



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
LAND AND ENVIRONMENT DIVISION
CIVIL CASE NO.157 OF 2011

PETER MUMO MASAVE..... PLAINTIFF/APPLICANT

VERSUS

MUTUA KIOKO 1ST DEFENDANT/RESPONDENT

KIOKO MUTUA..... 2ND DEFENDANT/RESPONDENT

R U L I N G

1. In a **Motion** dated 22.3.2012 the Plaintiff seeks injunctive relief against the Defendants/Respondents to stop them from entering, constructing, interfering or in any other manner dealing with Applicant's possession and occupation of Mavoko Town Block 3/3319 until determination of the instant suit. The same is supported by Applicant's Affidavit sworn on 22.3.2012. The Respondent No.1 has opposed same application and has filed a Replying Affidavit sworn on 25.4.2014.
2. The Applicant's case is that he sold 1st Defendant 2 acres of land of suit land on 13.6.2004 at a price of KShs.84,000/-. The 1st Respondent paid KShs.84,000/- and remained with a balance of KShs.16,000/- which he has failed to pay to date. Thereafter in 2010 he deposited KShs.84,000/- paid to his advocate to refund the 1st Respondent as he had refused to pay the balance KShs.16,000/- meanwhile the 1st Respondent entered suit land and took possession of the 2 acres sold to him. The Applicant avers that the 1st Respondent has been causing wanton destruction to the land.
3. The Respondent No.1 avers that after purchase of the 2 acres of the suit land, he entered with his family and settled thereon since 2004. He avers that he has filed a counterclaim to claim the 2 acres purchased and thus if orders sought are granted, same will cause his eviction together with his family. The issue arising in the instant application is that whether the court can grant the orders sought at this stage?
4. There is no dispute that the 1st Defendant is in suit land together with his family pursuant to sale agreement between himself and the Plaintiff/Applicant. The purchase price has not been refunded to him. There is a claim by the Plaintiff against him for eviction and a counterclaim for 2 acres bought. The Applicant submits that he has met the conditions of grant of interim orders of injunction set by the case of **GIELLA –VS- CASSMAN BROWN** by demonstrating ownership

- vide a title deed copy attached.
5. The Applicant further argues that there was no land board consent granted within 6 months of the agreement. Thus the agreement is a nullity. In the circumstances of the case the 1st Defendant cannot get the claimed 2 acres. The Applicant further argues that the 1st Respondent is doing destruction on suit land and thus ought to be stopped. The Respondent No.1 argue that since the Plaintiff does not deny sale to the 1st Defendant and possession of 2 acres by the 1st Defendant the suit should be heard before court makes such drastic orders which would evict him together with his family. The Respondent No.1 further submits that since 2004 he has been in open and continuous occupation and use of 2 acres bought with full knowledge and consent of the Plaintiff and has done development on the bought portion.
 6. The court notes that the Applicant either expressly or indirectly allowed the 1st Defendant to take possession of suit land in 2004 or thereabout and that is why since 2004 to 2011 when suit was filed (7 years or thereabout) he never questioned the occupation of the 2 acres by the 1st Defendant. He did not prevent him from entering suit land. In any event he is still holding the purchase price paid even if he claims to have deposited same in 2010 with his advocate for refund.
 7. Since there are 2 rivaling claims and the 1st Defendant is in occupation, the court has to determine the parties' rights. In the case of **MACHARI MWANGI & 87 OTHERS -VS- DAVIDSON MWANGI KAGIRI NYERI CIVIL APPEAL NO. 6/2010**, the court held that in absence of land board consent to transfer suit land, still court can hold existence of constructive trust if the purchaser is in occupation.
 8. In our instant case, the 1st Defendant is in occupation pursuant to sale agreement which may have been nullified by want of Land Board Consent. However, the court will have to hear suit and determine whether there is a trust created by the parties' relationship.
 9. The court thus makes the following orders;
 1. The status quo prevailing to continue pending hearing and determination of the suit.
 2. Costs in the cause.

Dated and Delivered at Machakos, this 6th day of March, 2015.

CHARLES KARIUKI

JUDGE