



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO. 12 OF 2017

MICHAEL MUMO NGOLAPLAINTIFF

VERSUS

JOSPHAT KANYEKI WAMBUA1ST DEFENDANT

ISAIAH MUTUNGA WAMBUA.....2ND DEFENDANT

ISAAC MUTINDA WAMBUA3RD DEFENDANT

JONATHAN MUASA WAMBUA4TH DEFENDANT

JOSEPH MUTUA WAMBUA5TH DEFENDANT

OLIVER NDUNGU CHEGE.....6TH DEFENDANT

RULING

1. In the Application dated 20th January, 2017, the Plaintiff is seeking for the following orders:

a. That an order of temporary injunction be issued restraining the Defendants by themselves, their agents, servants or any other persons acting through the Defendants' instructions from evicting, trespassing into, transferring and/or in any manner whatsoever from interfering with the Plaintiff's ownership, possession and use of all that parcel of land known as Donyo Sabuk/Kiboko Block 1/1344 pending the hearing and determination of this Application.

b. That an order of temporary injunction do issue restraining the Defendants by themselves, their agents, servants or any other persons acting through the Defendants' instructions from evicting, trespassing into, transferring and/or in any manner whatsoever from interfering with the Plaintiff's ownership, possession and use of all that parcel of land known as Donyo Sabuk/Kiboko Block 1/1344 pending the hearing and determination of this suit.

c. That the OCS, Kangundo Police Station do assist in service of the orders and in ensuring compliance.

d. That the costs of this Application be borne by the Respondents.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he purchased parcel of land known as Donyo Sabuk/Kiboko Block 1/1344 (*the suit land*) from the 1st -5th Defendants who are the sons of the late Stephen Wambua Kanyeti; that the purchase was approved by all the beneficiaries to the Estate of the late Kanyeti and that the suit property was to be transferred to the Plaintiff after the finalization of the succession proceedings.
3. It is the Plaintiff's case that after executing the Sale Agreement, he took possession of the suit land and that the suit land was later on fraudulently transferred to the 6th Defendant by the 1st Defendant.
4. In response, the 6th Defendant filed a Notice of Preliminary Objection in which he averred that the Sale Agreement of 16th September, 2007 over the suit land was done before the Grant was confirmed and that the same is null and void.
5. The 1st Defendant filed a Replying Affidavit in which he deponed that the suit land was registered in favour of his late father; that after the succession proceedings, the land was transferred to him and that he sold it to the 6th Defendant.
6. It is the 1st Defendant's deposition that the Plaintiff entered into an illegal transaction in respect to the suit land with some of the beneficiaries to his late father's estate and that the Defendants are willing to refund him the money he paid.
7. The 6th Defendant filed a Replying Affidavit in which he deponed that he purchased the suit land from the 1st Defendant and that the land was transferred to him after obtaining the consent of the Land Control Board on 18th August, 2015.
8. The Plaintiff and the Defendants' advocates filed their submissions in respect to the Application and the Notice of Preliminary Objection, I have considered the submissions and the filed authorities.
9. The Plaintiff's claim is based on the Agreement of 16th September, 2007 which he entered into with some of the beneficiaries of the Estate of the late Stephen Wambui Kanyeti, the registered proprietor of the suit land.
10. From the said Agreement of 16th September, 2007, the sellers of the suit land were the 2nd to the 5th Defendants. The 1st Defendant only came on the scene in the subsequent agreement of 8th April, 2013 when the Plaintiff was making the final payment of the purchase price. On the said date, the 1st Defendant purportedly agreed to transfer the suit land to the Plaintiff.
11. The 1st Respondent has argued that the beneficiaries of the Estate of Stephen Wambua Kanyeti could not have transferred the suit land before the Confirmation of Grant.
12. The 1st Defendant has annexed on his Affidavit the Certificate of Confirmation of Grant which shows that the same was issued on 1st October, 2012 way after the Plaintiff had purchased the land. Indeed, upon Confirmation of the Grant, the suit land was allocated to the 1st Defendant who became the legal owner of the same.
13. It is trite that under Section 82(b) (ii) of the Law of Succession Act, no immovable property can be sold before Confirmation of Grant. Indeed, if the Plaintiff had entered into an agreement with the 1st Defendant, and then the land was transferred to the 1st Defendant after Confirmation of the Grant, then the Plaintiff could enforce the agreement as against him. But that is not what happened in the instant case.
14. Considering that the Plaintiff purported to purchase the property of the late Stephen Wambua Kanyeti before the Confirmation of the Grant, the said sale was null and void. The Plaintiff's recourse is to pursue

the purchase price.

15. In the circumstances, I dismiss the Application dated 20th January, 2017 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JANUARY, 2018.

O.A. ANGOTE

JUDGE