



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Civil Case 21 of 2012

SAMUEL MUTISYA MUTHANGYA.....PLAINTIFF

VERSUS

1. FRANCIS MUTEMI KITEME

2. MUNYOKI MUTEMI

3. KITHEKA MUTEMI

4. MUTINDA MUTEMI.....DEFENDANT

RULING

There are 2 Applications on the file dated 3rd February, and 8th March 2012 respectively. They all seek temporary injunctions. In the one dated 3rd February, 2012, the applicant is the plaintiff. He seeks that the defendants be restrained from trespassing, encroaching, using, constructing on, digging any trenches, cultivating, fencing or in any other manner interfering with his quiet possession of all that piece or parcel of land known as Mwingi/Mwingi /448 or any part thereof until the hearing and determination of this suit.

The basis of the plaintiff's application is that the defendants are father and sons. The 1st defendant is the father whereas the sons are the 2nd, 3rd and 4th defendants. On 15th September, 1999, he entered into a sale agreement with the 1st defendant in which he sold him his parcel of land for Kshs. 110,000/= . He immediately took possession and has since been resident thereon. However, the 1st defendant did not and has not signed a transfer form to him despite repeated requests. The 2nd, 3rd and 4th defendants had since entered the fray and persuaded the 1st defendant not to finalise the transaction as they wanted the purchase price refunded to him. The value of the plot according to the plaintiff was Kshs. 1,000,000/= . Sometimes in the month of October, 2011, 2nd to 4th defendants advised him to seek refund of his money from the 1st defendant and threatened to occupy the suit premises. Sure enough, the said defendant subsequently carried through their threat by planting euphorbia plants and destroying his barbed wire fence that he had put round the suit premises. The defendant's acts were illegal and were meant to deprive him of the suit premises. The defendants had further threatened to physically occupy the suit premises by force and unless restrained, he stood to suffer irreparable damages, hence the application.

In response to the application, the 2nd defendant swore a replying affidavit on his own behalf and on behalf of other defendants. He deponed that the suit premises were registered in his name and that of the

3rd defendant and therefore the plaintiff had no business mounting the suit and or the application against them. In any event with regard to the sale transaction involving the plaintiff and the 1st defendant, no Land Control Board consent was obtained. Had he purchased the suit premises as claimed, the plaintiff would at least have registered a caution thereon to forbid its transfer to them.

Subsequent thereto, the defendants filed a joint statement of defence, and counterclaim. They all denied the plaintiffs allegations. In particular, the 1st defendant denied ever selling the suit premises to the plaintiff. Otherwise, the 2nd and 3rd defendants were the registered owners of the suit premises and had always been in possession thereof. The plaintiff never obtained consent to his transaction. By way of counterclaim, they averred that on or about 6th February, 2012, the plaintiff went to the suit premises, destroyed the defendants' temporary structures, and started digging terraces for purposes of erecting structures though he had neither title nor any equitable right to the suit premises. They therefore sought against the plaintiff a permanent injunction, damages for trespass and *mesne* profits.

The counterclaim was the precursor to the subsequent application by the defendants dated 8th March, 2012 directed at the plaintiff. The defendants sought that the plaintiff be restrained from using, erecting any structures or carrying out any activity on the suit premises until the counterclaim filed is heard and determined. That application was necessitated by the fact that the plaintiff had commenced construction on the suit premises yet the 2nd and 3rd defendants were the registered proprietors of the same. Upon filing the suit, the plaintiff had apparently moved into the suit premises and dug terraces, destroyed the defendants' temporary structures and commenced construction of a house. Therefore unless restrained he was likely to continue with the construction to their detriment.

In opposing the application, the plaintiff in a replying affidavit dated 20th March, 2012 deponed where pertinent that he had been in occupation of the suit premises, that the development of the plot was complete and orders sought have thus been overtaken by events. That the mere fact that the 2nd and 3rd defendants are registered as proprietors of the suit premises is not conclusive evidence that their ownership was legitimate

When the applications came before me on 26th March, 2012, **Mr. Musyoki** for the plaintiff and **Mr. Mwaniki** for the defendant agreed that the 2 applications be heard simultaneously. They also agreed to urge the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

In considering whether or not to grant an interlocutory injunction, the court must bear in mind that such an injunction;-

- Is an equitable remedy
- It is discretionary
- The applicant must show a prima facie case with a probability of success
- It will not normally be granted unless the applicant might otherwise suffer irreparable injury that cannot be compensated by an award of damages.
- When the court is in doubt, it will decide the application on the balance of convenience.

