



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 415 OF 2013

PAUL SAITI MUTHUI alias

PAUL SAIDI MUTHUI..... PLAINTIFF

VERSUS

WILSON MAINGI MUTIA..... DEFENDANT

RULING

Coming up before me for determination is the Plaintiff's Notice of Motion application dated 22nd March 2013 seeking a temporary injunction against the Defendant restraining him from occupying, entering or trespassing on the Plaintiff's property known as Kisasi/Mbitini/1079 situated in Mbitini location, Kisasi District, Kitui County, (hereinafter referred to as the "Suit Property").

The application is based on the grounds appearing on the face of the application and the Plaintiff's Supporting Affidavit sworn on 22nd March 2013. In it, the Plaintiff averred that he is the registered owner of the Suit Property. He produced a copy of the title deed bearing his name. He further averred that by an agreement dated 24/1/12, he agreed to sell to the Defendant 10 acres of the Suit Property at a price of Ksh. 65,000 per acre making a total purchase price of Ksh. 650,000/-. He said that pursuant thereto, the Defendant paid him Ksh. 100,000/- on 24/1/12 and a further sum of Ksh. 30,000/- by M-pesa on 22/7/12. He said that thereafter, the Defendant did not honour his obligations under the Sale Agreement. He further averred that on 18/12/12, he entered into a further agreement with the Defendant in which it was agreed that the Defendant would pay him Ksh. 200,000/- on or before 25/2/13 failing which he would be entitled to rescind the agreement, refund the Defendant Ksh. 130,000/- and resume possession of the Suit Property. The Applicant averred that the Defendant failed to honour his obligations and he proceeded to rescind the agreement and offered to refund the Defendant the sum paid to him. The applicant further stated that he later came to learn that the Defendant deposited Ksh.70,000/- in his account on 2/3/13. The applicant further indicated that he had offered the Defendant Ksh. 200,000/- but the Defendant refused to accept the refund and also refused to give up the Suit Property to the Applicant.

The Defendant/Respondent has opposed the application and has filed his Replying Affidavit which he swore on 17th April 2013. In it, he stated that it is true that the Plaintiff is the registered owner of the Suit Property. He also stated that the failure to complete the payment of the Purchase price was

occasioned by the Plaintiff who failed to bring surveyors to the land to measure the size of the land sold. He also stated that if the instant application is granted, he would be evicted from the Suit Property and his crops and other developments on the land would be destroyed even before the main suit is heard and determined. He also stated that he wished to put in a counterclaim. He also stated that it was agreed that the balance of the purchase price would be paid after the Applicant measures the actual acreage of the portion hived off and sold to him. He also stated that the proceedings of 18/12/12 were not voluntary but an order by the Area Assistant Chief. He also stated that he took possession of the Suit Property on 24/1/12 and he commenced developments therein with the consent and permission of the Applicant and he has a crop of pigeon peas which is at the flowering stage besides other fruit trees.

In response thereto, the Applicant filed his Supplementary Affidavit dated 24th May 2013 in which he stated that it is true that the size of the land sold was not stated in the initial agreement of 24/1/12 but by 18/12/12 the size of the land sold and the total purchase price had been agreed and determined. He also said that it was true that the balance of the purchase price was to be paid after the actual acreage of the portion sold was determined. He further stated that the Defendant did not pay the Applicant a total of Ksh. 330,000/- as agreed on or before 25/2/13 as a consequence of which the Applicant was at liberty to rescind the Sale Agreement which he duly did. He also stated that the Defendant was not forced to enter into the agreement of 18/12/12 but that in fact it was the Defendant who requested to pay Ksh. 200,000/- to the Applicant by 25/2/13 which the Applicant agreed. He also stated the Defendant acting under the agreement of 18/12/12 voluntarily deposited into the Applicant's account Ksh. 70,000/- on 2/3/13. The Applicant further denied having permitted or consented to the Defendant taking possession of the portion sold to him or carrying out any developments thereon and that the Sale Agreements attest to this fact. He stated further that the Defendant is a trespasser on the Suit Property. He stated that the Defendant illegally and unlawfully entered, planted crops and commenced developments on the Suit Property without his consent consequently the Defendant has not rights capable of being protected by this court.

Both the Applicant and the Respondent filed their written submissions which have been read and taken into consideration by this court.

This is an application for an interlocutory injunction pending the hearing and determination of the Suit. The considerations to be taken by the court in such an application have been long settled since the decision in now the famous ***Giella v. Cassman Brown & Company Limited [1973] EA 358***. An applicant has to show a *prima facie* case with a probability of success. Secondly an injunction will not normally be granted unless the applicant will otherwise suffer irreparable loss not capable of being compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

Has the Applicant established a *prima facie* case with a probability of success? It is common ground that the Plaintiff is the duly registered proprietor of the Suit Property. It is also common ground that the two Sale Agreements dated 24/1/12 and 18/12/12 notwithstanding, title to the Suit Property still remains with the Plaintiff. As registered proprietor of the Suit Property, the Plaintiff is entitled to the exclusive use of the Suit Property. He is therefore entitled to vacant possession of the Suit Property against the Defendant. Accordingly, he has established a *prima facie case* with a probability of success.

Will the applicant suffer irreparable injury which cannot be adequately compensated by an award of damages? It is true that the Defendant is in occupation of a portion of the Suit Property and continues to make developments thereon. However, the Applicant remains the undisputed, registered Proprietor of the Suit Property. The continued stay of the Defendant on the Suit Property until this Suit is determined will not in any way injure the Applicant. In fact, to the contrary, the possession of the Defendant of a portion of the Suit Property is opposite in effect. The Defendant has made positive developments on the Suit Property at his own expense. Allowing the Defendant to remain in possession for a while longer until this Suit is determined will not in any way prejudice the Applicant. Even if it does, the Applicant can be compensated with damages. I therefore find that the second condition has not been satisfied.

On a balance of convenience, I find that the Defendant being already in occupation of the portion of the Suit Property and having made various developments thereon stands to lose more if he is evicted at

this preliminary stage of the proceedings. No evidence has been tendered to show that the Applicant is in occupation of the Suit Property. The balance of convenience therefore tilts in favour of the Defendant who is in occupation of the Suit Property.

Overall, I find that the Applicant has not satisfied all the prerequisites for the grant of an interlocutory injunction. This application is therefore hereby dismissed. No order as to costs.

SIGNED AND DELIVERED AT NAIROBI

ON THE 5TH DAY OF JULY 2013.

MARY M. GITUMBI

JUDGE