



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 11 OF 2020

KENNEDY MULWA NGUMBAU.....PLAINTIFF

=VERSUS=

GEORGE MUSYOKA MWILU.....1 ST DEFENDANT

AGNES KASALU.....2 ND DEFENDANT

MOGI ANGWENYL.....3RD DEFENDANT

RULING

1. The plaintiff brought this suit through a plaint dated 20/1/2020. He sought the following orders against the defendants:

a) An order of specific performance to compel the defendants to avail to the plaintiff the completion documents set out at clause 8.2 of the agreement for sale dated 16th February 2018 in the manner set out in the aforesaid agreement for sale.

b) A permanent injunction to issue restraining the defendants whether by themselves, servants, agents or whomsoever from disposing off $\frac{3}{4}$ of an acre to be excised from LR no 2327/288 to any other person other than the plaintiff and/or alienating, leasing, charging or in any way interfering with $\frac{3}{4}$ of an acre to be excised from LR no 2327/288 in a manner that would prejudice the plaintiff's interest in the aforesaid parcel of land.

c) Costs of this suit and interest thereon at court rates.

IN THE ALTERNATIVE TO THE ORDERS SET OUT ABOVE

d) The sum of Shs 14,045,000/- being the deposit of the purchase price paid to the defendants together with interest thereon at commercial rates from February 2018 until payment in full

e) Loss of business income in the sum of Shs 5,700,000/- as pleaded at paragraph 26(b) above.

f) Interest on (ED) above at commercial rates from February 2018 until payment in full

g) Special damages in the sum of Shs 10,755,164/- as pleaded at paragraph 26(c) - (k) above

h) Interest on (g) above at court rates from February 2018 until payment in full

i) General damages.

j) Costs of the suit and interest thereon.

2. Simultaneous with the plaint, the plaintiff brought a notice of motion dated 20/1/2020 seeking the following interlocutory orders:

a) Spent

b) Spent

c) Pending the hearing and determination of this suit, an injunction be issued to restrain the defendants by themselves, agents,

servants, assigns or representatives from transferring ¾ of an acre to be excised from LR No 2327/288 to any other person other than the plaintiff and/or disposing, alienating, leasing, charging, sub-dividing, wasting or in any way interfering with ¾ of an acre to be excised from LR No 2327/288 in a manner that would prejudice the plaintiff's interest in the aforesaid parcel of land.

d) Pending the hearing and determination of this suit, an order do issue directing the defendants to deposit the amount paid to the defendants by the plaintiff as deposit of the purchase price in respect of ¾ of an acre to be excised from L R No 2327/288 in the sum of Shs 14,045,00/- in a joint interest earning account opened in the name of counsel for both parties within 14 days from the date of the order.

e) Costs of this application be provided for.

3. The above application is the subject of this ruling. It was supported by the applicant's affidavit dated 20/1/2020. He deposed that by an agreement for sale dated 16/2/2018, the 1st defendant agreed to sell to him ¾ of an acre of land to be excised from **Land Reference Number 2327/288**, at an agreed purchase price of Kshs 35,000,000. The agreement provided for payment of Kshs 10,000,000 as deposit on or before the execution of the agreement. The agreed completion period was 180 days. A portion of the suit property measuring 0.27 acres had already been sold to the interested party. On 17/10/2018, parties executed an addendum to the sale agreement dated 16/2/2018. The addendum provided for payment of Kshs 1,100,000 as additional deposit towards purchase price. The plaintiff fulfilled all his obligations under the agreement and under the addendum by paying Kshs 14,000,000 as deposit. The plaintiff had at all material times been ready and willing to pay the balance of the purchase price through financial accommodation from Equity Bank.

4. The plaintiff further deposed that on or about 20/8/2019, he received credible information to the effect that the 1st defendant had commenced searching for potential buyers of the ¾ acre of land which was the subject of the material agreement between the 1st defendant and himself. Consequently, he came to court praying for the above substantive and interlocutory reliefs.

5. The 1st defendant opposed the application through a replying affidavit sworn on 2/3/2020. He confirmed that they entered into the said sale agreement. He acknowledged receipt of the sum of Kshs 14,045,000. He denied intending to sell the suit land to a third party. He added that he would not be able to deposit the sum of Kshs 14,045,000 in a joint interest earning account because the money was paid to him in form of remittances towards repayment of debts he owed third parties and it would therefore not be possible for him to raise the sum of Kshs 14,045,000. He added that the conveyance process was delayed when the applicant involved the police in the matter. He further deposed that the sub-division and amalgamation exercises were yet to be completed. Lastly, he deposed that the 2nd defendant who is his spouse had given spousal consent to the transaction.

