



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 168 OF 2018

FLORENCE NDUNGE MULWA.....PLAINTIFF

VERSUS

JEREMIAH MUTAVI SIMBA.....1ST DEFENDANT

JOSEPH KIVINDU TINDI.....2ND DEFENDANT

DANIEL MUTISYA MAKAU3RD DEFENDANT

LYDIA MUTHOKI KISILU.....4TH DEFENDANT

RULING

1. In the Notice of Motion dated 29th August, 2018, the Plaintiff is seeking for the following orders of injunction:

a. That the Defendants be restrained either by themselves or through their agents, servants, employees or any one acting on their behalf from selling, advertising for sale, making offers, alienating, transferring, disposing or interfering with all those parcels of land known as Konza North/Konza North Block 2 (Malili) 6120, Konza North/Konza North Block 2 (Malili) 6121, Konza North/Konza North Block 2 (Malili) 6122, Konza North/Konza North Block 2 (Malili) 6123, Konza North/Konza North Block 2 (Malili) 6124, Konza North/Konza North Block 2 (Malili) 6125, Konza North/Konza North Block 2 (Malili) 6126, Konza North/Konza North Block 2 (Malili) 6127, Konza North/Konza North Block 2 (Malili) 6128, Konza North/Konza North Block 2 (Malili) 6129, Konza North/Konza North Block 2 (Malili) 6130, Konza North/Konza North Block 2 (Malili) 6131, Konza North/Konza North Block 2 (Malili) 6132, Konza North/Konza North Block 2 (Malili) 6133, Konza North/Konza North Block 2 (Malili) 6134, Konza North/Konza North Block 2 (Malili) 6135, Konza North/Konza North Block 2 (Malili) 6136, Konza North/Konza North Block 2 (Malili) 6137, Konza North/Konza North Block 2 (Malili) 6138, Konza North/Konza North Block 2 (Malili) 6139, Konza North/Konza North Block 2 (Malili) 6140, Konza North/Konza North Block 2 (Malili) 6141, Konza North/Konza North Block 2 (Malili) 6142, Konza North/Konza North Block 2 (Malili) 6143, Konza North/Konza North Block 2 (Malili) 6144, Konza North/Konza North Block 2 (Malili) 6145, Konza North/Konza North Block 2 (Malili) 6146, Konza North/Konza North Block 2 (Malili) 6147, Konza North/Konza North Block 2 (Malili) 6148, Konza North/Konza North Block 2 (Malili) 6149, Konza North/Konza North Block 2 (Malili) 6150, Konza North/Konza North Block 2 (Malili) 6151, Konza North/Konza North Block 2 (Malili) 6152, Konza North/Konza North Block 2 (Malili) 6153, Konza North/Konza North Block 2 (Malili) 6154, Konza North/Konza North Block 2 (Malili) 6155, Konza North/Konza North Block 2 (Malili) 6156, Konza North/Konza North Block 2 (Malili) 6157, Konza North/Konza North Block 2 (Malili) 6158, Konza North/Konza North Block 2 (Malili) 6159, Konza North/Konza North Block 2 (Malili) 6160, Konza North/Konza North Block 2 (Malili) 6161, Konza North/Konza North Block 2 (Malili) 6162, Konza North/Konza North Block 2 (Malili) 6163, Konza North/Konza North Block 2 (Malili) 6164, Konza North/Konza North Block 2 (Malili) 6165, Konza North/Konza North Block 2 (Malili) 6166, Konza North/Konza North Block 2 (Malili) 6167, Konza North/Konza North Block 2 (Malili) 6168, Konza North/Konza North Block 2 (Malili) 6169, Konza North/Konza North Block 2 (Malili) 6170, Konza North/Konza North Block 2 (Malili) 6171, Konza North/Konza North Block 2 (Malili) 6172, Konza North/Konza North Block 2 (Malili) 6173, Konza North/Konza North Block 2 (Malili) 6174, Konza North/Konza North Block 2 (Malili) 6175, Konza North/Konza North Block 2 (Malili) 6176, Konza North/Konza North Block 2 (Malili) 6177, Konza North/Konza North Block 2 (Malili) 6178, Konza North/Konza North Block 2 (Malili) 6179, Konza North/Konza North Block 2 (Malili) 6180 or any other parcel of land derived or excised from land parcel number Konza North/Konza North Block 2 (Malili)/237 until hearing and determination of this suit.

b. That the Defendants do pay costs of this Application.

2. According to the Affidavit of the Plaintiff, she entered into an Agreement with the 1st Defendant in which the 1st Defendant sold to her plot number 1674 which was within Malili Ranch Limited; that she paid the full purchase price in two installments; that she thereafter paid KShs. 30,000 for the transfer of the land to herself and that Malili Ranch Limited promised to process the title document.

3. The Plaintiff deponed that later on, the 1st Defendant informed her that out of desperation for money, she had sold the same land to the 2nd, 3rd and 4th Defendants; that she learnt that the suit land had been transferred to the 2nd, 3rd and 4th Defendants on 27th March, 2018 and that the suit land changed its number from 1674 to Konza North/Konza North Block 2 (Malili) 237 during registration and titling.

4. According to the Plaintiff, further investigations showed that the 2nd, 3rd and 4th Defendants had sub-divided the suit land into 61 plots and that she has neither met the said Defendants nor sold to them the suit land.

5. In response, the 1st Defendant deponed that he entered into a Sale Agreement dated 4th February, 2017 with the Plaintiff in respect of Plot No. 1674, Malili Ranch; that the purchase price was Kshs. 9,000,000 and not Kshs. 6,000,000 as averred by the Plaintiff and that the Plaintiff paid him Kshs. 6,000,000 leaving a balance of Kshs. 3,000,000 unpaid.

6. According to the 1st Defendant, the transfer of the suit land was made in good faith and on the promise by the Plaintiff that she will pay the balance of the purchase price; that the Plaintiff admitted that she was unable to pay the balance of Kshs. 3,000,000 in an Affidavit and that it is the Plaintiff who authorized him to sell the suit land to the 2nd, 3rd and 4th Defendants.

7. It is the 1st Defendant's deposition that the Plaintiff signed an Agreement dated 4th November, 2017 allowing the transfer of the suit land to the 2nd-4th Defendants; that the Plaintiff handed over and signed all the necessary documents to enable the transfer of the suit land to the 2nd-4th Defendants and that the said land was transferred to the Defendants after the Plaintiff applied for and obtained the consent of the Land Control Board.

8. The 1st Defendant finally deponed that the Plaintiff is entitled to a refund of Kshs. 4,200,000 and that when the Plaintiff reported the matter to the police, he was advised to take the refund of Kshs. 4,200,000.

9. The 2nd Defendant deponed that the 2nd-4th Defendants act for Zion Movers Investments Self Help Group; that they purchased the suit land from the 1st Defendant and that the Plaintiff had agreed to have the suit land resold by the 1st Defendant and have the Kshs. 6,000,000 paid to the 1st Defendant refunded to her.

10. According to the 2nd-4th Defendants, the Plaintiff agreed to have the suit land resold to them vide an Agreement dated 4th November, 2017 and an Affidavit dated 5th September, 2017; that they paid the full purchase price; that they have invested in the suit land by sub-dividing the land and that the Application should be dismissed.

11. In her Supplementary Affidavit, the Plaintiff deponed that she never signed the Affidavit annexed on the Defendants' Replying Affidavits; that the said Affidavit and the Agreement of 4th November, 2017 are forgeries and that the suit land having passed to her, it could only be transferred to the 2nd-4th Defendants upon her signing the transfer forms which she never signed.

12. Both the Plaintiff's and the Defendants' advocates filed their respective submissions which I have considered. I have also considered the filed authorities.

13. As was held in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others (2014) eKLR*, in an interlocutory injunction Application, the Applicant has to establish a prima facie case with chances of success, demonstrate irreparable injury if a temporary injunction is not granted and all any doubts by showing that the balance of convenience is in his favour. In the said case, the court went further to hold as follows:

“If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the Applicant to injunction directly without crossing the other hurdles in between.”

