



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELC NO.8 OF 2015

MOSES WANJOHI GIKUNGU.....1ST PLAINTIFF (APPLICANT)

PATRICK MWAI KINYUA.....2ND PLAINTIFF (APPLICANT)

VERSUS

PETER KAMAU MWANGI.....1ST DEFENDANT(RESPONDENT)

REBECCA WAIYEGO MWANGI.....2ND DEFENDANT(RESPONDENT)

RULING

1. On **15th January, 2015** the plaintiffs (**Moses Wanjohi Gikungu and Patrick Mwai Kinyua**) filed the suit herein against the defendants (**Peter Kamau Mwangi and Rebecca Mwangi**) seeking a permanent injunction to restrain the defendants from selling, charging, disposing off, subdividing, developing, trespassing, alienating, transferring to other persons and/or in any other manner whatsoever interfering with all that parcel of land known as **Tetu/Muthuani/582** (hereinafter the suit property). In the alternative, the plaintiffs pray that the executive officer of this court be authorized to sign all the necessary transfer documents in respect of the suit property on behalf of the defendants in order to facilitate transfer of the suit property to them.

2. Simultaneously with the plaint instituting this suit, the plaintiff filed the notice of motion dated **15th January, 2015** seeking to, *inter alia*, temporarily restrain the defendants from committing any of the acts sought to be restrained in the plaint pending the hearing and determination of the suit.

3. The motion is premised on the grounds that the plaintiffs (applicants) bought the suit property from the defendants (respondents) in 2014; that whereas the applicants have performed their obligations under the sale agreement executed between themselves and the respondents, the respondents have unlawfully and without any justification whatsoever refused to sign the necessary transfer documents. The applicants contend that the respondents have hatched a plan to illegally sell the suit property to a third party which action unless restrained through the orders herein sought will occasion irreparable loss and damage to the applicants.

4. In view of the foregoing, the applicants contend that it is in the interest of justice and fair play that the orders sought in the application be granted.

5. The application is supported by the affidavit of the 1st applicant (Moses Wanjohi Gikungu) sworn on the same day as the day the application was filed (15th January, 2015). In that affidavit the deponent has in addition to reiterating the grounds thereon, annexed the sale agreement executed between the applicants and the respondents and marked as **MWG 1**.

6. In reply to the issues raised in the motion herein, the respondents filed the replying affidavit sworn by the 1st respondent (Peter Kamau Mwangi) on **22nd January 2015**. In that affidavit, the respondents have admitted that they entered into the agreement referred to herein above but contended that the applicants have breached the terms of that agreement.

7. Without expounding in which way/manner the applicants have breached the terms of the agreement, the respondents contend that the value of the suit property was undervalued as its current value is Kenya Shillings eight million (Kshs.8,000,000/=). They deny having refused to sign the transfer form or consent to transfer and instead blame the applicants for having failed to add some money on the agreed purchase price.

8. When the matter came up for hearing on **2nd February, 2015**, counsel for the applicants **Mr. Ndwiga** informed the court that he was entirely relying on the grounds on the face of the application and the affidavit sworn in support of the application, in particular, paragraphs 5, 6 and 7 of the supporting affidavit. In those paragraphs the applicants have deposed as follows:-

“5. That during execution of the said sale agreement, we agreed that the down payment would take care of succession cause to enable them (read the respondents) to transfer the suit land into our names;

6. That the balance of the down payment was also used to pay for the supply of power from Kenya Power and Lighting Company Limited in their other land No.Nyeri/Municipality/9464/1 and the balance thereof bought a parcel of land (10) acres at a different location and further balance was shared amongst the family members;

7. That after the completion of the succession Cause the respondents have been promising to transfer the said land to me but to date they have not fulfilled their part of their bargain.”

9. Explaining that the respondents have commenced construction on the suit property, Mr. Ndwiga urged the court to grant the orders sought, in particular, prayer 3 (the prayer for temporary injunction pending the hearing and determination of the suit).