See **Giella vs Cassman Brown & Co. Ltd [1973] E.A. 358.**

I think that both parties have been less than candid to this court. That being the case they are disentitled to the equitable remedy of injunction sought in their respective applications. In other words, they have all fallen short of the requirements of equity that whoever seeks it must come to court with clean hands. Similarly lack of candidness does not sit well with a discretionary remedy. A court deciding on a

discretionary remedy will not look kindly to a litigant who does not tell it all as it is. Both parties claim to be in possession of the suit premises. That cannot be possibly correct. One of them or indeed all of them are being economical with the truth.

The 1st defendant does not dispute having sold the suit premises to the plaintiff and received the proceeds thereof. But he has left it to his sons to do the talking for him as he sits tight. He is also comfortable with an injunction being granted in his favour and that of his sons on account of the counterclaim. Yet he does not even talk of what will become of the purchase price he received from the plaintiff on the sale agreement

The plaintiff claims to have bought the suit premises but did nothing on the same until the defendants came calling. It was then that he decided to develop the suit premises. Though he claims that the developments on the suit premises are complete and orders being sought are overtaken by events, that deposition is not possibly correct. A scrutiny of the pictures he has annexed to his affidavit in support of his application for injunction does show that the developments are far from over. One wonders again that, if the plaintiff knew that he needed to have the property transferred and registered in his name before he could call it his own going by his many entreaties to the 1st defendant to sign the documents of transfer, why did he all of a sudden throw caution to the wind and started to develop the suit premises in a frenzy, title or no title notwithstanding.

It is instructive that though the 2nd and 3rd defendants claim that the suit premises are now registered in their names and have a title deed to boot, that transfer and registration was only effected on 10th February, 2012. Yet the plaintiff's suit was filed on 3rd February, 2012. Is it possible as the plaintiff claims that after the defendants were served with the court documents, they conspired and rushed to the lands office and had the suit premises transferred into the names of the 2nd and 3rd defendants in order to defeat the plaintiff's case? That possibility cannot be ruled out. A title obtained in those circumstances will be liable to impeachment in the fullness of time. But again it is possible that 2nd and 3rd defendants had the suit premises legally transferred and registered in their names. At the end of the day whether the said transfer was fraudulent, *null* and *void ab initio* as claimed by the plaintiff or legal and regular as opined by the defendants is a matter of evidence that will have to be interrogated at the plenary hearing of the suit as well as the defence and counterclaim.

For now though the 2nd and 3rd defendants are the registered proprietors of the suit premises. *Prima facie* that is evidence of ownership. However and as correctly submitted by the plaintiff, the mere fact that they are so registered is not conclusive evidence that their ownership is legitimate. After all, it is not a first registration which cannot be impeached.

Then there is question of the consent of the Land Control Board to the transaction. The defendants claim that even if the 1st defendant sold the suit premises to the plaintiff, the same is void for want of consent from the relevant Land Control Board. Since the alleged sale was on 15th September, 1999, going by the sale agreement exhibited, parties to the agreement should have obtained the consent of the relevant Land Control Board within 6 months in accordance with the provisions of the Land Control Act. Since that did not happen, the transaction is void and cannot be enforced. On the part of the defendants, they have exhibited a letter of consent dated 19th January, 2012 from Migwani Land Control Board giving its consent to the transfer of the suit premises from the 1st defendant to 2nd and 3rd defendants, the consideration being "*gift out of love and affection*"

The plaintiff counters this argument by submitting that the transaction was not subject to the provisions of the Land Control Act as the suit premises is not agricultural land. It is situated within Mwingi Town and hence not covered by section 2(a) of the Land Control Act. That section defines Agricultural land as land not within:-

“i) A municipality or a township or

ii) A market

iii)...

iv)...

The Plaintiff supports the above contention by reference to letters from the Mwingi Town Council annexed to the defendants' affidavits on record. At this interlocutory stage this court cannot be able to determine the veracity or otherwise of these contrasting positions. It is not possible to tell whether the plaintiff's transaction was void or the transfer of the suit premises to the 2nd and 3rd defendants was genuine much as they have a title deed. This is an issue best left to be ventilated at the trial.

For all the foregoing reasons, I am satisfied that none of the parties are entitled to the injunction sought in their respective applications. They have all acted malafides and therefore undeserving of the equitable and discretionary remedies they have sought. This being my view on the two applications, they are all dismissed with no order as to costs. However, pending the hearing and final determination of the suit, the *status quo* currently obtaining on the ground shall obtain. That is to say, none of the parties shall access the suit premises. Further, I would direct the parties to take necessary steps to have the suit heard and determined expeditiously in view of the above order.

RULING DATED, SIGNED and DELIVERED at MACHAKOS this 6TH day JULY, 2012.

**ASIKE -MAKHANDIA
JUDGE**