



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 5 OF 2018

DAVID MUKOMA NGONGO.....APPLICANT

VERSUS

WILSON KIVUVO MBITHI.....1ST RESPONDENT

KILONZI NZIOKI.....2ND RESPONDENT

WACHIRA NJERU.....3RD RESPONDENT

RULING

1. In the Application dated 16th March, 2018, the Appellant/Applicant is seeking for the following orders:

a. That an injunctive order be issued restraining the 1st Respondent by himself, his agents and/or his servant(s) or any other person acting for the 1st Respondent or with the 1st Respondent's authority from transferring land known as Mavoko Town Block 3/10910 pending the hearing and determination of an Appeal by the Applicant herein.

b. That costs be in the cause.

2. The Application is premised on the grounds that the Applicant is aggrieved by the Ruling of the lower court in Machakos CMCC No. 668 of 2013; that the 1st Respondent is likely to transfer the suit land known as Mavoko Town Block 3/10910 unless an injunctive order is issued and that the orders which have been sought will not occasion any prejudice on the Respondents.

3. In his Affidavit, the Applicant deponed that the Appeal raises triable issues; that he purchased the suit land measuring ten(10) acres from the 1st Respondent and that the lower court declined to grant him orders of injunction.

4. In the Replying Affidavit, the 1st Respondent deponed that the Applicant did not produce any evidence to support the allegation that he purchased ten(10) acres of land known as Mavoko Town Block 3/10910 from him; that all along, he has been willing to give the Applicant a title for 5 acres of the suit land upon payment of the balance of the purchase price and the sub-division fees and that the Applicant should be ordered to deposit a security of Kshs. 3,000,000 pending the hearing and determination of the Appeal.

5. In his submissions, the Applicant's advocate submitted that the Applicant purchased ten (10) acres of land from the 1st Respondent; that he first purchased 5 acres of land and vide an Agreement dated 4th April, 1994 purchased a further 5 acres and that the Applicant took possession of the ten (10) acres. Counsel submitted that an injunctive order should have issued.

6. In response, the Respondents' advocate submitted that the 1st Respondent only sold 5 acres of land to the Applicant; that the Applicant did not pay fully the purchase price and that the Applicant's allegation of having purchased ten (10) acres from the 1st Respondent is not supported by documents.

7. The Respondents' advocate submitted that the 2nd and 3rd Respondents have settled and developed their respective parcels of land and that there is no evidence to show that a Record of Appeal has been prepared.

8. The Applicant has challenged the decision of the Chief Magistrate in Machakos CMCC No. 668 of 2013. In the Memorandum of Appeal; the Appellant has averred that the learned Magistrate erred by failing to appreciate that the Appellant had made out a prima facie case with a probability of success; that the Magistrate failed to appreciate that the Appellant purchased ten (10) acres of land from the 1st Respondent and that the Magistrate erred when he failed to appreciate that he was an innocent purchaser for value.

9. I have perused the Ruling of the learned Magistrate that was delivered on 14th March, 2018. In the said Ruling, the learned Magistrate dismissed the Applicant's Application dated 20th November, 2017. In the said Application, the Applicant had prayed for injunctive orders restraining the 1st Respondent from transferring or dealing with the suit land. While dismissing the Application, the learned Magistrate held as follows:

“The Applicant alleges to have purchased ten (10) acres from the 1st Respondent. However, the annexure “DM1” which is alleged to be a Sale Agreement does not support that fact. It's a collection of bits of transactions between the Applicant and the 1st Respondent. It does not state anywhere that the Applicant purchased ten (10) acres of land, the consideration or if the purchase price has been paid in full.”

10. The trial court proceeded to dismiss the Application because the Applicant had not set out a prima facie case with a probability of success. The granting of an injunction by a trial court entails a discretion which must be exercised judiciously.

11. I have considered the purported Agreements that were entered into between the Plaintiff and the Defendants between the year 1990 and 1994. The Agreement that directly deals with the suit land is the one dated 20th September, 1990. In the said Agreement, the Plaintiff acknowledged having sold to the 1st Respondent “5 acres of land whereby one acre will be exchanged with his parcel which is located at Kwa Kivoa bordering Mulova Nzioki, a river.” The other Agreement which makes reference to land is the Agreement of 27th March, 1994 and 4th April, 1994. In the latter Agreement, it is indicated that the Applicant had purchased “5 acres of land in Lukenya at a price of Kshs. 86,500.”

12. The rest of the Agreement referred to various payments whose purpose can only be ascertained at trial.

13. The Applicant did not annex on his Application the copies of the responses that the Respondents filed in the lower court to enable this court to ascertain if indeed he was entitled to injunction orders. Indeed, while considering an Application for injunction, the court should have regard if the party who is in possession of the suit land. The failure to annex the Replying Affidavits that were filed in the lower court renders this Application a non-starter. Indeed, the failure to annex evidence to show that the Applicant is the one who is in possession of the entire land as alleged confirms the Respondents' advocates assertion that it is the 2nd and 3rd Respondents who are in possession of a portion of the suit land.

14. Having looked at the numerous Agreements, and in view of the fact that the said Agreements do not refer directly to the suit land, and in the absence of evidence to show that indeed the Applicant paid the full purchase, I would, which I hereby do, agree with the findings of the learned Chief Magistrate that the Applicant had not established a prima facie case with chances of success.

15. Considering that the 1st Respondent is not opposed to the Applicant's occupation of the five (5) acres, the Applicant will not suffer any irreparable damage that cannot be compensated by way of costs. For those reasons, the Application dated 16th March, 2018 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE