



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 847 OF 2017

PATRICK GITONGA MUGUKU.....PLAINTIFF

VERSUS

GILBERT MAINA NGEI.....1ST DEFENDANT

ESTATE OF PATRICK NJUGUNA NJOROGE..... 2ND DEFENDANT

ESTATE OF ISAIAH KIBINGE MUGUKU.....3RD DEFENDANT

USERNAME INVESTMENT LIMITED.4TH DEFENDANT

(NGONG CRESCENT LIMITED)

RULING

The application for determination is the Plaintiff's Notice of Motion dated the 1st September, 2017 brought pursuant to Rule 3(2) of the High Court Vacation Rules and Order 37 of the Civil Procedure Rules.

The application is based on the following grounds which in summary is that the Plaintiff is the purchaser for value of land parcel number LR. NGONG/NTASHART/5033 (hereinafter referred to as the suit land) having purchased the same from the 1st, 2nd and 3rd Respondents. The suit land was curved out of LR No. NGONG/NGONG/ 755 as the Plaintiff only purchased a portion of 28.33 hectares from the said parcel. The 1st, 2nd and 3rd Defendants have failed to honour the agreement for sale and sold the entire parcel of land to the 4th Respondent which is a land buying company and they are in the process of subdividing and apportioning it to unknown parties. The suit property should be preserved pending the hearing and determination of the main suit and no prejudice will be suffered by the Defendants if the application is allowed.

The application is supported by the affidavit of PATRICK GITONGA MUGUKU the Plaintiff herein where he deposes that upon purchase of the suit parcel, it was agreed that he would pay the 1st, 2nd and 3rd Defendants part of the purchase price and settle the balance upon subdivision of the LR no. NGONG/NGONG/755 so as to apportion him the title of land he had purchased. He claims the 1st, 2nd and 3rd Respondents registered the subdivision of LR no. NGONG/NGONG/NTASHART/755 and his parcel was indicated as NGONG/NGONG/5033 which is the suit land herein, in accordance with the acreage he had purchased. He avers that the 1st, 2nd and 3rd Respondents have frustrated his efforts to

complete the transaction as agreed on the Sale Agreement dated the 19th December, 2011 despite his frequent demands. He has learnt the 1st, 2nd and 3rd Respondents have sold the whole of LR no.NGONG/NGONG/755 as it then was to the 4th Respondent.

The application is opposed by the 1st, 2nd and 3rd Respondents who gave authority to the 1st Respondent GILBERT MAINA NGEI to swear the replying affidavit where he deposes that the Plaintiff breached the agreement by paying Kshs. 10,680,000 out of the agreed Kshs. 13,000,000 and has not done so five years nine months later. He states that the agreement dated the 19th December, 2011 was duly rescinded by the Vendor's advocates on record and is now not enforceable. He reiterates that the Plaintiff's claim on rescission of agreement lies in the refund less the liquidated damages payable of Kshs. 1, 320,000. He admits that the 1st, 2nd and 3rd Defendants sold the suit land to the 4th Defendant who has fulfilled the conditions in the agreement for sale and taken possession of the suit land which has already been subdivided and sold to clients. He insists titles NGONG/NTASHART/755 and NGONG/NGONG/5033 do not exist as they have been duly alienated and the orders sought are not justifiable. He claims the Plaintiff is guilty of laches and slept on his rights since 2011 and has not demonstrated a reasonable cause of action against the Defendants. Further that the Plaintiff has wrongly sued the 2nd and 3rd Respondents as an estate is not a corporate body or legal person capable of being sued in its own name. Further that there is no reasonable cause of action against the 4th Respondent as it was not privy to the contract dated the 19th December, 2011, and a bonafide purchaser for value without notice in the title if at all. He reiterates that the suit property in question is agricultural and subject to the consents of the Land Control Board and therefore an order for specific performance cannot obtain in the circumstances.

