



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
E.L.C NUMBER 346 OF 2013

**PHILIP MUTURI & 2 OTHERS (Suing on his own behalf and
on behalf of MIA MOJA SELF HELP GROUP)PLAINTIFF/ APPLICANT**

VERSUS

LEAH WANJIRU GACHERU.....DEFENDANT/RESPONDENT

RULING

1. Philip Muturi, hereinafter referred to as the Applicant, has taken out the Motion dated 3rd April, 2013 on his behalf and on behalf of Mia Moja Self Help Group. The motion seeks the following orders among others:

(i) That pending the hearing and determination of this suit the Defendant/Respondent whether acting in person, through her agents, servant, employees or any other person claiming title under her be restrained by way of an injunction from selling, sub-dividing, registering such subdivisions, registering any mutations, surveying, selling or in any way changing the nature and extent of the interest in the parcel of land known as Nakuru/Municipality Block 17/86; (“suit land”).

(ii)The cost of this application be borne by the Respondent.

2. The Motion is supported by the affidavit of John Ndege sworn on 3rd April, 2013. He deponed that the Applicant entered into a contract for the purchase of the suit land with the Respondent's husband, Zacharia Kiratu Gacheru. The Applicant paid the consideration and took possession of the land but before the title was processed, the vendor passed on and his affairs were taken over by his wife, Leah Wanjiru Gacheru (defendant/Respondent herein). The Respondent has since reneged on the contract and caused the suit land to be subdivided into small portions for subsequent sale. The applicants are apprehensive that the intent of the Respondent is to alter the nature of the registered interest in the land and to change the character of the dispute. They hence seek an injunction against the Respondent pending the hearing and determination of the suit.

3. Leah Wanjiru Gacheru, swore a Replying Affidavit on 15th April, 2013. She conceded that her late husband entered into a contract with the Applicant for the sale of the suit land. She further conceded that

the Applicants paid Kshs. 600,000/- on execution of the Agreement and took possession of the suit land immediately. She avers that the Applicants breached the contract by failing to pay the balance of the purchase price and denied the Applicants ever utilized their monies to process the title to the suit land. The Respondent avers that the Applicants do not deserve an equitable order of injunction as they approached the court with unclean hands. She urged this Court to dismiss the application with costs.

4. When the application came for hearing on 9th May, 2013 parties intimated to court that they wish to dispose the matter by way of written submission.

5. The Applicants filed their submissions on 11th June, 2013. It was their submission that **Section 52** of the **Transfer of Property Act** provides that immovable property cannot be transferred in whole or in part in the pendency of a suit where the immovable property is the subject matter. The applicant further relied on the decision in **Mawji vs. US International University** (1976-1980) KLR 229 to submit that a court ought to preserve the suit property pending the final determination of the proceedings. In the instant case, the applicant avers that the Respondent intends to subdivide and sell the suit land. He therefore urges this court to find the actions of the Respondent contrary to the provisions of **Section 52**.

6. The Applicants further relied on the doctrine of proprietary estoppel. It was their submission that they relied on the representation by the Vendor that they shall acquire rights in respect to the property and to their detriment paid to the vendor part of the purchase price. As such they urge the court that the Respondent cannot turn back on his word and deny the applicants the right over the property.

7. Finally, the Applicants submitted that a breach of statutory obligation cannot be paid by way of damages. They further stated that under the circumstances damages cannot be adequate compensation. They therefore pray that the court grants an order of injunction.

8. The Respondent filed her written submission on 30th September, 2013. In response, she submits that the applicants had not established a *prima facie* case as they had waited for a period of nine years before instituting a suit; That the applicants have been occupying their own portion of land which was excised from the suit land for nine years and there is no attempt to sell the entire land.

9. The Respondent further submitted that the contract was executed in the year 2003. The provision of **Section 3** of the **Limitation of Actions Act** bars the applicants from commencing an action founded on contract or claiming equitable relief after six years. It was her submission that since 2003, nine years had lapsed and therefore the applicants should have no audience of the court. She further relied on the decision of the court of Appeal in **Divecon Limited vs Samani** (1955-1998) 1 EA 48.