10. There was no appearance on the part of the respondents.

Analysis and determination

11. From the replying affidavit filed by the respondents, it is not in dispute that the applicants entered into the sale agreement which is the subject matter of this suit. Although the respondents contend that the applicants are in breach of the terms of the agreement, no particulars or evidence of the said breach has been demonstrated.

12. The agreement executed between the parties herein had provided for what would happen if the applicants failed to meet their part of the bargain to wit:-

“If the completion does not take place by reason of the purchaser’s willfull default, the vendors shall refund the deposit of the purchase price within 21 days from the receipt of notice by the purchaser or purchaser’s advocates to refund the same less thirty percent (30%) being the penalty for default.”

13. There is no evidence that the agreement executed between the applicants was brought to an end through the process contemplated in the sale agreement hereto or through any other legal process of the law.

14. Turning to the Law applicable to the application, it is settled law that the guiding principles for granting a temporary injunction are as set out in **Giella –Vs- Cassman Brown and Company Ltd [1973] E.A.** Those principles are first, that the applicant must show a *prima facie* case with a probability of

success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.

15. An injunction being a discretionary remedy, there is ample authority that a party, who has acted in a manner not acceptable to a court of equity, will be denied the remedy. See *Kenya Hotels Limited Vs Kenya Commercial Bank and another* [2004] 1 KLR 80, *Public Trustee Vs Nicholas Kabucho Murimi* HCCC ELC 610 of 2011 [2012] e KLR and *George Munge Vs Sanjeev Sharma & 3 others* HCCC ELC 677 of 2011 [2012] eKLR.

16. The conditions outlined in the *Giella* case (supra) are sequential “*so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed*” See *Kenya Commercial Finance Company Ltd Vs Afraha Education Society* [2001] 1 E.A. 86 and *Karen Bypass Estate Ltd v. Print Avenue & Company Ltd; Nairobi HCCC No. 284 of 2013 [2014]eKLR.*

17. Have the applicant's established a *prima facie* case?

In answering this question, I take note of the respondents’ admission that they entered into the sale agreement hereto and that they received some down payment part of which they used to file Succession cause No.692 of 2012 and to pay legal fees to their advocate; to transfer L.R No. Mweiga/Settlement Scheme/

191, pay for electricity supply to Nyeri/Municipality/946/1 for the benefit of all family members and the balance thereof shared among the family members. There being no evidence that the agreement executed between the applicants and the respondents was terminated in the manner contemplated in the agreement executed between themselves or through any other lawful process, I find and hold that the applicants have established a *prima facie* case with a probability of success.

18. On whether the applicants will suffer irreparable damage if the orders sought are not granted, since it appears that it is the respondents who are in breach of their terms of the agreement (although the parties herein had provided for what would happen in case of breach of the terms of the sale agreements), I am of the view that failing to grant the orders sought may lead to the respondents dealing with the suit property in a manner prejudicial to the applicants’ beneficial interest therein. It is also noted that the amounts involved are colossal yet the respondents’ have not demonstrated that they have the ability to refund the applicants’ the purchase price or any other amounts that may be decreed against them.

20. In case I am wrong on the question of adequacy of damages as compensation to the applicants, on the question of balance of convenience, I find that the balance of convenience tilts in favour of the applicants who have fulfilled their contractual obligations under the sale agreement hereto.

21. The property ought to be preserved by way of the orders sought herein to avoid a situation whereby the applicants’ interest therein is compromised.

22. The upshot of the foregoing is that the application has merit and is allowed in the following terms; that the respondents are restrained by themselves, agents, servants and/or anybody claiming through them from selling, charging, disposing-off, developing and/or interfering in any other manner with the suit property pending the hearing and determination of this suit or until further orders are granted by this court.

23. The costs of preparing and prosecuting the application are awarded to the applicants.

Dated, signed and delivered at Nyeri this 10th day of March, 2015

N. WAITHAKA

JUDGE

In the absence of:

The applicants and respondents

Lydia – Court Assistant