



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 44 OF 2017 (O.S)**

**ELIUD KIAMA KABUCHWA.....APPLICANT**

**VERSUS**

**FRANCIS MURAGE KATHUNGU.....RESPONDENT**

**RULING**

**BACKGROUND**

The application before me is the Notice of Motion dated 21<sup>st</sup> September 2018 brought under Order **40 Rule 1 & 2 CPR and Section 1A, 1B, 3A and 63 (e) CPA**. The Applicant seeks a temporary injunction restraining the Respondent by himself, his agents, servants, employees and/or anybody working under him from entering, encroaching into, trespassing and /or in any other way interfering with the Applicant's quiet possession and proprietary rights over the one acre out of land parcel No. MUTITHI/KIBIRIRI/11/172 pending hearing and determination of this application. The Applicant is also seeking similar orders pending the hearing and determination of the main suit herein. The application is premised on grounds shown on the face of the said application supported by an affidavit of the Applicant sworn the same date. In the said supporting affidavit, the Applicant deponed that on or about the 21<sup>st</sup> October 2003, he entered into an agreement with the defendant/Respondent herein for the purchase of land parcel No. MUTITHI/KABIRIRI/11/172 at a consideration of Ksh. 150,000/= which he paid in full. He attached a copy of the sale agreement and marked **EKK 1 (a) & (b)**. The Applicant has also attached a copy of acknowledgment letter, a green card, two copies of certificates of search and photographs. The Applicant has also attached a copy of demand letter, title deed, certificate of search, an affidavit by one Richard Kabuchwa, Duncan Mutugi Kiminju and Edward Warui Nyamu.

In a replying affidavit sworn on 12<sup>th</sup> May 2017, the Respondent stated that the sale agreement between him and the Plaintiff/Applicant became null and void for want of Land Control Board consent at the expiry of six (6) months from the date of the agreement on 21<sup>st</sup> October 2003. He deponed that the Applicant's recourse is for a refund of the purchase price as a civil debt. The Respondent further stated that on 29<sup>th</sup> June 2012, they reconciled their accounts and agreed that he should pay Ksh. 130,000/= to the Applicant which he duly paid as per their agreement annexed and marked **FMK 1** dated 13<sup>th</sup> July 2012. The Respondent also attached a letter from the firm of Magee Wa Magee & Co. Advocates dated 8<sup>th</sup> February 2017.

In a further affidavit sworn on 2<sup>nd</sup> November 2018, the Applicant stated that in the period of July 2010, while still occupying the suit land, he elected to lease a different portion from the daughters who were the beneficial owners of the same parcel of land No. 172. He attached copies of the agreements as **EKK 4 & 5**.

I have looked at the Notice of Motion dated 21<sup>st</sup> September 2018 together with the supporting affidavit and further affidavit sworn on 21<sup>st</sup> September 2018 and 2<sup>nd</sup> November 2018 respectively. I have also perused the replying affidavit sworn on 22<sup>nd</sup> October 2018 and all the supporting documents. The application before me is seeking substantial orders of an equitable nature under **Order 40 CPR**. It is now trite law that before an order of injunction is issued, the applicant must satisfy the three principles as set out in the Locus Classicus case of **GIELLA VS CASSMAN BROWN CO. LTD (1973) E.A 368**. The three principles are as follows:

- (1) An applicant must show that he has a prima facie case with a probability of success at the main trial.***
- (2) An applicant must demonstrate that he will suffer irreparable injury for which damages will not be an adequate compensation.***
- (3) Where the Court is in doubt, the Court will decide the application on a balance of convenience.***

From the affidavit evidence and the documents both in support and opposition to the said application, the defendant is the registered proprietor of the suit property registration No. MUTITHI/KABIRIRI/172 which property has since been sub-divided into two portions being parcel No. MUTITHI/KABIRIRI/222 and 223 respectively. The Respondent has raised a serious issue to the effect that no consent was obtained from the Land Control Board for the transfer of the property within six (6) months from the date of the agreement and therefore the sale agreement became null and void.

As to whether the Applicant has satisfied the first principle for the grant of the injunction order, my answer is negative. The Applicant has not established a prima facie case with a probability of success. The suit property is registered in favour of the Respondent as the sole proprietor. On the second principle, the Applicant has not also shown that he will suffer irreparable injury for which damages will not be an adequate remedy. In any event, the Applicant had even agreed to be refunded a sum of Ksh. 130,000/= by the Respondent as shown from the correspondences attached to the replying affidavit. In my respective view, the Applicant has not shown that he will suffer injury for which damages will not be an adequate compensation. Deciding this matter on the third principle, I find and hold that the balance of convenience tilts in declining the orders sought.

In the upshot, I find the application dated 21<sup>st</sup> September 2018 lacking merit and the same is hereby dismissed. The costs of the application to be costs in the cause. It is so ordered.

**READ and DELIVERED in open Court at Kerugoya this 11<sup>th</sup> day of February 2019.**

**E.C. CHERONO**

**JUDGE**

**11<sup>TH</sup> FEBRUARY, 2019**

*In the presence of:*

1. Mr. Magee for the Applicant – present
2. Respondent's Advocate – absent
3. Respondent – present