The 4th Respondent opposed the application and their Chief Executive Officer REUBEN KIMANI filed a replying affidavit where he deposed that the 4th Respondent purchased suit land from the 1st, 2nd and 3rd Respondents. He states that before purchasing the suit land, they undertook due diligence through their advocates after which they engaged the vendor's advocate. He insists the search carried out did not show any adverse interest registered against the title to the property and in particular, any interests to the Plaintiff. He claims they purchased the land from the 1st Respondent and representatives from the estates of the 2nd and 3rd Respondents were paid a total of Kshs. 48, 650,000 being the purchase price with the final instalment being paid on 31st July, 2017. He reiterates that after they paid deposit, they were granted partial possession of the suit land which they cleared and undertook subdivisions with the same being done in broad daylight and no objection was raised from the Plaintiff. He confirms that the suit land was registered in their favour on 12th September, 2017 and they hence acquired a good title as an innocent purchaser for value. He reaffirms that they are the absolute and indefeasible owners thereof whose title to the suit land can only be challenged by fraud or misrepresentation which the Plaintiff has not pleaded. He further states that new title deeds exist for the plots already subdivided from the suit land and that the agreement dated the 19th December, 2011 is void. Further that no consent of the Land Control Board was obtained and there is no privity of contract between it and the Plaintiff. He reaffirms that the application and the entire suit discloses no reasonable cause of action against the 4th Respondent.

The 1st Respondent filed further affidavits where he included various correspondence between themselves and the Plaintiff culminating in the rescinding of the contract between them.

All parties filed their respective written submissions, which I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 1st September, 2017, including the supporting and replying affidavits as well as the annexures herein, the only issue for determination is whether the Plaintiff is entitled to the injunctive orders sought pending the outcome of the suit.

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, it is not in dispute that the Plaintiff entered into an agreement to purchase the suit land on 19th December, 2011 and paid Kshs. 10,680,000 out of the agreed Kshs. 13,000,000. The 1st, 2nd and 3rd Defendants insist the Plaintiff breached the agreement by failing to pay the remaining balance. I note as per annexure V in the further affidavit, the firm of messrs Kiana Njau & Co. Advocates vide their letter dated the 25th November, 2014 issued the Plaintiff's advocates messrs Maina Njuguna & Company Associates the notice rescinding the agreement dated the 19th December, 2011. An excerpt from the letter reads as follows:

'For the foregoing reason the agreement is now hereby rescinded as per the provisions of the agreement dated the 19th December, 2011.'

I note the Clause on **Breach of Contract** within the **Agreement dated 19th December, 2011** was very specific and stated that: ***' If either party fail to comply with any of the conditions hereof then the party suffering the breach of contract ('Notifying party") may give to the other party ('Defaulting party') at least fourteen (14) days' notice in writing confirming the party's readiness to complete the sale in all respects and specifying the default and requiring the defaulting party to remedy the same before the expiration of such notice AND if the defaulting party fail to comply with notice the notifying party shall be entitled to rescind the contract.'***

From the correspondence annexed to the 1st Respondent's further affidavit, I note this was the procedure adhered to in rescinding the contract. It is not disputed that the 4th Defendant purchased the suit land for Kshs. 48, 650,000 being the purchase price and paid the final instalment on 31st July, 2017 with the title being issued to them on 12th September, 2017. It contends that it acquired a good title as an innocent purchaser for value and has proceeded to subdivide the suit land and obtain fresh titles for the plots. The 1st, 2nd and 3rd Defendants insist there was no consent of the Land Control Board and the Plaintiff only has a remedy to get back his purchase price less the penalty of Kshs. 1,320,000.

I note that the 1st, 2nd and 3rd Respondents have not indicated as to whether they will be able to refund the Plaintiff the purchase price. The Plaintiff confirmed that the suit land had been sold to the 4th Defendant, who is a purchase for value without notice and it has already acquired title, I find that the Plaintiff in the circumstance, 'has failed to establish a prima facie case as the suit land he is seeking no longer exist.

Further, the 1st, 2nd and 3rd Respondents already sold land to the 4th Respondent who has acquired title and is protected by the provisions of sections 24 (a) and 25 of the Land Registration Act which provides as follows: ***'Subject to this Act— (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; (25) (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.'***

At this juncture the only remedy the Plaintiff has is to sue for the refund of the purchase price from the 1st, 2nd and 3rd Respondents.

On the question of irreparable loss, I find that the Plaintiff can be compensated by way of damages by the 1st, 2nd and 3rd Respondents as already the suit property he purchased no longer exists.

It is against the foregoing that I find that the Plaintiff's application dated the 1st September, 2017 is not merited and I dismiss it.

The costs will be in the cause.

Dated, Signed and Delivered in Kajiado this 25th day of January, 2018

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Ms Gachie for Plaintiff

Kyongera for 3rd Defendant

Kinyanjui for 4th Defendant