



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND OF KENYA
AT NAKURU
CIVIL CASE NO. 485 OF 2013
CHARLES KIMUTAI CHERUIYOT.....PLAINTIFF/APPLICANT
VERSUS
MARY CHEPNGENO ROTICH ...DEFENDANT/ RESPONDENT
RULING

1.The Notice of Motion dated **29th April, 2013** was filed by **Charles Kimutai Cheruiyot**, the plaintiff/applicant herein under **Sections 3A and 95** of Civil Procedure Act Cap 21, **Order 1 Rule 1, Order 40 Rule 1, 4 and 10, Order 51 Rule 1** and 3 of the Civil Procedure Rules and all enabling provisions of the Law seeking;

1. **That pending the hearing and determination of the suit herein this honourable court be pleased to issue a temporally injunction restraining the defendant/respondent together with her servants and or agents from trespassing, wasting, damaging, alienating, removing, disposing off, selling, parting with possession or interference or in any manner whatsoever dealing or effecting transactions inconsistent with the plaintiff's right or their prejudice in that that piece of land known as 1.R No. 50556 (hereafter referred to as the suit property) registered as situate in the North East of Londiani Town in the Nakuru County.**
2. **That the defendant/ respondent be directed to survey subdivide and transfer the suit property**
3. **Costs**

2. The application is premised on the grounds which are found in the body of the application and supporting further and supplementary affidavits sworn by the applicant on 29th July, 2013, 29th August, 2013 and 18th October 2013. The applicant was represented by **Ms. Sang** who also filed written submissions on 20th November,2013.

3. The defendant swore a replying affidavit dated 17th September, 2013 and a further replying affidavit (undated).She strenuously opposed the application, and also filed written submissions on 7th November 2013.

4. The brief facts of the plaintiff's case are that the plaintiff and defendant entered into two sale

agreements dated 22nd June, 2012 and 5th October, 2012 for the purchase of two portions of the suit property of 5 acres each totaling to ten (10) acres. The plaintiff in compliance with the terms of the agreements, paid the total purchase price of Kshs. 2,500, 000 to the defendant who would in exchange survey, subdivide and transfer the 10 acres to the plaintiff. The defendant failed to transfer the 10 acres to the plaintiff and instead issued threats to the plaintiff that he had already sold the land to someone else. Indeed some strangers with the defendants authority started reinforcing the fence already put up by the plaintiff.

5. On his part, the defendant admits having entered into two agreements with the plaintiff and acknowledged payment of Kshs. 1,925,000. However, he avers that the plaintiff breached the terms of the agreement by failing to comply with the completion clauses in making full payment of the purchase price within the stipulated 90 days. Further, the suit land being Agricultural land required that consent be obtained from the Land Control Board within six months of execution of the agreements which was not procured. He urged the court not to grant the injunction sought since he was in occupation of the suit land and granting the orders would result in his eviction.

6. In his submissions filed on 20th November, 2013 the applicant submitted that he had established a prima facie case with a high probability of success at the trial. She relied on two cases **Dulu Igwo V Lydia Wangui Kamau & Anor. Civil Case No. 104 of 2012** and **Edward Mwangi Irungu v Rose Wanjiru Kamau 2013 eKLR**

7. The respondent on her part relied on the submissions filed on 7th November, 2013 and submitted that the injunction sought should not be granted in favour of the applicant as he had failed to perform his part of the contract. He relied on numerous authorities listed as follows:

(i) **Kenya Breweries Ltd & Another Vs Washington O. Okeyo Nairobi Civil Appeal No.332 of 2000.**

(ii) **Proxy Auto Consultants Ltd Vs Kenya Commercial Bank Ltd & 2 others Nakuru HCCC No.90 of 2008**

(iii) **Hezron Muruka Vs Helasabili Ltd & Another Nakuru HCCC No 129 of 2011**

(iv) **Joseph C. Chepkwony Vs Kiptagich Tea Estate Ltd Nakuru HCCC No.51 of 2007**

(v) **Tiwi Beach Hotel Ltd Vs Juliane Ulrike Stamm (1990) 2 KAR 189**

(vi) **Simon Muthamia Mutie Vs Peter Mbithi Kimeu Machakos HCCC No.110 of 2002**

(vii) **Peter Waweru Waititu Vs Cyruys J. Karanja Nairobi HCCC No.340 of 1995 V O.S**

(Viii) **Wasike Vs Swala Civil Appeal No.6 of 1993.**

8. I have considered the rival arguments by the parties herein and from the material before court I find the issues for determination to be as follows;

- i) what is the effect of not obtaining the consent from the land control board
- ii) is the plaintiff entitled to the orders sought?
- iii) is the plaintiff entitled to costs?

