



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 179 OF 2017

JAMES GICHURU WAKAI.....PLAINTIFF

VERSUS

PETER KIMANI KAMAU.....DEFENDANT

RULING

1. In the Notice of Motion dated 11th April, 2017, the Plaintiff is seeking for the following orders of injunction:

a. This Honourable Court be pleased to grant a temporary injunction restraining and/or prohibiting the Defendant/Respondent whether by himself, his servants, employees, agents and/or by whomsoever from entering onto, selling, alienating, transferring, mortgaging, leasing, renting and/or trespassing on the Plaintiff's parcel of land known as Donyo Sabuk/Komarock Block 1/3808 or otherwise dealing with any portion thereof at all pending the hearing and determination of this suit.

b. The Defendant/Respondent do furnish the Plaintiff/Applicant and this Honourable Court with the Equity Bank Statement for the Account Number 0120293089479, in the name of Alphaland Investments for the period running from January, 2013 to date.

c. The costs of this Application be borne by the Defendant/Respondent.

d. Any other or further relief this Honourable Court may deem fit and/or just to grant suo motu.

2. The Application is premised on the Affidavit of the Plaintiff who has deponed that he is a *bona fide* purchaser for value of all the parcel of land known as Donyo Sabuk/Komarock Block 1/3808 (*the suit property*); that in February, 2013, he entered into an oral Agreement with the Defendant to sell to him two (2) acres of the suit property and that after paying the Defendant a deposit of Kshs. 500,000, the Defendant granted him vacant possession.

3. It is the deposition of the Plaintiff that he deposited the Kshs. 500,000 in account number 0120293089479, Equity Bank, in the name of Alphaland and that he continued making payments into the said account the subsequent instalments.

4. The Plaintiff deponed that as the time the Defendant invaded the suit land in October, 2016, he had paid him a total of Kshs. 3,800,000 and that he is unable to peacefully use the suit property.

5. In reply, the Defendant deponed that he is the registered proprietor of the suit property; that he has never entered into a Sale Agreement over the sale of the suit property with the Plaintiff as alleged; that the Plaintiff had initially expressed a desire to purchase the suit property and that the Plaintiff never showed up to sign the Sale Agreement.

6. According to the Defendant, during his routine visit to the suit land, he noticed that the Plaintiff had fenced it without his permission and that when he made a report to the police, he was authorized to demolish the structures standing on the land.

7. In his Supplementary Affidavit, the Plaintiff deponed that the terms of the Agreement he entered into with the Defendant were well understood by both of them and that he made several deposits in the Defendant's account to settle the purchase price of Kshs. 4,000,000. It is the Plaintiff's case that so far, he has paid the Defendant a sum of Kshs. 3,800,000.

8. In his submissions, the Plaintiff's advocate submitted that the Plaintiff has demonstrated that he has beneficial interest in the suit property having purchased it; that the Plaintiff has proved that there was an oral Agreement between himself and the Defendant for the purchase of the suit property and that the Plaintiff paid to the Defendant a total of Kshs. 3,800,000 being the purchase price.

9. The Defendant's advocate submitted that there was no Sale Agreement in writing between the parties; that Section 3(3) of the Law of Contract Act provides that no suit based on a contract for the disposition of an interest in land can be entertained unless the contract is in

writing, executed by the parties and attested and that in any case, the consent of the Land Control Board should have been obtained to validate the Sale Agreement.

10. The Defendant's counsel submitted that the Plaintiff has not demonstrated a prima facie with a probability of success; that if the Plaintiff can demonstrate that he paid a sum of Kshs. 3,800,000 as alleged, then he shall be entitled to a refund and that the Application should be dismissed.

11. The Plaintiff's case is that he entered into an oral Agreement with the Defendant, who is a Director of Alphaland Investments, for the sale of land known as Donyo Sabuk/Komarock Block 1/3808.

12. According to the Plaintiff, he agreed to purchase the suit property at a price of Kshs. 4,000,000 and that he has paid the Defendant a total of Kshs. 3,800,000 in instalments.

13. It is trite that an Agreement for Sale of land must be in writing and witnessed. Section 3(3) of the Law of Contract Act provides as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

14. Section 38(1) of the Land Act is similar, word for word, with the provisions of Section 3(3) of the Law of Contract Act. Having admitted that there was no written contract between himself and the Defendant in respect of parcel of land known as Donyo Sabuk/Komarock Block 1/3808 which is registered in the name of the Defendant, the Plaintiff is unlikely to succeed in recovering the said land.

15. Indeed, the Plaintiff's only recourse is to sue for the money paid and damages, if any, and not for an order of specific performance. That being the case, I find that the Plaintiff has not established a prima facie case with chances of success. The Application dated 11th April, 2017 is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE