



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 38 OF 2018

JAMLECK MWANGI NDAMBIRI.....PLAINTIFF

VERSUS

CHARITY RUGURU KARIUKI.....1ST DEFENDANT

VICTOR BRUCE MWAI.....2ND DEFENDANT

RULING

What is before me is the Notice of Motion dated 10th July 2018 brought under **Order 40 Rule 1 & 3 CPR**. The applicant is seeking an equitable relief of injunction restraining the respondents either by themselves, agents, employees, servants, relatives, friends or otherwise from selling, entering, cultivating/working and/or interfering with land parcel No. Kabare/Njiku/3118 pending the hearing of this suit. The applicant is also seeking an order for cancellation of title deed for Kabare/Njiku/3118 and all names of the defendant number one be inserted and replaced by the names of the plaintiff. The application is premised upon grounds apparent on the face of that application and a supporting affidavit of the applicant sworn on 29th March 2018. That affidavit is further supported by numerous documents attached thereto. In a replying affidavit sworn on 26th July 2018 and filed in Court on 24th August 2018, the respondents opposed the applicant's application.

APPLICANT'S CASE

The applicant in his supporting affidavit stated that he entered into a sale agreement with the 1st defendant on 21st January 2013 for a portion of his father's land parcel No. Kabare/Njiku/158 (deceased) which was to be effected upon completion of succession cause to be filed. The applicant deponed that prior to the sale agreement, he had leased the portion of the suit property to the 2nd respondent on 7th November 2012, a copy of which was attached and marked as "**JMN 2**". He further stated that the 1st respondent has failed to pay him the balance of Ksh. 156,000/=. He therefore seeks the orders in this application. He is apprehensive that he may lose the money and the land to the 1st respondent unless this Honourable Court intervenes.

RESPONDENTS CASE

The respondents' position is that on or about 21st January 2013, the 1st respondent and the applicant entered into a sale agreement of a portion of land from L.R. No. Kabare/Njiku/158 measuring ½ an acre. The land by then was registered in the name of the applicant's father Michael Ndambiri Murathi (deceased). The purchase price was Ksh. 900,000/=. The applicant at the execution of the sale agreement acknowledged receipt of a total of Ksh. 376,000/= and the balance of Ksh. 524,000/= was to be paid as follows:

- a. Ksh. 300,000/= on or before 28th February 2013
- b. Ksh. 224,000/= to be paid after transfer in favour of the purchaser.

After the completion of the succession cause, the applicant declined to transfer the land to the 1st respondent who filed a case in Gichugu Law Court being P.M.C.C No. 30 of 2017. Immediately upon filing the said case, the applicant agreed to transfer the land to the 1st respondent. The 1st respondent further stated that the balance of Ksh. 192,000/= was paid on 7th July 2017 whereby the applicant acknowledged he had no claim against them. The respondent further contend that the balance of Ksh. 156,000/= allegedly being claimed by the applicant was completed as part of the purchase price vide the sale agreement dated 21st January 2013 and which amount was duly acknowledged through a demand letter by the applicant's advocate M/S Ndana dated 13th December 2017 which was annexed to the replying affidavit and marked "**CRK 3**". The applicant further deponed that land parcel No. Kabaare/Njiku/158 was partitioned and a new number issued in the name of the applicant being L.R No. Kabare/Njiku/2173. The applicant subsequently sub-divided the said land into two

portions being Kabare/Njiku/3118 and 3119. Land parcel No. Kabare/Njiku/3118 was transferred to the 1st respondent after she cleared the purchase price. The respondent averred that the purchase of land parcel No. Kabare/Njiku/3118 was above board, for valuable consideration and duly registered in accordance with the law. They stated that the application filed by the applicant is a non-starter, scandalous, un-meritorious, frivolous and meant to cause embarrassment and that the same should be dismissed.

DECISION

I have considered the affidavit evidence both in support and in opposition to the application dated 10th July 2018. The applicant's application is seeking an injunction order which is an equitable relief. The principles for the grant of injunction orders have been set out in the celebrated case of *Giella Vs Cassman Brown Co. Ltd (1973) E.A. 358*. Before granting an order of injunction, the Court must satisfy itself on the following three principles:

1. **The applicant has established a prima facie case with high chances of success.**
2. **The applicant must demonstrate that he will suffer substantial injury and that damages will not be an adequate remedy.**
3. **Where the Court is in doubt, it may decide the case on a balance of convenience.**

From the affidavit evidence and the documents annexed both in support and opposition to this application, it is clear in my mind that the parties executed a sale agreement for the disposition of an interest in the suit property. The parties executed all the relevant documents and the 1st respondent was registered as proprietor of land parcel No. Kabare/Njiku/3118. The applicant's complaint from the pleadings is that he has not been paid a balance of Ksh. 156,000/=. He is not challenging the manner in which the 1st respondent obtained the title to the suit property. He is not challenging the 1st defendant's/respondents title on grounds of fraud or illegality. Section **26 of the Land Registration Act, 2011** provides as follows:

“26 (1) The certificate of title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except in:-

- a. **On grounds of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme**”

I am mindful that this is an application at an interlocutory stage and the case is yet to be heard. Having said that, I have no doubt in my mind that no prima facie evidence with a probability of success at the main hearing has been placed before this Court. No material has also been shown that the applicant will suffer irreparable loss that cannot be remedied by way of damages. To the contrary, the applicant is actually complaining that the respondents have not paid him the balance of the purchase price of Ksh. 156,000/=. On that account, I find that the applicant cannot suffer injury which cannot be compensated since he can be compensated by the claim of Ksh.156,000/= which he is demanding as the balance of the purchase price. I find this case is appropriate to be determined on the third principle. In the result therefore, the balance of convenience tilts in dismissing the application dated 10th July 2018 which I thereby do with costs to the respondents.

It is so ordered.

READ and DELIVERED in open Court at Kerugoya this 14th day of June, 2019.

E.C. CHERONO

ELC JUDGE

14TH JUNE, 2019

In the presence of:

1. Mr. Macharia holding brief for Mr. Mwaura for Defendants/Respondents
2. Plaintiff – absent
3. Mr. Mbogo Court clerk – present