off in **2008**; that the defendants have been developing the land with the plaintiff's knowledge; that a constructive trust was created in favour of the defendants; that the sale agreement was not forged and the defendants are in actual occupation of the purchased portion; that in **2019** the plaintiff and other family members consented to the surveyor's visit to the suit land and the said surveyor confirmed what was sold to the 2nd defendant and prepared a report and that failure by the advocate to attest to the agreement must have been inadvertent; he denies knowledge of the agreements exhibited by the plaintiff which the plaintiff alleges to be forged; that the defendants are therefore not trespassers on the suit land.

6. In his supplementary affidavit the plaintiff reiterates that it is not the deceased's known signature which is on the agreements; that there is no proof that the deceased received the money; that the developments on the suit land were secretly erected without his knowledge; that at meetings with the police after the dispute arose the 1st defendant failed to produce a sale agreement and the impugned agreements were only produced in **May 2019** during an attempted mediation by Kiarie & Co Advocates; that in **July 2019** there was a verbal agreement between the parties that the developments should stop till proof of purchase is provided by the 1st defendant; that however the defendants have continued with the developments despite his protests; that even after being served with the order of this court injuncting the construction of the wall the 1st defendant continued with the construction and that as late as **12th May 2020** that construction was still going on; that the sale agreements were contrived to assist the defendants in this suit and they have been disowned by the firm alleged to have made them; that the surveyor's report is backdated and an afterthought; that there is a ruling of the High Court in **Kitale HC Misc. Succession Cause No 82 of 2011** identifying the 2nd defendant as a trespasser who should be evicted; that the non-inclusion of the suit land in the deceased's will was as a result of the confusion brought about by registration of the land in the name of the interested party; that the defendants never enjoined themselves to the succession cause despite knowledge that it existed and their advocate being a member of the Board of the 1st defendant.

7. The 1st and 2nd defendants filed their submissions on **12/5/2020**. The plaintiff filed his submissions on **14/5/2020**. I have considered the application, the response and the filed submissions.

DETERMINATION

The Issues for Determination

8. The issues which arise for determination in this application are as follows:

(a) Whether an order of temporary injunction should issue against the defendants as prayed.

(b) Who should bear the costs of this application?

9. The above issues are discussed as hereunder.

(a) Whether an order of temporary injunction should issue against the defendants as prayed

10. The conditions for the grant of an interim injunction are set out in the case of **Giella -vs- Cassman Brown 1973 EA 358**. They are that the applicant must show that he has a *prima facie* case with a probability of success, that he must establish that he would suffer loss that may not be compensated for by way of damages, and lastly, if the court is in doubt it will rule on a balance of convenience.

11. In this case the plaintiff avers that the agreements relied on by the defendants are a forgery. The subject land is **LR No. 6670 - Kiminini Township**.

12. The Plaintiff has annexed two agreements which are undated, and which are said to have been executed between the deceased and the second defendant in the suit. In the first agreement the vendor appears to be selling **6 plots of 50 feet by 100 feet**. The first agreement also provides for a further portion of **0.3** of a **50 feet x 100 feet** plot. That agreement bears the official stamp of the second defendant. It also purportedly bears a signature said to be the deceased's, which the plaintiff disputes. The second agreement is a replica of the first agreement save that the official stamp of the second defendant is missing on the first page.

13. The plaintiff's disputation of the signatures on the agreements is primarily based on eye scrutiny and no expert report is exhibited to establish that indeed the signatures are not the deceased's. The 2nd defendant has already disowned these agreements, but the plaintiff maintains that these agreements are copies of the agreements produced by the 2nd defendant when the parties appeared before the police. However, the plaintiff has expressed an intention to have them examined by a document examiner to confirm that they are forged.

14. The plaintiff also avers that there is no proof that survey was ever carried out to excise the portion that the 1st defendant is alleged to be trespassing on, and no beacons were ever placed on the ground to mark the extent of the sold land, and the admission by the defendants that a surveyor has recently visited the site appears to lend credence to this allegation

15. The 2nd defendant exhibits copies of cheques made out in favour of the deceased as consideration, but the plaintiff faults them on the basis that there is no evidence that they were cashed in favour of the deceased. And truly, for the moment, there is no conclusive proof that the deceased ever received the purchase price. In this court's view the above points are worth of consideration at the main hearing.

16. I need not say any more here so as not to prejudice the hearing of the suit. The plaintiff has established that he has a *prima facie* case with a probability of success and the plaintiff's case has passed the first test.

17. Upon scrutiny of the application, this court has not seen any evidence to the effect that the plaintiff would suffer loss that is not capable of being compensated for by way of damages in this matter. The plaintiff's case has therefore failed the second test.

18. Notwithstanding the foregoing, this court observes that allowing the defendants to develop the suit land further while this suit is still pending may considerably alter the character and nature of the land before the conclusion of this litigation. Such developments may render this suit to possess an added

complexity which is undesirable. It is therefore proper that the application before me be determined on a balance of convenience. The balance of convenience in this court's view lies in maintaining the current *status quo*.

(b) Who should bear the costs of the application?

19. The costs of the instant application should be in the cause.

CONCLUSION.

20. This court therefore issues the following orders on the application dated 17/4/2020 in this suit:

21. The *status quo* prevailing regarding the suit land at the time of this order shall be maintained till the hearing and determination of this suit. Therefore, for clarity, there shall be no further development of any nature that would interfere with the *status quo* of the suit land before the hearing and determination of this suit.

22. The costs of the application shall be in the cause.

Dated, signed and Delivered at Kitale via electronic mail on this 21st day of July, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.