



REPUBLIC OF KENYA

High Court of Kisii

Civil Suit 72 of 2012

CHARLES BARONGO MOMANYI.....PLAINTIFF

VERSUS

HEZRON KEBATI MOKUA.....1ST DEFENDANT

FRANCIS MACHUKA OBWOCHA.....2ND DEFENDANT

RULING

1. The facts of this case are straight forward. The Plaintiff claims that on 28th August, 1985, he entered into an agreement for sale with the 1st defendant of all that parcel of land measuring 259 feet by 157 feet comprised in **LR. No. Wanjare/Bomariba/1466** (hereinafter referred to as **“the suit property”** where the context so admits) under which the 1st defendant agreed to sell to the Plaintiff the suit property at a consideration of Ksh.5,000.00. The Plaintiff claims that although he paid to the 1st defendant the full purchase price aforesaid, the 1st defendant refused to transfer the suit property to him. The Plaintiff however took possession of the suit property and planted several trees thereon. Sometimes in the year, 2001, the Plaintiff learnt that the 1st defendant had sold the suit property once again to the 2nd defendant who had entered the same and commenced cultivation thereon. The 2nd defendant after taking possession of the suit property denied the Plaintiff access to the same. Faced with this situation, the Plaintiff lodged a complaint against the 1st defendant with Suneka Division Land Disputes Tribunal in Land Case No.45 of 2007. In its ruling dated 18th December, 2007, the said tribunal declared the Plaintiff as the legal owner of the suit property. It is not clear as to whether the said decision of the tribunal was adopted as a judgment of the court pursuant to the provisions of section 7 of the Land Disputes Act, No.18 of 1990 as there is no evidence to that effect. What is clear is that the 2nd defendant continued in occupation of the suit property. The Plaintiff thereafter decided to bring this suit in which the Plaintiff is seeking a permanent injunction to restrain the 2nd defendant from trespassing on and continuing to cultivate the suit property, specific performance of the agreement for sale between the Plaintiff and the 1st defendant and cancellation of the title to the suit property issued in favour of the 2nd respondent and his eviction from the suit property. It is the Plaintiff’s contention that, the sale and transfer of the suit property by the 1st defendant to the 2nd defendant was not proper on the ground that the 1st defendant could not transfer to the 2nd defendant a property that he had already sold to the Plaintiff. It is the Plaintiff’s further contention that the Plaintiff is the lawful owner of the suit property and as such entitled to all proprietary rights conferred by law in relation thereto. The defendants have denied that the 1st defendant did enter into any agreement for sale in 1985 with the Plaintiff with respect to the suit property. In the alternative they have contended that if such agreement existed, it could not confer upon the Plaintiff any proprietary rights in

view of the Provisions of the Land Control Act, Cap.302 Laws of Kenya. The defendants' contention is that the alleged sale agreement between the 1st defendant and the Plaintiff on the basis of which this suit has been brought was void for want of land control board consent required under the provisions of the said Land Control Act, Cap.302, Laws of Kenya. The 2nd defendant's contention is that he is in possession of the suit property as of right being the registered proprietor thereof. The Plaintiff has not responded in any significant way to the defendants' said allegation that the agreement for sale if any that was entered into between the Plaintiff and the 1st defendant is null and void for want of consent.

2. Together with the Plaintiff, the Plaintiff filed an application for a temporary injunction seeking to restrain the 2nd defendant from entering into, cultivating, alienating, developing and/or in any other manner dealing with the suit property pending the hearing and determination of this suit. The Plaintiff's application that was brought by way of Notice of Motion dated 22nd February, 2012 is the subject of this ruling. The application is supported by an affidavit sworn by the Plaintiff in which he has deposed to the facts that I have already highlighted herein above. The Plaintiff has annexed to the said affidavit as exhibit "CBM1" a copy of what is alleged to be agreement for sale that was made between the Plaintiff and the 1st defendant in relation to the suit property. The annexed document however is neither in English or Kiswahili language. The court cannot therefore make any sense of the contents thereof. The Plaintiff has also annexed as exhibit "CBM 2" a copy of the decision that was made

3. In his favour by Suneka Division Land Disputes Tribunal on 18th December, 2007 referred to herein earlier. The Plaintiff's contention is that the said agreement for sale and decision of the said tribunal confers upon him proprietary interests on the suit property and the accompanied legal rights. The Plaintiff contends that he has established a prima facie case against the defendants. On the part of the defendants, only the 2nd defendant responded to the application. In his affidavit sworn on 12th March, 2012 in reply to the application, the 2nd defendant also reiterated the defendants' main grounds in opposition to the Plaintiff's claim that I summarized herein earlier. The 2nd defendant's contention is that he lawfully purchased the suit property from the 1st defendant and has been duly registered as the proprietor thereof. The 2nd defendant claims that by virtue of that proprietorship, he has enjoyed exclusive possession of the suit property since he purchased the

4. same from the 1st defendant. The 2nd defendant has maintained that, if the Plaintiff entered into an agreement with the 1st defendant for the purchase of the suit property in 1985 as alleged, such agreement is incapable of conferring any legal interest upon the Plaintiff as it became void for want of Land Control Board Consent required under the Land Control Act, Cap.302 Laws of Kenya. The 2nd defendant has contended further that, the ruling of Suneka Division Land Disputes Tribunal relied upon by the Plaintiff as conferring upon him proprietorship interest in the suit property is invalid, first, because the said tribunal had no jurisdiction to entertain a dispute over land ownership and secondly, because the said decision was never filed with the court for adoption as a judgment of the court. It is the 2nd defendant's contention that there is no basis upon which injunction can issue against him being the registered owner of the suit property. In conclusion the 2nd defendant has contended that the application has not met the requisite conditions for granting a temporary injunction.

