



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 132 OF 2017

JANE WAMBETI NJUE.....PLAINTIFF

VERSUS

KELLEN MUTHONI MBOGO.....1ST DEFENDANT

ESTHER KAGENDO NJUE.....2ND DEFENDANT

RULING

1. By a plaint dated 1st August 2017 and filed and on 30th August 2017, the Plaintiff sued the 1st and 2nd Defendants seeking the following reliefs;

a. Specific performance by the Defendants of the agreement dated 27th August 2015 and in default the Land Registrar Embu be ordered to transfer the said parcels to the Plaintiff.

b. Costs of this suit and interest.

c. Any other relief the court may deem just and expedient (sic).

2. The basis of the suit was that the Defendants had in breach of some sale agreements made in 2015 or thereabouts failed to transfer to the Plaintiff a portion of 1 ½ acres out of *Title No. Ngandori/Ngoviu/2417* in respect of which they had a certificate of confirmation of grant in their favour. The said parcel of land was apparently sub-divided into *Title Nos. Ngandori/Ngoviu/5615, 5616, 5617 and 5618* after confirmation of grant.

3. Contemporaneously with the filing of the said suit, the Plaintiff also filed a notice of motion dated 1st August 2017 for an inhibition order to issue against *Title Nos Ngandori/Ngoviu/5616 – 5618* pending the hearing and determination of the suit. The said application was based on the following grounds which were stated on the face of the said motion;

a. The applicant is a purchaser for value of the said land parcels.

b. The applicant has paid the entire purchase price.

c. The Respondents are in the process of selling the same parcels to 3rd parties.

d. The Applicant has been in occupation for close to three (3) years from date of agreement.

e. The Applicant has extensively developed the said land.

f. *The Respondents have no means whatsoever of refunding the purchase price.*

4. The said application was supported by an affidavit sworn by the Plaintiff in which she reiterated the contents of the plaint and the above grounds. She stated that she bought 1 ½ acres out of *Title No. Ngandori/Ngovio/2417* from the Defendants for a total of sum Kshs 2,170,000/- vide a sale agreement dated 27th August 2015. She stated that she paid the entire purchase price but that the Defendants had failed or refused to transfer the property to her as per the agreement. It was also the Plaintiff's case that the Defendants intended to transfer the property in dispute to third parties and that they had no means of refunding the purchase price.

5. The 1st Defendant filed a replying affidavit sworn on 15th September 2017 in which she admitted the existence of the sale agreement with the Plaintiff but contended that she rescinded the agreement on account of breach by the Plaintiff. The 1st Defendant contended that the agreed price was Kshs 1,700,000/- out of which the Plaintiff paid only 1,500,000/- and defaulted on the balance of Kshs 200,000/-. It was further her case that she was willing to refund the deposit already paid within 6 months.

6. The 2nd Defendant filed a replying affidavit sworn on 15th September 2017 in which she stated that she was the registered proprietor of *Title No. Ngandori/Ngovio/5616*. She denied having entered into any sale agreement with the Plaintiff over the sale of the said property. She stated that she was only a witness to the sale agreement between the Plaintiff and the 1st Defendant who is her mother. She asked for the restriction against her property to be lifted.

7. A third replying affidavit sworn on 15th September 2017 was filed by one, Boniface Mbogo Mbuti who is a son of the 1st Defendant. He stated that he was the registered proprietor of *Title No. Ngandori/Ngovio/5617* and that he was not privy to the sale agreement between the Plaintiff and the 1st Defendant. He further stated that he had not agreed to sell his land to the Plaintiff and that the 1st Defendant had no capacity to dispose of any land at the material time. He asked the court to compel the Applicant to lift the restriction on his property.

8. The Plaintiff filed a supplementary affidavit sworn on 5th October 2017 in which she asserted that she bought the disputed property with full knowledge of the 1st Defendant's aforesaid children. She stated that the agreement for sale was made on 27th August 2015 whereas the certificate of confirmation of grant was issued on 22nd April 2014. The Plaintiff also contended that she was not interested in the refund of the purchase price but a transfer of the 1 ½ acres that she bought.

