



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 89 OF 2018

ESTHER NYAKAMBI MAJUMA.....PLAINTIFF

VERSUS

PHILIP SIMIYU MAKOKHA.....DEFENDANT

RULING

1. The Notice of Motion dated 17th September, 2018 which has been filed by the plaintiff seeks the following orders:

(1) That this application be certified as urgent and that service in the 1st instance be dispensed with.

(2) That while pending the *inter partes* hearing and determination of this application, the honourable court be pleased to issue a temporary injunction restraining the defendant by himself, his agents, servants, employees or any other persons acting for or on his behalf whatsoever from entering into, trespassing, disposing, leasing, selling, carrying on any construction, or erecting structure, carrying out any operation and/or activities of any nature or doing such nature of thing whatsoever on the plaintiff's parcel of land known as LR No. 2116/Block 13 Plot No. 4.

(3) That pending the hearing and determination of the suit herein, this honourable court be pleased to issue a temporary injunction restraining the defendant by himself, his agents, servants, employees or any other persons acting for or on his behalf whatsoever from entering into, trespassing, disposing, leasing, selling, carrying on any construction, or erecting structure, carrying out any operation and/or activities of any nature or doing such nature of thing whatsoever on the plaintiff's parcel of land known as LR No. 2116/Block 13 Plot No. 4.

(b) That the costs be in the cause.

2. The Notice of Motion is brought under provisions of Section 1A and 1B 3A, 63 (e) of the Civil Procedure Act and Order 40 Rules 2 and 4 (1) Civil Procedure Rules and it is founded on the grounds set out at the foot of the application and in the supporting affidavit of the applicant sworn on 17/9/2018.

3. The grounds are that the plaintiff had sold her piece of land known as **LR. No. 2166/Block 13 Plot No. B** (the suit property) situated near GK Prison Kitale within Trans-Nzoia County to the defendant herein; that the defendant has failed, refused and/or neglected to pay to the plaintiff the total agreed consideration within the prescribed and/or agreed period; that the defendant acquired possession of the land by way of fraudulent misrepresentation to the plaintiff; that the defendant had stated to the plaintiff that he was in a position to pay the agreed purchase price when in fact he was not ready, willing and/or able to do so; that the defendant is in repudiatory breach of the sale agreement between himself and the plaintiff; that the defendant without colour of right or justifiable cause has started constructing permanent structures on the suit land despite being in breach of the agreement between him and the plaintiff and that the act of the defendant amounts to disobedience, dishonest and arrogance towards the plaintiff.

4. The respondent filed a replying affidavit sworn on 4/10/2018. His response is that he admits the sale agreement dated 18/3/2016 and the payment of 600,000/= as an initial deposit; that he took vacant possession of the suit property upon payment; that he later discovered the suit land was lesser in size than he had been made to believe and also that the plaintiff had defaulted in paying the relevant government fees as the allotment letter with consequence that the land revert back to the government; that he had been paying the land rate; that he has not neglected to pay the balance; that the agreement provides for a remedy in case of breach; that the plaintiff breached the contract and ought to compensate him as he has already developed the suit property in good faith almost to completion at a cost of **Kshs.3 million**. He accuses the applicant of coming to court with unclean hands and avers that he is still willing "to negotiate to fulfil the terms of the agreement".

5. The applicant filed submissions on 6/3/2019 while the respondent filed submissions on 13/3/2019.

6. I have considered the application and the response including the submissions of the parties.

7. On the issue of whether the applicant has established a *prima facie* case, I find that the admissions by the respondent confirm this to be so and I need not look any further. As to whether she would suffer any substantial loss that cannot be compensated for by way of damages, it is good to note that she gave possession of the suit land to the respondent long ago and was paid part of the consideration. In my view she was determined to sell the property save for the admitted default of the respondent. However it is noteworthy that the respondent attributes his non-payment of the purchase price in full to the default of the applicant in paying all the outgoings owed to the various levels of Government and to the land being short of the size he expected.

8. I do not wish to comment on the issues above further save that proof of the matters alleged at this interlocutory stage may be proved at the hearing upon an examination of the agreement entered into between the parties. In this case the respondent is in possession. An order of injunction would have the mandatory effect of ejecting him and barring him from further entry on the land whereas he has even commenced development thereon, and does not have any objection to completion of the transaction once the terms of the agreement are interpreted between the parties upon negotiation. This is not what an injunction is ordinarily meant to do. An injunction is meant to forestall what has not already happened.

9. I find that now that the parties have approached this court, this is the right forum for the interpretation of such agreement with finality.

10. For now I find that the applicant stands no risk of sustaining any loss or damage that cannot be compensated for by way of damages. I do note that even under the terms of the agreement itself, damages are provided for in the event of breach.

11. It having failed the test of *prima facie* case and substantial loss set out in the case of **Giella Vs Cassman Brown (1973) E.A. 358**, I therefore dismiss the application dated **17/9/2018**.

12. The costs of the application shall be in the cause.

Dated, signed and delivered at Kitale on this 28th day of March, 2019.

MWANGI NJOROGE

JUDGE

28/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi holding brief for Bungei for respondent

N/A for applicant.

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

28/03/2019