



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 342 OF 2016

ZEPHANIA GICHEHA WAWERU.....1ST PLAINTIFF

THE BOARD OF GOVERNORS

ST. JOHNS KINGS ACADEMY.....2ND PLAINTIFF

VERSUS

SAHAL AHMED DAHIR.....1ST DEFENDANT

SAMUEL MORRIS BISASE.....2ND DEFENDANT

RULING

1. The Application before me for determination is the Notice of Motion dated 7th February 2018 brought under order 40 Rules 1 and 2 and Order 51 Rule 1 and 2 of the Civil Procedure Rules and Section 1A, 1B, 3A and 63 of the Civil Procedure Act. The 2nd Defendant/Applicant seeks orders:

1. That this honorable court to issue orders of termination of sale agreement between the 1st and 2nd Defendants in respect of the suit property situated at Vikobani Miritini area in Mombasa County and the 2nd Defendant be ordered to refund the purchase price of Kshs.2,100,000/= to the 1st Defendant pending hearing and determination of this suit.

2. That this Honourable Court do issue an order to the 1st Defendant, his agents, servants and/or employees not to continue trespassing into the suit property.

3. Cost of this Application be provided for.

2. The Application is supported by the affidavit of Samuel Morris Bisase the Applicant sworn on 7th February 2018 and a supplementary affidavit sworn on 2nd May, 2018 and is based on the following grounds:

i) That the 2nd Defendant had no authority or power to sell the suit property which is a school.

ii) That the 1st Defendant has demolished classrooms, kitchen and dormitory belonging to the school.

iii) That the community stands to suffer irreparable loss and damages if the 1st Defendant is not removed from the school.

3. The Applicant avers that he entered into a sale agreement with the 1st Defendant for the purchase of a swampy vacant un-surveyed plot situated at Vikobani, Miritini area within Mombasa County and the 1st Defendant paid a sum of Kshs.2, 100,000/= to the Applicant. That the Applicant is one of the proprietors of St. John's Kings Academy the 2nd plaintiff which occupies the suit premises. The Applicant avers that the 1st Defendant trespassed and stated erecting fences beyond the boundaries of the swampy portion which the Applicant had sold to him which measures 1/8 of an acre. The Applicant further avers that the 1st Defendant has trespassed into the school compound and has gone ahead to demolish the school classroom, kitchen and dormitory. That the 1st Defendant has exhibited arrogance despite being served with a court order issued on 18th November, 2016 which he has refused and/or neglected to obey. The Applicant states that the 1st Defendant is not a good man, is arrogant and has threatened to remove the school from the suit premises and that he has hired goons and placed them in the

school compound where they chew miraa, moguka and smoke bhang. It is the Applicant's argument that the 1st Defendant's actions have forced the school to lose business since most parents have transferred their children to other schools. The Applicant avers that the suit land was allocated to the community by the Mombasa County for the purpose of building a school and that he has since discovered that he had no authority to sell even a fraction of the said land. The Applicant asks the court to cancel the sale agreement between him and the 1st Defendant and that the Applicant be ordered to refund the purchase price of Kshs.2,100,000/= to the 1st Defendant. The Applicant also wants the 1st Defendant be ordered not to continue trespassing the suit premises.

4. The Application is opposed by the 1st Defendant who filed a preliminary objection dated 20th April 2018 and a replying affidavit sworn on 20th April 2018. The 1st Defendant avers that he does not know that the Applicant is one of the proprietors of St. John's Kings Academy the 2nd Plaintiff herein and denies that he trespassed on the premises occupied by the said school. He further denies that he has erected fences beyond the boundaries of the swampy portion of the land nor that that portion measures 1/8 of an acre which the Applicant sold to the 1st Defendant. The 1st Defendant categorically denies that he has trespassed on the school compound and demolished the school classroom, kitchen and dormitory or at all. He further denied defying the court order of 18th November 2016 which order he argues has since expired and was discharged by this court on 7th June 2017. That the court order issued on 18th November 2016 was not to the 2nd Defendant but to the plaintiffs. It is the 1st Defendant's contention that he has merely secured property that lawfully belongs to him and which he legally purchased. He denies that the suit land was allocated to the community.

5. The 1st Defendant states that this court cannot cancel the agreement of sale between him and the 2nd Defendant and order a refund of Kshs.2, 100,000 as the court is not privy to the contract. The 1st Defendant further states that since taking possession of the portion of land in June, 2016, he has incurred expenses in securing developing and guarding the land to the tune of Kshs. 25 million and that he continues to be inconvenienced by the Applicant in quiet use and occupation of the land. The 1st Defendant avers that he has demanded for payment of damages from the Applicant for loss and damage suffered as a result of his incessant interference and believes that it is as a result of the said demand that the 2nd Defendant has instituted these proceedings. It is the 1st Defendant's contention that the Application is incompetent, frivolous and misconceived in law and an abuse of the court process. The 1st Defendant further contends that the court has no jurisdiction to grant the prayers sought in the motion, and urged the court to dismiss the Application.

