



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.440 OF 2014

PETER OMBUI NYANGOTO..... PLAINTIFF

VERSUS

WILLIAM ONKOBA MATUNDURA..... 1ST DEFENDANT

JOHNSON ABUTA MATUNDURA..... 2ND DEFENDANT

JERIA BONARERI ABUTA.....3RD DEFENDANT

RULING

1. What I have before me is the plaintiff's application dated 17th November 2014 seeking an order of prohibition to prohibit the defendants from transferring, charging, sub-dividing or in any way dealing with **LR No. Kisii Town/Block II/68** (hereinafter referred to as "**the suit property**") pending the hearing and determination of this suit. The application is supported by the affidavit of the plaintiff sworn on 17th November 2014. The same was brought on the grounds that; the plaintiff was at all material times the registered owner of the suit property until 27th July 2010 when his title was cancelled by the High Court in Kisii High Court succession Cause No. 62 of 2009. The cancellation of the plaintiff's title was confirmed by the Court of Appeal in Kisumu Civil Appeal No. 65 of 2011 in a judgment that was delivered on 1st November 2013. The plaintiff had purchased the suit property from one, Daniel A. Matundura at a consideration of kshs. 6,000,000/= on 26th September 2006.
2. The High Court and the Court of Appeal held in their decisions aforesaid that the sale of the suit property by the said Daniel Matundura to the plaintiff was illegal null and void. The plaintiff has contended that he is entitled to recover the sum of kshs. 6,000,000/= that he paid for the suit property. He has contended that a half of the purchase price in the sum of Kshs. 3,000,000/= was paid to the 1st defendant while the other half amounting to Kshs. 3,000,000/= was paid to Daniel Matundura, deceased whose estate is being administered by the defendants. The plaintiff has claimed that the said sum of kshs. 6,000,000/= is due and payable to him by the defendants. He has contended that the defendants are in the process of selling the suit property to a third party notwithstanding the fact that they have not refunded the said sum of kshs. 6,000,000/= to him. The plaintiff has averred that he stands to suffer irreparable harm if the intended sale of the suit property proceeds before the said sum of Kshs. 6,000,000/= that he had paid to the defendants is refunded. It is on account of the foregoing that he has sought an order of prohibition to prohibit the defendants from disposing of the suit property pending the hearing and determination of this suit.
3. The plaintiff's application was opposed by the defendants through a replying affidavit sworn by the 1st defendant on 2nd February 2015. The 1st defendant averred that the defendants are

registered as owners of the suit property to hold in trust for their children. He denied that they are the administrators of the estate of Daniel Matundura. The 1st defendant averred that the plaintiff can only recover the purchase price that he paid for the suit property from Daniel Matundura, deceased. He contended that the plaintiff's claim for a refund of the said sum of Ksh. 6,000,000/= is time barred the agreement for sale on which it is based having been made in the year 2006. The 1st defendant averred that the plaintiff has not established a prima facie case against the defendants to warrant the granting of the orders sought.

4. On 9th February 2015, the parties agreed to argue the application by way of written submissions. The plaintiff filed his submissions on 13th February 2015 while the defendants did so on 2nd March 2015. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit that was filed by the defendants in opposition to the application. Finally, I have considered the parties respective submissions. The plaintiff's application has been brought under Order 40 rule 1 and (e) (sic) of the Civil Procedure Rules and sections 3A and 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya. The plaintiff is essentially seeking an interlocutory injunction to restrain the defendants from having any dealing with the suit property pending the hearing and determination of this suit.
5. It is not clear to me why the plaintiff has termed the order sought "an Order of Prohibition". I would consider the plaintiff's application as if it is one for injunction the application having been brought under among others, Order 40 of the Civil Procedure Rules. I am of the view that the application should not be defeated merely because the plaintiff has referred to an order for injunction as a prohibition. Article 159 (2) (d) of the Constitution of Kenya enjoins this court to dispense justice without undue regard to procedural technicalities.
6. The principles for granting interlocutory injunction are well settled. As was stated in the case of **Giella -vs- Cassman Brown [1973] E. A 358**, an applicant for interlocutory injunction must establish a prima facie case with a probability of success. He must also demonstrate that he stands to suffer irreparable injury which cannot be compensated in damages if the order is not granted. In the event that the court is in doubt as to the above, the application would be determined on a balance of convenience. The plaintiff's claim against the defendants is for the refund of a sum of Kshs. 6,000,000/= that the plaintiff had paid as purchase price for the suit property the plaintiff's title to the suit property having been cancelled by the court as aforesaid. The plaintiff is not claiming any interest in the suit property. His claim is strictly for the refund of the purchase price as aforesaid. The plaintiff has submitted that he paid the said purchase price to the 1st defendant and Daniel Matundura, deceased. The plaintiff has submitted that the 1st defendant and, the 2nd and 3rd defendant who he claims to be the son and daughter of Daniel Matundura respectively are liable to refund the said sum of Kshs. 6,000,000/=.
7. The plaintiff has not placed any evidence before the court to show that the 1st defendant was a party to the agreement for sale of the suit property to him or that any monies were paid to him. Although the plaintiff has submitted that he paid Kshs. 3,000,000/= to the 1st defendant through bankers cheques and cash, the plaintiff has not place any evidence before the court in proof of these payments. As concerns the sum of Kshs. 3,000,000/= which the plaintiff claims to have paid to Daniel Matundura, the plaintiff has not laid a basis for claiming the same from the defendants. It is not in dispute that Daniel Matundura is deceased. Any debt due from him can only be claimed from his legal representative. The plaintiff has not placed any evidence before the court that the defendants are the legal representatives of Daniel Matundura, deceased. In the absence of any evidence that the defendants are the legal representatives of Daniel Matundura, the plaintiff's claim against the defendants in their capacity as legal representatives of Daniel Matundura has no basis. Due to the foregoing, I am not persuaded that the plaintiff has established a prima facie case against the defendants with a probability of success.
8. In view of what I have stated above regarding the plaintiff's lack of interest in the suit property, I am not satisfied that the plaintiff stands to suffer irreparable harm unless the order sought is granted. I am unable to see the loss that the plaintiff would suffer if the suit property is sold, leased or charged by the defendants. The plaintiff has no interest of whatsoever nature in the suit property which this court can be called upon to protect. In the absence of any interest in the property, the plaintiff stands to lose nothing if the property is disposed of by the defendants. The plaintiff's interest is only in the purchase price that he paid for the suit property. He can still

pursue the same even if the suit property is alienated by the defendants. If the plaintiff wanted the suit property as a security for any judgment that he may obtain against the defendants herein, he should have stated so. The court should also have been moved appropriately under Order 39 rule 5 of the Civil Procedure Rules. As things stand now, I am not satisfied that the plaintiff would suffer irreparable injury which cannot be compensated in damages if the orders sought are not granted.

9. In conclusion, it is my finding that the plaintiff has not satisfied the conditions for granting interlocutory injunction or the prohibition sought. The plaintiff's application dated 17th November 2014 is therefore not for granting. The same is dismissed accordingly with costs to the defendants.

Delivered, Dated and Signed at Kisii this 8th day of May 2015.

S. OKONG'O

JUDGE

In the presence of:

N/A for the plaintiff

Miss Moguche for the 1st and 2nd defendants

Mr. Bosire Court Clerk

S. OKONG'O

JUDGE