10. On equity, the Respondent submitted that equity aids the vigilant as opposed to the indolent. She also submitted that he who comes to equity must come with clean hands. According to the Respondent, the applicant had waited far too long before instituting a claim and had not completed payment of the purchase price.

11. I have considered the pleadings and written submissions of all parties.

12. I wish to commence by determining whether the Applicants' application is time barred. **Section 4** of the **Limitation of Actions Act** bars any action founded on contract from been brought to court after the expiry of six years from the date on which the cause of action accrued. However, there is provision to the extension of periods of limitation under **Section 23** of the **Limitation of Actions**. One such situation is where the person in possession of the suit land acknowledges the title of the person to whom the right of action has accrued. At paragraph 17-19 of the Replying Affidavit, the Respondent does acknowledge that the Applicants bought and are entitled to one acre of the suit land. She further acknowledges the applicants are in possession and have been cultivating the one acre since 2003. To my mind, the right of the Applicants, thus accrues on and not before the date of the acknowledgement. The Applicants thus do have a right of audience from this court.

13. The application is brought under **Order 40** of the **Civil Procedure Rules**. The principles on which

the court acts in such matters are clear. The applicants must establish the conditions necessary for such orders to be granted as enunciated in the case of **Giella v Cassman Brown & Company Limited** (1973) E.A. 358 and re-enforced by the case of **Abel Salim and others v. Okong'o and others** (1976) KLR 42 that is to say:

1. The probability of success of the main suit;
2. Irreparable injury which cannot otherwise be compensated by an award of damages; and
3. In case of doubt, on a balance of convenience.

14. In the instant case, the applicants contend that they entered into an agreement for the purchase of the suit land with the Respondent's late husband. The Respondent has acknowledged been a witness to the agreement and further confirms receipt of part payment of the purchase price. She also in her replying affidavit concedes that the one acre which was excised from the suit land has been occupied by Applicants since 2003. It is not my place, at this interlocutory stage of these proceedings to make final finding of the rivalry submissions. However, after due consideration of that evidence I find that it is just to issue a temporary injunction to stop the subdivision and subsequent sale of the suit land until the final determination of the issues in this suit. The Court will need to determine at the hearing of the suit whether indeed the Applicants paid the balance of the purchase price and whether the respondents made any promise to the applicants to complete the transaction.

15. The applicants submitted that the intent of the Respondents is to diminish the applicants claim over the suit land by selling the subdivided portions to third parties. As such, the Applicants will incur damages which cannot be compensated under the circumstances. Though the consideration is in monetary form, there are peculiar circumstances such as the applicants been in possession and cultivating the suit land and the Applicants being members of a self-help group. This poses difficulties in ascertaining sufficient damages and further allows me discretion to allow the orders sought.

16. The third principle is only applicable where the court is in doubt. I will not consider this principle in light of my findings on the first two principles.

17. A fourth principle has evolved over time. It has been stated that the conduct of the parties must be scrutinized. In this matter, I have formed the opinion that the applicants have come to court with clean hands contrary to the submissions by the Respondent. In fact she has admitted to many averments by applicants and the point of departure is whether the balance of purchase price was paid and whether there was a verbal agreement between the parties herein.

18. The upshot therefore is that this court grants a temporary injunction restraining Defendant whether acting in person, through her agents, servant, employees or any other person claiming title under her from selling, sub-dividing, registering such sub-divisions, registering any mutations, surveying, selling or in any way changing the nature and extent of the interest in the parcel of land known as Nakuru/Municipality Block 17/86 pending the hearing and determination of this suit.

19. Costs be in the cause.

Dated, signed and delivered at Nakuru this 8th day of November 2013.

L.N. WAITHAKA

JUDGE

PRESENT

Ms Omondi holding brie for Mr Wambenyi for the respondent.

Mr Otieno holding brief for Mr Githui for the Applicant

CC: Emmanuel Juma.

L N WAITHAKA

JUDGE