



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 13 OF 2015**

**HON. DAVID KINISU SIFUNA.....PLAINTIFF/APPLICANT**

**VERSUS**

**MARRIANE EYAASE KISANJI.....1ST DEFENDANT/RESPONDENT**

**DOREEN ADISSA KISANJI.....2ND DEFENDANT/RESPONDENT**

**OLIVER MAGERO GUMO.....3RD DEFENDANT/RESPONDENT**

**R U L I N G**

1. The applicant is the Speaker of the County Assembly of Trans-Nzoia County. The first and the second respondents are sisters who are daughters of the late **Lorna Kuleanya** (deceased) who bought **10 acres** from the third respondent on **20/3/1999**. The deceased bought the 10 acres from the third respondent from a larger portion of land which was subsequently subdivided culminating into smaller portions including **L.R. No. Kiminini/Kiminini Block 2/Wekhonye/145 and 146** (suit lands) which had been earmarked for the first and second respondents, their mother who was the purchaser having died before the subdivision.

2. On 18/12/2013, the applicant entered into an agreement with the first respondent for the purchase of **Plot No. 145** which was **7 acres** at a consideration of **Kshs. 5,775,000/=**. On the same day he also entered into an agreement with the second respondent for the purchase of **Plot No. 146** which was two acres at a consideration of **Kshs.1,650,000/=**. The applicant paid a deposit of **Kshs.577,500/=** and **Kshs.165,000/=** to the first and second respondents on execution of the agreements respectively. It was agreed that the balance of the purchase price was to be paid upon successful transfer and registration of the suit lands in favour of the applicant.

3. To fastruck the process of transfer of the suit lands into the applicant's name, the first and second respondents gave an authority letter to the applicant on 28/11/2014 authorising him to spend not more than **1.2 million shillings** towards the registration of the parcels in the first and second respondent's name. In the meantime the applicant was put into possession of the suit lands on execution of the sale agreements.

4. The first respondent then gave the applicant telephone contacts of a surveyor called Maasai and contacts of the third respondent. The applicant asked the surveyor (Maasai) to prepare forms for application of the consent of the land control board. The applicant then called the third respondent on the contact phone given to him by the first respondent. He asked the third respondent to come to his office in Kitale for purpose of facilitating the transfer of the suit lands into the names of the first and second respondent who will in turn transfer the same to the applicant. The third respondent came from Kakamega and met the applicant. The third respondent however went away promising to come and

complete the transaction later.

5. The third respondent had promised to come back to the applicant's office on 26/1/2015 but on that date, he did not turn up. The applicant then got a hint that the first and second respondents had conspired to have the suit lands sold to a third party in order to defraud him of the land and his money. On the same date that is 26/1/2015 the applicant received two letters from the advocate of the first and second respondents indicating that the first and second respondents had rescinded the agreements on grounds that the applicant had failed to clear the balance of the purchase price.

6. The applicant went to the lands office where he carried out a search which revealed that the suit lands had been registered in the name of the third respondent. The applicant proceeded to lodge cautions on the titles to the two suit lands. The applicant then moved to court where he filed the present application in which he seeks a number of prayers which I will address shortly.

7. The applicant's application was only opposed by the third respondent who contends that he was wrongly enjoined in this suit and that he has no privity of contract with the applicant and cannot transfer his properties to him. The third respondent states that if the applicant has any claim, the same should be directed to the first and second respondents and that in any case, the transaction between the applicant and the first and second respondents became void after six months for want of consent of the land control board. He contends that he has already evicted the applicant from the suit lands and that therefore the application for injunction has been overtaken by events.

8. I have carefully considered the applicant's application as well as the opposition to the same by the third respondent and the submissions of counsel for the parties. Prayers 1 to 4 of the notice of motion dated 12/2/2015 have already been spent. The prayers which are for consideration are prayers 5 to 10 of the application.

9. Prayer 5 is seeking an injunction against the respondents, restraining them, their agents, assigns or anyone acting on their behalf from offering for sale, selling, advertising, transferring, alienating, trespassing, evicting the plaintiff or his servants or otherwise dealing with the suit lands. When the application was placed before me under certificate of urgency on 16/2/2015 a temporary injunction was given ex-parte pending interpartes hearing. I am informed that the respondents ignored the injunction order and proceeded to evict the applicant and his servants from the suit lands. The question which begs for an answer is whether this application has been rendered unnecessary by that act. I do not think that the application has been overtaken by events. Eviction from the suit lands was one prayer in the injunction which the applicant was seeking. There are still other prayers in the injunction application which still need to be addressed.

10. The principles for grant of temporary injunctions are now well settled. First an applicant must demonstrate that he has a prima facie case with probability of success. Secondly, an injunction will not normally be granted unless otherwise the applicant will suffer loss which will not be compensated in damages. Thirdly if the court is in doubt, it will decide the application on a balance of convenience. This is what was set out in the case of ***Giella -vs- Cassman Brown Co. Ltd [1973] E.A.358.***

11. In the instant case it is not denied that the third respondent had sold 10 acres to the deceased in 1999. The deceased remained on the land until her death and she was buried there as confirmed by the letter from the area chief annexed to the applicant's affidavit. The land was left to the first and second respondents who chose to sell the same to the applicant. The land which the deceased had bought had not been registered in her name as subdivision had not been carried out by the third respondent. The issue of dealing with property of a deceased cannot therefore arise. There was nothing wrong in the third respondent transferring the suit lands direct to the first and second respondents because they are known that they are daughters of the deceased and there was no one raising any issue as to that.