Effect of not obtaining consent from the Land Control Board

9. Both parties agree that this is Agricultural land and is therefore a controlled transaction within the province of **section 6 (1) of the Land Control Act Cap 302**. The defendant argues that the agreement for sale is invalidated by lack of consent of the land control board not having been obtained within the stipulated six months in accordance with section 6(1) of the Land Control Act Cap 302. Therefore the orders sought cannot issue against her. It is clear from the aforementioned sections that any sale transaction within a land control area which has no land control board consent is void for all purposes and the remedy for the applicant lies elsewhere. Equally, due to lack of the control board consent the order sought to direct the defendant to survey, subdivide and transfer the suit property i.e. specific performance is not a remedy available to the plaintiff.

10. **Section 7 of the Land Control Act Cap 302** gives the remedy that is available to the plaintiff. It says ; **"If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid....."**

11. The defendant in paragraph 16 of her replying affidavit states that she is in occupation of the suit property. This court being mindful of the fact that the plaintiff has paid a total of Kshs.1,925,000 which the defendant has acknowledged. He should not have the money and continue enjoying the use of the land.

12. In one of the authorities relied on by the applicant **Dulu Igwo V Lydia Wangui Kamau & Anor. (Supra) Mukunya J** in his ruling holds;

"A court of Law cannot compel a party to a contract for sale of land to apply for consent nor can it compel him to attend the land board for such an application. It can neither compel such board to grant a consent. The recourse for a purchaser who pays money to a vendor who is unwilling to attend the land control board or who altogether refuses to apply for such consent lies elsewhere. Various remedies are stipulated by Cap 302 aforesaid. Parties should be careful and should protect their interest in case of breach of contracts by well drafted contract of sale."

Is the plaintiff entitled to the orders sought?

13. The conditions upon which an interlocutory injunction may be granted were well settled in the case of **Giella V Cassman Brown & Co. Ltd (1973) EA 358**. They are:-

"1. The applicant must demonstrate that he has a prima facie case with a probability of success;

2. An interlocutory injunction will normally not be granted unless the applicant will suffer irreparable loss that cannot adequately be compensated in damages;

3. If the court is in doubt, it will decide the application on a balance of convenience."

14. At this stage the court is not required to make any final findings on the facts. That will be for the main hearing. The issue is therefore whether the applicant satisfies the above conditions. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the appellant has a prima facie case. However, traditionally, courts have always considered all the three principles.

15. Has the plaintiff established a prima facie case?

Prima facie is defined in **Mrao Ltd vs. First American Bank Kenya Ltd & 2 Others (2003) KLR 125** as " a case which, on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an

explanation rebuttal from the latter''

16. It is not in dispute that the parties in this suit entered into two sale agreements for purchase of 10 acres. The completion date was 90 days from the date of execution of the sale agreement. On or before the completion date the vendor was to deliver to the purchaser's Advocate certain documents among them, consents and clearances necessary and relevant to the completion of this sale transaction. Payment by the plaintiff was to be completed on or before 22nd September, 2012 for the first agreement and 5th January, 2013 for the second agreement. Although the plaintiff may not have paid the entire purchase price within the stipulated period, it is disputed that the plaintiff has paid a substantial amount of the purchase price.

17. On his part the plaintiff claims to have paid the entire purchase price save for Ksh20,000. The defendant on the other hand acknowledges receiving a total of Kshs 1,925,000. This is by all means a substantial amount but the defendant has failed to show that he honored his part of the agreement by availing the documents he had undertaken to provide within the 90 days, including consents required to complete the transaction, which I will take to include the consent from the land control board. This being the case, I do believe that the applicant has demonstrated a prima facie case with a probability of success and I do not see the need to consider the second and third principles for granting of an injunction.

18. This court therefore makes the following orders under the circumstances:

1. A temporally injunction is issued restraining the defendants together with her servants and or agents from wasting, damaging, alienating, removing, disposing off, selling and or transferring the suit land.

2. The defendant is ordered to deposit the amount acknowledged of Kshs 1,925,000/= in an interest earning account in joint names with the plaintiff or in the alternative in an interest earning account in the plaintiff and the defendant Advocates names within 14 days from the date hereof until the final determination of this case. Failure to deposit the money within the period given, execution for the above sum to follow.

3. costs for this application are awarded to the applicant.

Dated signed and delivered this 9th day of May 2014

L N WAITHAKA

JUDGE

PRESENT

Mr Murimi for the Defendant/Respondent

Mr Kairu Holding brief for Mrs Rotich for plaintiff/Applicant

Emmanuel Juma : Court Assistant

L N WAITHAKA

JUDGE