5. The parties agreed by consent on 26th June, 2012 to argue the application by way of written submissions. The Plaintiff filed his written submissions on 9th July, 2012 while the defendants filed theirs on 24th July, 2012. I have considered the case put forward by the Plaintiff in support of his application for injunction and the defendant's case against the grant of the same. I have also considered the submissions filed by the respective advocates for the parties and the cases relied upon. The following is the view I have taken of the matter. I am not satisfied that the Plaintiff's application has met the threshold for granting a temporary injunction that was set in the case of **Giella-vs-Cassman Brown & Company Ltd. (1973) E.A.358**. I am not persuaded that the Plaintiff has shown a prima facie case with a probability of success against the defendants. The Plaintiff's case is based on the alleged agreement between the Plaintiff and the 1st defendant that was made on 28th August, 1985 and the decision of Suneka Land Disputes Tribunal dated 18th December, 2007. The Plaintiff was under a duty to demonstrate to the court that the said agreement and decision of the tribunal are capable of conferring upon the Plaintiff proprietary

interest on the suit property which can be protected by an injunction. My take on this is that, the Plaintiff failed to do so. As I have mentioned earlier in this ruling, the purported agreement for sale that was produced in court by the Plaintiff was not in the language of the court. As submitted by the defendants' advocate, the language of this court according to Section 86(1) of the Civil Procedure Act, Cap.21 Laws of Kenya and Section 23(1) of the Environment and Land Court Act, No.19 of 2011 is English. If the Plaintiff wanted the court to take cognizance of the said agreement, the Plaintiff ought to have produced an English translation thereof. As things stand now, the court can neither take cognizance of it nor give it any evidential weight as the court cannot make out its intent and purport. The document was neither in English nor Kiswahili. The Plaintiff is therefore deemed by this court not to have placed any evidence before it in proof of the alleged agreement between him and the 1st defendant. In the absence of such evidence, the veracity of the Plaintiff's case becomes doubtful. On the issue of the decision of Suneka Division Land Disputes Tribunal, I am in agreement with the submission of the advocates for the defendants that under section 3(1) of the Land Disputes Tribunals Act, No.18 of 1990 (now repealed), the tribunals did not have the jurisdiction to entertain disputes touching on or concerning ownership of land. The decision of the said Tribunal dated 18th December, 2007 was therefore arrived at without jurisdiction and as such was a nullity and not capable of conferring any rights upon the Plaintiff. Furthermore, for the said decision to be able to confer any right, it had to be filed at the Resident Magistrates Court for adoption as a judgment of the Court pursuant to the provisions of section 7 of the said Land Disputes Tribunals Act. There is no evidence that the said decision was ever filed and adopted as a judgment of the court. The other point on this issue of prima facie case is the defence which has been put forward by the defendants based on the provisions of the Land Control Act, Cap.302, Laws of Kenya. Even if it is assumed that the 1st defendant and the Plaintiff had entered into a valid agreement for sale on 28th August, 1985, will the Plaintiff be able to surmount this defence at the trial? As stated above, the defendants' contention is that if there was such agreement, the same became null and void by dint of the provisions of sections 6 and 8 of the Land Control Act, Cap.302, Laws of Kenya and as such not capable of conferring upon the Plaintiff any interest on the suit property. It is the defendants' contention that the alleged agreement for sale between the Plaintiff and the 1st defendant was a controlled transaction under the said Act and as such required a consent of the Land Control Board for the area which consent was never obtained. The legal position of the parties to a controlled transaction under the Land Control Act with respect to which no consent has been obtained is set out in the case of **Wamukota-vs-Donati[1987] KLR 280** which has been cited by the defendants. A party to such transaction has no legal or equitable claim over the property which was the subject of such transaction and the only redress available to such a party is to recover the money or valuable consideration that was paid in the course of such transaction which becomes void for all intents and purposes. The Plaintiff has not placed any evidence before the court to show that consent was obtained with regard to the alleged agreement between him and the 1st defendant for the sale of the suit property which without doubt was a controlled transaction. In the absence of such evidence, there is a possibility as contended by the defendants that none was obtained with the result that the transaction became void with the attendant consequences. The Plaintiff has cited the Court of Appeal case of **Peter Wekesa-vs-Peter Wangusi Wasike, Court of Appeal at Eldoret, Civil Appeal No.62 of 2003(unreported)** for the proposition that, in land matters caution must be exercised to avoid determination of disputes on pure technicalities. While I agree entirely with this observation by the Court of Appeal, I don't think that failure to obtain consent for a controlled transaction under the Land Control Act, Cap.302 is a mere technical issue. This being the Plaintiff's response to this defence, I am not convinced that he will be able to surmount it at the trial.

6. I have said enough to show that the Plaintiff has not shown that he has a prima facie case against the defendants with a probability of success. That being the conclusion that I have reached, I am not obliged to consider the other condition that must be met before a temporary injunction can be granted. Due to the foregoing, the Plaintiff's application dated 22nd February, 2012 is not for granting. The same is hereby dismissed with costs to the 2nd defendant.

Dated, signed and delivered at KISII this 3rd day of May, 2013.

**S. OKONG'O,
JUDGE.**

In the presence of:-

No appearance for Plaintiff

Mr. Okemwa holding brief for Minda for the Defendants

Mobisa Court Clerk.

**S. OKONG'O,
JUDGE.**

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