12. The third respondent was well aware that he had sold the suit lands to the deceased and the beneficiaries of the deceased were the first and second respondents. This is why in the subdivision, he set aside the suit lands which totaled to about 10 acres which he had sold to the deceased. The two parcels

were then earmarked for transfer to the first and second respondents. When the first and second respondents sold the suit lands to the applicant, the first respondent gave him the contact of the third respondent. The third respondent came to the office of the applicant and assured him that he was going to effect transfer into the names of the first and second respondents who will in turn transfer the same to the applicant.

13. The third respondent was doing this but at the back of his mind, he was aware that he had conspired with the first and second respondents to defraud him of the money and land because he had already registered the suit lands in his name on 24/12/2014. The first and second respondents purported to give authority to the applicant to process transfer but it appears they were aware that they had given the third respondent a go ahead to register the parcels in his names so as to defraud the applicant. There is no way the third respondent would have registered the suit lands in his name when he knew that the deceased and her children had been on the same land since 1999. There is no evidence that the third respondent had a case where it had been determined that the deceased and or her daughters had no right to the 10 acres which the deceased bought from the third respondent.

14. The first and second respondents purported to cancel the transaction on 26/1/2015 on allegations that the applicant had failed to pay the balance of the purchase price. The agreements were clear that the balance was to be cleared upon successful transfer of the suit lands to the applicant. The first and second respondents were purporting to cancel the transaction because they knew that the suit lands had already been registered in the name of the third respondent. This is a clear conspiracy to defraud the applicant. The applicant is suing for specific performance of the contract. He had sold his property in Mombasa to come and purchase the suit lands. He is ready and willing to complete the transaction. I find that he has demonstrated that he has a prima facie case with probability of success. There is no amount of compensation which will put him back to his original position. No two parcels of land are the same. He has already sold one of his properties in Mombasa. He cannot again lose the suit lands. It is clear that the registration of the suit land in the name of the third respondent was a ploy to defraud the applicant. The applicant is entitled to an injunction to protect the property from being sold to third parties before the suit is determined.

15. Related to the issue of injunction is a prayer that the third respondent be compelled to deposit the titles to the suit lands in court. In the circumstances of this case, I find that it is necessary that that order be issued. This is because the third respondent has demonstrated that he does not respect the orders of the court. He had been barred from evicting the applicant but he went ahead to do that despite the court's order. To stop the third respondent from transferring the suit lands to a third party before this case is concluded an order is hereby given directing the third respondent to deposit the titles to the suit lands in court until hearing and determination of this case.

16. The applicant has sought for extension of the period within which the consent of the land control board is to be given. **Section 8** of the **Land Control Act Cap 302** provides that an application for consent in respect of a controlled transaction should be made within six months of the making of the agreement. The agreements for sale of the suit lands were made on 18/12/2013. The application for consent of the land control board should have been made before 18/6/2014. The proviso to Section 8 of the Land Control Act provides as follows:-

**“Provided that the High Court may notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason to do so, upon such conditions, if any, as it may think fit”.**

17. The consent of the land control board ought to have been applied for by either the first and second respondents or the third respondent. The same was not applied for by either party who ought to have done so. This may be explained in view of what had emerged namely that there was a conspiracy to defeat the interest of the applicant. The applicant in his bid to have the necessary machinery put in place had to seek authority of the first and second respondents to help in fastracking the process. Forms for application for consent were obtained and filled but the third respondent did not sign them because he already knew what was happening. There are so many people who have suffered because of consent

which is withheld as in this case. The third respondent is using the failure to obtain consent as ground for denying the applicant his entitlement to the suit land arguing that the applicant can only get a refund of the purchase price. The proviso to Section 8 of the Land Control Act was put in place to assist purchasers in situations like the one the applicant is in. I therefore find that this is a case in which the time for application of the consent of the land control board should be extended. I therefore extend the time for application for consent until this case is determined. If the applicant is successful in his case, consent of the board should be applied for to facilitate the transactions in accordance with the orders of the court which will be given then.

**18.** The applicant is seeking a mandatory injunction compelling the third respondent to transfer the suit lands to him. This prayer cannot be granted at interlocutory stage. There are no special circumstances to warrant the issuance of the same. I therefore decline to grant the same. This is a civil matter. I do not think that there is any order which has been granted which will require the assistance of the OCPD to enforce it. However should the third respondent fail to deliver the two titles to court, then the assistance of the OCPD Kitale will be necessary to ensure that the order of the court in that regard is not in vain.

**19.** All in all, I find that the applicant's application has succeeded to a large extent. For avoidance of doubt. The prayers granted are prayers **5, 6, 7, 9** and **10** as more particularly specified in the body of the ruling.

It is so ordered.

Dated, signed and delivered at Kitale on this **14th** day of **October, 2015.**

**E. OBAGA**

**JUDGE**

**In the presence of Mr. Analo for Mr. Lumalele for Applicant and Mr. Ngeywa for Mr. Okile for 3rd Respondent. Court Assistant – Winnie.**

**E. OBAGA**

**JUDGE**

**14/10/15**