



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 334 OF 2017

FREDRICK KALUMBA ----- PLAINTIFF

-VERSUS-

MATHIAS MULI KISWII ----- 1ST DEFENDANT

PAUL MUTUKU KISWII ----- 2ND DEFENDANT

TITUS MWOLOLO KISWII ----- 2ND DEFENDANT

RULING

1. There is before me a Notice of Motion application expressed to be brought under Order 40 Rule 1(a) and 2 Order 51 Rule (i) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law for orders:-

4. That this Honourable Court be pleased to make temporary interim orders to the Land Registrar Makueni to stop any dealings whatsoever with the title deeds No. MAKUENI/KIOU/1252 and MAKUENI/KIOU/361 pending the hearing and determination of this suit.

5) That this Honourable court be pleased to make interim orders that the 1st, 2nd and 3rd Defendants/Respondents by themselves, their agents and/or servants be restrained from entering onto and/or encroaching and/or remaining on and/or constructing and/or in any other manner whatsoever interfering with the 2.5 acres portion of land in parcel MAKUENI/KIOU/1252 and MAKUENI/KIOU/361 which belongs to the Applicant/Plaintiff pending hearing and determination of the main suit.

7) That specific performance to compel the Respondents/Defendants to complete their part of the sale contract by doing sub-division and transfer in favour of the Applicant/plaintiff.

8) That the said orders be enforced by the O.C.S Sultan-Hamud Police Station.

9) That costs of this application be provided for.

Prayers 1, 2, 3 and 4 are spent. The application is dated the 07th September, 2017 and was filed in court on the 18th September, 2017. It is predicated on the grounds on its face and is supported by the affidavit and further affidavits of Fredrick Kalumba sworn on the 07th September, 2017 and 06th November, 2017 respectively. It is opposed by the replying affidavit of Paul Mutuku Kiswii, the second Defendant/Respondent, sworn on the 11th October, 2017 and filed in court on the 12th October, 2017.

2. On the 19th October, 2017 the court directed that the application be disposed off by way of written submissions. The Applicant was granted 14 days within which to file and serve his submissions and the case was fixed for mention on the 09th November, 2017 when it turned out that the Applicant was yet to serve his submissions upon the Respondents. On the same date, the second Respondent was granted 14 days to file and serve his submissions. He hadn't done so by the time the date for this ruling was fixed on the 06th December, 2017. He however managed to file and serve his submissions on the 07th December, 2017.

3. The counsel for the Applicant submitted that the latter has demonstrated the reason as to why injunctive orders sought ought to be granted as against the Respondents as was laid out in the case of **Giella vs Cassman Brown and Company Limited [1973] EA 358** and urged the court to allow the application as prayed. On the other hand, the counsel for the second Respondent was of the view that the application has not satisfied the principles set out in Giella's case (supra) and as such, the application ought to be dismissed with costs to the second and the third Respondent.

4. Having read the application together with the supporting, further and replying affidavits and having read the submissions filed, the question to pose at the outset is whether or not prayer 7 of the application can be granted at the interlocutory stage? The second Respondent has deposed in paragraph 4 of his replying affidavit that to grant such orders would amount to determining the suit at preliminary stage. On his part, the Applicant deposed in paragraph 4 of his further affidavit that it is in the interest of justice that the application be allowed.

5. It should be noted that Order 40 of the Civil Procedure Rules is headed as follows:-

“Temporary injunctions and interlocutory orders”

Indeed under Order 40 Rule (1)(a) an order of temporary injunction or order is issued to prevent wasting, damaging, alienation, sale or disposition of property pending the hearing of a suit or until further orders. It follows therefore that an order for specific performance cannot be issued at interlocutory stage as it will determine the suit in finality before it is heard. As such, I am in agreement with the respondent on this issue.

6. The Applicant and the second Respondent are agreed that the application is to be determined on the basis of the principles set out in **Giella vs Cassman Brown case** (supra). I need not repeat those principles herein. I will however proceed to determine whether or not this application ought to be allowed.

7. Has the Applicant shown a prima facie case with probability of success? The applicant has in paragraph 3 deposed that he entered into sale agreement with the first Respondent who proceeded to show him an agreement between him and the second agreement that showed the first defendant as the owner of **Makueni/Kiou/361** and 0.5 acres in plot number **Makueni/Kiou/1252**. The agreement is said to have been entered into December 2007. The Applicant only carried official search of the suit properties on 29th August, 2017, after he started receiving threats from the third Respondent in 2016. Even though the Applicant says that he took possession of the suit property upon his agreement with the first Respondent, he never carried due diligence to establish ownership of plots numbers **Makueni/Kiou/361** and **Makueni/Kiou/1252**. He says that he has been requesting the first Respondent to facilitate the process of having the suit property transferred to him. This raises issues of whether or not the contract is enforceable against the first Respondent and whether or not it is void as well as the remedies that are available to the Applicant. This cannot be determined at interlocutory stage but it will suffice to note that I am not convinced that the Applicant has shown a prima facie case with probability of success.

8. Has the Applicant shown that he will suffer irreparable harm if injunction is not granted? In my view, the Applicant has not shown the irreparable harm that he is likely to suffer notwithstanding the fact that he says that he has been in possession of the suit property for 10 years. From the affidavit evidence, it is clear that Applicant can be compensated by way of damages for whatever harm he is likely to suffer if the orders sought are not granted.

9. This court is not in doubt and evening it were, in my view the balance of convenience would tilt in favour of the second Respondent.

10. Arising from the foregoing, it is my finding that the application lacks merit. **Same is dismissed with costs to the second Respondent.**

Signed, Dated and Delivered on this 31st Day of January, 2018.

MBOGO C.G.,

JUDGE.

In the presence of;

No appearance for the applicant and the 2nd Respondents

Mr. Kwemboi Court Assistant

MBOGO C.G.,

JUDGE.