6. The Application was canvassed by way of written submissions. The Applicant filed his written submissions dated 29th September, 2018 and filed in court on 12th October, 2018 through M/s J. K. Mwarandu & Co Advocates wherein he reiterated the issues raised in the Application. The Applicant submitted that he had no authority to sell the suit property and that any transaction between him and the 1st Defendant is null and void.

7. M/s Asige Keverenge & Anyanzwa Advocates for the 1st Defendant filed their submissions dated 15th October 2018 in which it was submitted *inter alia*, that the 2nd Defendant has no *locus* to institute proceedings in this suit filed against him and the 1st Defendant to obtain the orders sought as no such orders have been sought in the suit. In other words, the 1st Defendant submitted that the Applicant has no claim against the 1st Defendant in this suit. The 1st Defendant further submitted that the 2nd Defendant who is in blatant breach of contract cannot under cover of this Application benefit from his breach of agreement and seek the court to re-write the agreement he freely and validly concluded between him and the 1st Defendant. The 1st Defendant submitted that the court has no jurisdiction to re-write the agreement between the parties.

8. I have considered the Application and weighed the rival submissions. From the material on record, the following is discernable The Applicant entered into a sale agreement in which the Applicant sold to the 1st Defendant an unsurveyed land situate at Vikobani, Miritini within Mombasa County. The Applicant has conceded that he was paid the full purchase price of Kshs.2,100,000/=. The Applicant now seeks an order to terminate the said agreement and have the consideration paid refunded to the 1st Defendant. The question is whether this court has the power to grant the order sought by the Applicant.

9. In the case of National Bank of Kenya Limited – v- Pipeplastice Samkolit (K) Ltd and Another (2002) 2 EA 503, the court of appeal stated:

“..... A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of Fina Bank Limited –v- Spares and Industries Ltd (2000) EA 52: “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”

10. In my view, the above principle is Applicable in the present case. I have perused the Application and find that there is no allegation of coercion, fraud or undue influence with regard to the agreement for sale which substantially constitute the contractual document between the Applicant and the 1st Defendant. To the contrary, the said contractual document, i.e. the sale agreement, is expressly admitted by the Applicant. I have also found that there is no claim pending between the Applicant and the 1st Defendant in this suit. The Applicant wants the agreement between him and the 1st Defendant terminated because the Applicant alleges that he had no authority or power to sell the suit property which is a school where he is a director. It is apparent that the Applicant wants the court to assist him in breaching the agreement between him and the 1st Defendant. I am afraid this court cannot do so. In my view, it would not be proper to go into a determination of this issue in this interlocutory Application when the orders sought will amount to granting substitutive reliefs in a summary manner even when there is no claim pending between the parties with regard to that transaction. The suit and indeed the issues that are pending for determination as can be seen from the pleadings on record are between the plaintiffs on one part and the Defendants on the other part. These are issues which I can only determine after the advantage of a full hearing.

11. The Applicant also seeks an order against the 1st Defendant not to continue trespassing into the suit property. In effect, the 2nd Defendant wants a mandatory injunction to issue against the 1st Defendant. The standard required for mandatory injunction is higher than that required of a restraining or prohibitory injunctions. This is because, among other things, the grant of such an injunction results in a change of the status quo before the trial. This court must therefore act very cautiously and diligently. However, in a proper case a court of equity will not hesitate in correcting or reversing a *status quo* or situation obtained or created by the violation of the law. However, an interlocutory mandatory injunction would be granted sparingly and only in exceptional circumstances such as where the Applicant's case was very strong and straight forward. In the other ordinary prohibitory injunction, such a prayer must be considered on the usual criteria. That criteria is that the Applicant is required to show a prima facie case with a probability of success at the trial; second, it is to be borne in mind that an injunction would not ordinarily be issued unless the Applicant was exposed to an injury which could not adequately be compensated in damages if he were to prevail at the trial; third, if the court is in doubt about the existence of a prima facie case, it should decide that Application on a balance of convenience; and fourth, injunction is a discretionary equitable remedy and it may be denied if the Applicant is shown to be underserving of equitable relief. Looking at this matter that way, the first question is whether the Applicant has shown a *prima facie* case with a probability of success at the trial.

12. In the present case, the Applicant has conceded that he sold the suit property to the 1st Defendant who took possession upon paying the full purchase price. There is no case pending between the Applicant and the 1st Defendant. Now that being the case, I do not see how a prima facie case with a probability of success can be established where there is no case in the first place. In the premises, I find that the Applicant cannot be said to have shown a prima facie case with a probability of success.

13. In the result, I find that the Application dated 7th February 2018 lacks merit and is hereby dismissed with costs to the 1st Defendant.

DATED, SIGNED and DELIVERED at MOMBASA this 4th day of April 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Gitonga holding brief for Mwarandu for Defendant

Mohamed holding brief for Asiege 1st Defendant/respondent

No appearance for plaintiff

Yumna Court Assistant

C.K. YANO

JUDGE