6. The interested party responded to the application through a replying affidavit sworn on 12/3/2020. He deposed that he was not privy to the agreement dated 16/2/2018 and all he was interested in was transfer of his ¼ portion of the suit property. He added that he was not opposed to the application.

7. On 25/6/2020, the 1st defendant through counsel conceded to the grant of prayer (c) of the notice of motion dated 20/1/2020. What remains to be determined in this ruling is therefore the question as to whether an order should issue directing the 1st defendant to deposit the sum of Kshs 14,045,000 in a joint interest earning account to be opened in the joint names of counsel for the plaintiff and counsel for the 1st defendant.

8. The application was canvassed through written submissions dated 6/7/2020 which I have duly considered. The 1st defendant filed written submissions dated 6/7/2020 which I have also considered.

9. The court is invited to exercise jurisdiction under Sections 1A and 3A of the Civil Procedure Act and Order 40 rule 1 of the Civil Procedure Rules. Section 1A of the Act encompasses the principle of overriding objective in civil court proceedings. Section 3A encompasses the doctrine of inherent powers of the court.

10. Order 40 rule 1 under which the court is invited to exercise jurisdiction provides as follows:

1. Where in any suit it is proved by affidavit or otherwise-

a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fits until the disposal of the suit or until further orders

11. I have considered the tenor and import of prayer (d) of the notice of motion dated 20/1/2020. I have also considered the circumstances of application. The plaintiff seeks an injunction in the nature of a preservative order in relation to the sum of Kshs 14,045,000. The single question to be answered in this ruling is whether the applicant has satisfied the criteria upon which our courts issue injunctive reliefs in form of preservative orders.

12. The principle which governs the exercise of jurisdiction to grant injunctive orders is well settled [*see Giella v Cassman Brown (1973)*

EA 358] First, the applicant is required to demonstrate a prima facie case with a probability of success. Second, the applicant is required to demonstrate that if the injunctive relief is declined, he will stand to suffer damage that may not be indemnified through an award of damages. Third, should there be doubt on both or either of the above two limbs, the court will determine the application on a balance of convenience.

13. At this stage of interlocutory application for interim injunctive relief, the court would not make conclusive or definitive findings or pronouncements on the substantive issues in the suit. Conclusive and definitive findings are reserved for the final findings of the court.

14. Prayer (c) was granted on 25/6/2020. The import of the order granted on 25/6/2020 is that the suit property has been preserved pending the hearing and determination of this suit. The applicant now seeks preservation of the sum of Kshs 14,045,000 paid by him to the 1st defendant.

15. The court would no doubt have been inclined to preserve the money if the applicant had demonstrated that the money was held in a specified account or by a specified stakeholder. What, however, emerges from the agreement for sale and the addendum thereto, is that at the request of the 1st defendant, the said monies were disbursed towards settlement of debts which the 1st defendant owed third parties. This means that the monies are not available in a specific account or held by a specific stakeholder. Put differently, the monies are not available for preservation within the framework of Order 40 rule 1 of the Civil Procedure Rules. Secondly, it is not lost to the court that the plaintiff seeks orders of specific performance of the land sale contract subject of this suit. Thirdly, the land subject matter is currently preserved pursuant to the order of 25/6/2020.

16. In light of the foregoing, I do not think the circumstances of this application are appropriate for a preservatory order in relation to the sum of Ksh 14,045,000. The court will instead fast-track disposal of the main suit.

17. Consequently, the plaintiff's notice of motion dated 20/1/2020 is disposed in the following terms.

a) Prayers (c) of the motion, which was granted on 25/6/2020, shall remain in force pending the hearing and final determination of this suit.

b) Each party shall file a single, bound, paginated and indexed bundle of pleadings, written statements, and documentary evidence within 21 days from today.

c) The substantive suit shall be heard on a date to be fixed at the time of reading this ruling

d) Notwithstanding the preservatory order issued herein on 25/6/2020, the Lands Registry and Survey Office shall be at liberty to process instruments by the 1st defendant, conveying the $\frac{3}{4}$ acre portion of LR 2327/288 to the plaintiff herein, meaning that the 1st defendant is at liberty to complete sale of the $\frac{3}{4}$ acre piece of land to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF NOVEMBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Court Clerk - June Nafula