9. When the said application came up for hearing before me on 11th October 2017, Mr Mugambi Njeru for the Plaintiff prosecuted the application on behalf of the Plaintiff. He relied upon the two affidavits filed by the Plaintiff. He submitted that the 1st Defendant had failed to facilitate the transfer of the 1 ½ acres the Defendant had bought and that she had exhibited fraudulent conduct by signing an agreement for 1 ¼ acres whereas she was entitled to 1 acre only under the certificate of confirmation of grant.

10. It was further submitted by Mr Mugambi, from the bar, that the 1st Defendant had moved out after selling her property hence it may not be possible to trace her attachable assets. It was his submission that she had no means of refunding the purchase price. He, therefore, urged the court to allow the said application.

11. The 1st Respondent opposed the application on the basis of her replying affidavit sworn on 15th September 2017. She wondered why the Plaintiff had sued her daughter whereas the sale agreement did not involve her or any of her children. She stated that she could not agree to give her consent before the Land Control Board because the Plaintiff had cautioned or restricted the parcels belonging to her children. She asked the court to dismiss the application.

12. The 2nd Defendant also opposed the Plaintiff's said application on the basis of her replying affidavit.

She submitted that she inherited parcel No. 5616 through succession proceedings and that she had never sold it to the Plaintiff. She asked the court to dismiss the said application.

13. The main question for determination in this suit is whether or not the Plaintiff is entitled to the order of inhibition sought against the 4 parcels of land listed in her notice of motion dated 1st August 2017. The court has perused the sale agreement dated 27th August 2015. It was an agreement for the sale of 1 ¼ acres out of *Title No. Ngandori/Ngoviu/2417* between the Plaintiff and the 1st Defendant only. The 2nd Defendant only signed as a witness and not as a party thereto. There is no statement in the agreement providing that the 1st Defendant's children had authorized her to sell their respective portions of inheritance on their behalf. The two acknowledgement notes for receipt of money indicate that the purchase price was received solely by the 1st Defendant.

14. The court has perused the Plaintiff's list of documents dated 1st August 2017 together with the annexed documents dated 1st August 2017. It is evident that only parcel Nos 5615 and 5618 are registered in the name of the 1st Defendant who was party to the sale agreement dated 27th August 2017. The certificates of official search indicate that the other two parcels are registered in the names of the 1st Defendant's children. Parcel No. 5616 is in the name of Esther Kagendo Njue (the 2nd Defendant) whereas parcel No. 5617 is in the name of Boniface Mbogo Mbuti who is neither a party to the suit nor the sale agreement dated 27th August 2015.

15. In view of the foregoing, the court is not satisfied that there is a legitimate reason to issue an inhibition order against parcel Nos 5616 and 5617 since the Plaintiff does not appear to have a legitimate claim thereto on the basis of the material evidence on record so far. *A fortiori*, there is no legitimate reason for the maintenance of the restrictions which were placed on those two parcels by the Land Registrar. The court will, therefore, make an appropriate order to remedy the situation.

16. The court is, however, satisfied that there is a legitimate dispute between the Plaintiff and the 1st Defendant regarding the two parcels belonging to her i.e parcel No. 5615 and 5618. The Plaintiff's application shall therefore succeed only in part for the purpose of preserving the two properties which are in dispute pending the hearing and determination of the suit.

17. The upshot of the foregoing is that the Plaintiff's notice of motion dated 1st August 2017 succeeds only in part and the court makes the following orders in respect thereof.

a. An order of inhibition is hereby issued to prevent any further dealings with *Title Nos NGANDORI/NGOVIO/5615 and 5618* only.

b. The Land Registrar Embu shall forthwith remove the restrictions placed against *Title Nos NGANDORI/NGOVIO/5616 and 5617*.

c. Costs of the application shall be in the cause.

d. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **18th day** of **JANUARY, 2018**.

In the presence of Ms Muriuki holding brief for Mr. Mugambi for the Plaintiff and Ms Beth Ndorongo for 1st and 2nd Defendants.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

18.01.18