14. The Court of Appeal in *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others (2003) KLR 125* defined “a prima facie” as follows:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

15. It is not in dispute that the suit land was originally owned by the 1st Defendant. It is also not in dispute that on 4th February, 2017, the 1st Defendant agreed to sell to the Plaintiff the suit land, then known as Plot No. 1674, Malili Ranch, vide an Agreement of the same date.

16. The Agreement annexed on the Plaintiff's Affidavit shows that the agreed purchase price was Kshs. 6,000,000. Upon signing the Agreement, the Plaintiff was required to pay a deposit of Kshs. 3,000,000, with the balance of Kshs. 3,000,000 to be paid within ninety (90) days.

17. The Plaintiff has annexed his bank statement which shows that he paid to the 1st Defendant a total of Kshs. 6,000,000. The Plaintiff has also annexed on his Affidavit a copy of the receipt of Kshs. 30,000 that was issued to her by Malili Ranch being the transfer fee.

18. The undisputed evidence before the court shows that the suit land was transferred to the Plaintiff from Malili Ranch Limited on 24th May, 2017. According to the exhibited copy of the green card, the land was then transferred from the Plaintiff to the 2nd-4th Defendants on 27th March, 2018.

19. Although the 1st Defendant has acknowledged that he transferred to the Plaintiff the suit land, he claims that the Plaintiff was to pay him Kshs. 9,000,000 for the land; that the Plaintiff only paid Kshs. 6,000,000 for the land and that when she was unable to pay the balance of the purchase price, she agreed vide an Agreement dated 4th November, 2017 and an Affidavit sworn on 5th September, 2017 to have the suit land resold to the 2nd-4th Defendants.

20. It would appear that the Agreement of Sale between the Plaintiff and the 1st Defendant dated 4th February, 2017 exhibited on the Plaintiff's Affidavit and the 1st Defendant's Affidavit is different, both in terms of the payable purchase price and the font. According to the Agreement annexed on the 1st Defendant's Affidavit, the payable purchase price was Kshs. 9,000,000. However, the Agreement annexed on the Plaintiff's Affidavit shows the payable purchase price to be Kshs. 6,000,000. What is interesting about the two Agreements is that the font is different and both Agreements were witnessed by one advocate, R.M. Matata on the same day. It is therefore obvious that one of the Agreements is a forgery.

21. However, what is curious about the Agreement of Sale annexed on the 1st Defendant's Affidavit is the fact that the 1st Defendant agreed to transfer the suit land to the Plaintiff *"after payment of second installment of Kshs. 6,000,000 to make it easy for Malili Ranch Limited offices to process the Title Deed."*

22. Why would the 1st Defendant agree to transfer the suit land to the Plaintiff, which he did, before being paid the full purchase price? The 1st Defendant has not given any plausible reason why such an arrangement, which is unknown in practice, was allowed. Indeed, the transfer of the suit land to the Plaintiff supports the Plaintiff's assertion that the purchase price was Kshs. 6,000,000 as indicated in the Sale Agreement annexed on her Affidavit and not Kshs. 9,000,000.

23. The 1st Defendant has also claimed that the Plaintiff agreed to have the suit land transferred to the 2nd-4th Defendants. If that is so, the Plaintiff would have signed the transfer documents transferring the suit land to the 2nd-4th Defendants. Indeed, having been registered as the proprietor of the suit land, it is the Plaintiff, and not the 1st Defendant, who should have entered into an Agreement of Sale with the 2nd-4th Defendants.

24. To the extent that there is no evidence before the court to show that the Plaintiff entered into an Agreement of Sale with the 2nd-4th Defendants and the Plaintiff never signed the transfer documents, I find and hold that the Plaintiff has established a prima facie case with chances of success.

25. Indeed, the suit land having already passed to the 2nd-4th Defendants, who have since sub-divided it into 67 portions, the Plaintiff is likely to suffer irreparable injury that cannot be compensated by way of damages unless an injunction is issued by this court.

26. For those reasons, I allow the Plaintiff's Application dated 29th August, 2018 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE