



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 893 OF 2013

JOSEPH KABUGO NJENGA t/a

SAVIOR PROPERTY DEVELOPERS.....1ST PLAINTIFF

SAMWEL KEBUGO MBURU.....2ND PLAINTIFF

VERSUS

JOSEPH KIMANI KAMAU.....1ST DEFENDANT

CAROLINE MUTHONI NJUGUNA.....2ND DEFENDANT

RULING

The Application

The Plaintiff has filed an application by way of a Notice of Motion dated 19th July 2013 in which she is seeking an order that the Defendants be restrained from selling, offering for sale, disposing or any other way dealing with all those parcels of land known as Kajiado/Kauptiei North /32418, Kajiado/Kauptei-North/32419, Kajiado/Kauptiei-North/32420, Kajiado/Kauptiei-North/32575, Kajiado/Kauptiei-North/32576, and Kajiado/Kauptiei-North/32577 (hereinafter referred to as the suit properties), or any other parcel of land carved, excised or derived from these titles until hearing and determination of this application. The grounds for the application are that the suit properties belong to the Plaintiffs and have been fraudulently registered in the 2nd Defendant's name. Further, that the 2nd Defendant is in the process of subdividing the land with intentions of selling it to members of the public.

The application is supported by an affidavit sworn by the 1st Plaintiff on 19th July 2013, in which he states that the Plaintiffs and 1st Defendant entered in a sale agreement with one Isaac Topua Tumpes on 21st May 2004, who sold to them land parcel number Kajiado/Kauptiei-North 3931. The Plaintiffs annexed the said sale agreement. They further stated that after receiving the title documents from the said vendor, they entrusted them with the 1st Defendant who was to transfer the land in all their names, and that to realize this objective the Plaintiffs and 1st Defendant incorporated a company known as Savyon Holdings Ltd on 19th January 2005. A copy of the certificate of incorporation of the said company was also annexed.

The Plaintiffs aver that after the 1st Defendant received the transfer documents he promised to have the land transferred to the company but soon thereafter he left the country for Dubai, Further, that after

contacting him, he assured the Plaintiffs that the land was safe, and his wife who is the 2nd Defendant was keeping the title deeds until he came back. However, that when the 1st Defendant returned back it became apparent that he was avoiding them, and the Plaintiffs then decided to conduct investigations. They thereupon found that the 1st Defendant had transferred the land to the 2nd Defendant on 30/11/2004 just before he left the country, and they annexed a copy of the title to this effect. Further, that the said property had been sub-divided into parcels numbers 32 418, 32,419 and 32,420 which are also being further subdivided.

Lastly, the Plaintiffs claim that their intention of buying the land was to sub-divide it into small plots and in turn sell the same to different people at a profit, and that persons who paid them deposit for the plots have complained to police that the Plaintiffs obtained money from them by false pretences and they risk being prosecuted for actions occasioned by the Defendants.

The Response

The Defendants opposed the Notice of Motion in a replying affidavit sworn by the 1st Defendant on 17th September 2013 wherein he stated that he and the Plaintiffs were to initially engage in business together, but that the Plaintiffs failed to make their respective financial contributions towards the project, and by their conduct frustrated the business venture forcing it to collapse. Further, that the Plaintiffs have not shown any evidence of their financial contribution to the purchase of the suit properties. The Defendant denied engaging in any fraudulent acts as alleged, and stated that the Plaintiffs have not made any report of the alleged fraud to the police.

The 1st Defendant also stated that no evidence has been placed before this Court to illustrate that the suit properties were exercised from the parcel of land known as L.R. No. Kajiado/Kaputiei-North 3931 as alleged by the Plaintiffs, and that the same are registered in the Defendants' names for the Orders of injunction sought to issue against them.

The Submissions

The parties were directed to file and serve written submissions in which they reiterated the averments made in their pleadings. The Plaintiffs' counsel in submissions dated 10th October 2013 argued that the Plaintiffs had shown a *prima facie* case as the Defendants' title was obtained through a process that was not transparent, and relied on the Court of Appeal decision in **Simon Towett Maritim vs Joptham Muiruri, (2006) eKLR** in this regard. The counsel also argued that the Defendants were under a duty to disclose to the court how their registration as owners was done as they are the ones in possession of the title documents. Lastly, the Plaintiffs' counsel submitted that the Plaintiffs cannot be compensated by damages as they have made commitments to, and received deposits from prospective buyers, and that the balance of convenience tilted in their favour as the suit properties are currently not occupied by anyone.

The Defendants' counsel filed submissions dated 14th January 2014. He argued that the Plaintiffs had not established a *prima facie* case to warrant the grant of the orders sought as they had not provided any cogent evidence to show that the suit properties belong to the Defendants or any other person. The Defendants' counsel further submitted that the allegations of fraud are unproved, and the Plaintiffs need to provide the evidence thereof at full trial. The counsel urged the court not to grant orders which may be in vain and out of speculation, as the suit properties have been sold to other persons.

The Issue and Determination

I have read and carefully considered the pleadings, annexed evidence and submissions made by the Plaintiffs and Defendants. The issues arising herein is whether the Plaintiffs have met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. The requirement for the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the

balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. I note from the Plaintiff's Plaint dated 19th July 2013 that they are seeking a permanent injunction restraining the Defendants from dealing with the suit property, a declaration that the said properties are owned jointly by themselves and the 1st Defendant, and all titles issued thereof be cancelled and the properties be registered in their joint names with the 1st Defendant. The Plaintiffs have attached a copy of the sale agreement dated 21st May 2004 entered into between them and the 1st Defendant with the vendor with respect to L.R. No. Kajiado/Kaputiei-North 3931. The Plaintiff also brought evidence to show that the title to the suit property was issued to the 2nd Defendant on 30th November 2004 and annexed mutation forms as evidence of the sub-division of the said property.

The Plaintiffs however did not brought any evidence of title to the suit properties with respect of which they seek injunction orders. In addition, the mutation forms that they provided as evidence are not in relation to L.R. No. Kajiado/Kaputiei-North 3931, but in relation of two of the suit properties namely Kajiado/Kaputiei-North/32419 and Kajiado/Kaputiei-North/32420, and with respect to the former a third party other than the Defendants is shown to be the person sub-dividing the property. No evidence has therefore been produced by the Plaintiffs to show that the suit properties are indeed subdivisions of L.R. No. Kajiado/Kaputiei-North 3931.

I find that in these circumstances, the Plaintiff have not established a *prima facie* case since they have not brought any evidence of the title of the suit properties, or that the same are registered in the names of the Defendants or derived from L.R. No. Kajiado/Kaputiei-North 3931. This court cannot therefore grant any injunctive orders with respect to the suit propoerties. In any event I find that the Plaintiffs can be adequately compensated in damages if it is found that they did contribute to the purchase of the suit properties.

The Plaintiff's Notice of Motion dated 19th July 2013 is accordingly denied for the foregoing reasons. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____12th____ day of ____March____, 2014.

P. NYAMWEYA

JUDGE