



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1186 OF 2014

HUMPHREY EKISAI EKIRAPA..... PLAINTIFF

VERSUS

MITON ENE OLOLOSHOO.....1ST DEFENDANT

SILAS MOROMPA NYAKITO alis

MOROMPA OLE OLOSHOO.....2ND DEFENDANT

PIUS NYABUGA MOCHOGE.....3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 3rd September 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from transferring, selling, leasing out, disposing, erecting any structures, planting, cultivating or interfering in any manner whatsoever with the 20 acre portion of the parcel of land known as Kajiado/Looda Riak/159 (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also requests for costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Humphrey Ekisai Ekirapa, sworn on 3rd September 2014 in which he averred that he entered into a Sale Agreement dated 16th November 2012 with the 1st and 2nd Defendants/Respondents in which he agreed to purchase the suit property for a consideration of Kshs. 7,400,000/-. He averred further that the vendors identified and pointed out to him the part of the suit property from which the 20 acre portion would be excised and sold to him. He averred further that by the time of entering into the said Sale Agreement, the suit property was still registered in the name of Lolosho Ole Dagitus (deceased) who was the husband and father of the 1st and 2nd Defendants respectively. He confirmed that the 1st and 2nd Defendants subsequently obtained letters of administration of the estate of the deceased and were also granted confirmation of grant, copies of which he produced. He further averred that the said vendors informed him that they were in urgent need of cash since they were facing many financial hardships including lacking college fees for their dependants which is why they were selling to him the 20 acre portion. Pursuant to those requests, the Plaintiff/Applicant averred that he had paid to the said vendors a total amount of Kshs. 4,100,000/-. He averred further that in spite of receiving

that sum, the said vendors have failed to honour their part of the Sale Agreement of transferring the 20 acre portion to him. He further averred that he has since discovered that the said vendors have now transferred the entire suit property to the 3rd Defendant in complete disregard of his interests therein. He annexed a copy of the official search on the suit property to prove this assertion. He added that the transfer to the 3rd Defendant was effected in the absence of the original title to the suit property, which was still in the custody of the said vendor's advocate and further that the transfer was effected after the removal of a caution on the suit property which had been registered by another purchaser of another portion of the suit property.

The 2nd Defendant, Silas Morompa Ntakito alias Morompa Ole Oloshoo, filed his Replying Affidavit sworn on 29th October 2014 in which he averred that he supports this Application because the transaction of transfer of the suit property to the 3rd Defendant was fraudulent and should be immediately revoked. He averred that that transfer was done without the original title deed to the suit property, which remains in the custody of their advocate, that they did not receive any purchase price for the land and that the transfer was done without his knowledge or involvement. He further averred that no land was given to him in exchange for the suit property as alleged by the 3rd Defendant. He confirmed that the Plaintiff/Applicant has purchased a 20 acre portion of the suit property from them and that he had paid him over Kshs. 4,100,000/- for it.

The Application is contested. The 3rd Defendant/Respondent, Pius Nyabuga Mochoge, filed his Replying Affidavit sworn on 3rd November 2014 in which he averred that the Plaintiff/Applicant failed to comply with the terms of the Sale Agreement he entered into with the 1st and 2nd Defendants, specifically clauses 5(b), (c) and (d) requiring the Plaintiff/Applicant to pay Kshs. 540,000/- on 23rd November 2012, Kshs. 1,000,000/- on 7th December 2012 and thereafter monthly installments of Kshs. 300,000/- until payment in full leading to the 1st & 2nd Defendants rescinding the said Sale Agreement by their letter. He added that the transfer of the suit property to him was regular and legal and was pursuant to the Sale Agreement dated 25th April 2014 entered into between himself and the 1st and 2nd Defendants in which he exchanged his three parcels of land being Kajiado/Loodariak/489, Kajiado/Keekonyokie Ilkisumet/1874 and Kajiado/Loodariak/1485 for the suit property. He stated that this exchange was done with the consent of all the beneficiaries entitled to the suit property. He added that he has since sold the suit property to a third party by the name Florence Onyambu vide a Sale Agreement dated 12th June 2014 for fair and good consideration in good faith unaware of the Plaintiff/Applicant's claim. He added by stating that the Plaintiff/Applicant may seek a refund of his monies under clause H of his Sale Agreement and may also sue the 1st and 2nd Defendants for breach of contract.

The Plaintiff, 1st and 3rd Defendants filed their written submissions.

The issue that I am called upon to determine is whether or not to grant the Plaintiff/Applicant the temporary injunction that he seeks. In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and

arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Has the Plaintiff/Applicant demonstrated that he has a “genuine and arguable” case and thus a prima facie case with high chances of success at the main trial? In the first place, the main difficulty I am facing in this matter is determining which specific parcel of land is being claimed by the Plaintiff/Applicant in respect of which this court is requested to issue a temporary injunction. The Plaintiff/Applicant is claiming a 20 acre portion of land which forms part of a larger parcel of land identified as Kajiado/Looda Riak/159. The Plaintiff/Applicant claims to have been shown the area where the 20 acre portion lies. However, no sketch map or other document has been filed to enable the court to appreciate the actual portion being claimed. This situation is further compounded by the provisions of **section 42 of the Land Registration Act No. 3 of 2012** which provides as follows:

“No part of the land comprised in a register shall be transferred unless the proprietor has first subdivided the land and fully registered each new subdivision.”

The land being claimed by the Plaintiff/Applicant has not been subdivided and hence cannot be transferred to the Plaintiff/Applicant. The import of this is that the court is uncertain as to the actual portion of land within the suit property being claimed by the Plaintiff/Applicant.

Secondly, I have perused the document relied upon by the Plaintiff/Applicant in his claim over the suit property which is the Sale Agreement dated 16th November 2012 between him and the 1st and 2nd Defendants. It is alleged that the Plaintiff/Applicant defaulted in fulfilling his obligation to pay the purchase price for the parcel of land in full, having paid only Kshs. 4,100,000/- out of Kshs. 7,400,000/-. Indeed, clause 5(k) of the said Sale Agreement is to the following effect:

“Completion of the sale and purchase and payment of the balance of the purchase price shall be 90 days after successful application and approval by the court of the sale of the land parcel and approval by the Land Control Board of the sale agreement or such earlier date as shall be mutually agreed between the parties subject to payment of the purchase price in full.”

Being an equitable remedy, an injunction cannot be issued in favour of a party who comes with unclean hands. I consider that the payment of the full purchase price was the Plaintiff/Applicant’s obligation under the Sale Agreement but he defaulted in paying the same as per the agreement with the Defendants/Respondents. In the circumstances, I find that the Plaintiff/Applicant has not established that he has a genuine and arguable case or a prima facie case with high chances of success at the main trial.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application with costs to the Defendant/Respondent.

DELIVERED AND SIGNED IN NAIROBI THIS 10TH DAY OF JULY 2015.

MARY M. GITUMBI

JUDGE