



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 897 OF 2017

SEURI LEGUSI SANOE.....PLAINTIFF

VERSUS

THE STATUTORY MANAGER UNITED INSURANCE CO. LTD

(UNDER STATUTORY MANAGEMENT).....1ST DEFENDANT

KAPAIKO NGUSSUR.....2ND DEFENDANT

JOSEPH AYIAKI.....3RD DEFENDANT

THE DISTRICT LAND REGISTRAR, NGONG.....4TH DEFENDANT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

The application before Court for determination is the Plaintiff's Notice of Motion dated the 19th October, 2017 brought pursuant to Order 40 rules 1 of the Civil Procedure Rules 2010, Sections 1, 1A, 3, 3A of the Civil Procedure Act and any other enabling provisions of the law. It is premised on the following grounds which in summary is that on 5th July, 2004 the Plaintiff entered into a Sale Agreement with the 1st Defendant for the sale of all that parcel of land known as KAJIADO/ KIPETO/ 558 hereinafter referred to as the 'suit land', belonging to the 1st Defendant. According to the terms and conditions stipulated in the said Sale Agreement, the purchase price was Kshs. 2,590,000 whereupon the Plaintiff was to pay a deposit of 25% upon its execution. Pursuant to the terms of the said Sale Agreement, the Plaintiff duly paid the deposit and he was allowed to take physical possession of the suit land. Since the year 2004, the Plaintiff has been in physical, open, actual and uninterrupted occupation of the suit land pursuant to the terms and conditions of the Sale Agreement. The 1st Defendant has refused and/or neglected to transfer the suit premises to the Plaintiff despite having received the full purchase price. The Plaintiff has learnt that the 2nd and 3rd Defendants are interfering with the suit land claiming to be its owners and been bringing potential buyers to it. On 25th September, 2017, the Plaintiff proceeded to register a caution at the Kajiado North Land Registry to protect his interests, but found the Green Card missing. The Plaintiff contends that the 1st, 2nd and 3rd Defendants have connived and or colluded to defeat his legal interest by interfering with the Green Card of the suit land. The Plaintiff has established a prima facie case in this matter being a bona fide purchaser for value.

The application is supported by the affidavit of SEURI LEGUSI SANOYE the Plaintiff herein, where he reiterated his claim and deposed that subsequent to the payment of the 25% deposit of the purchase price

as well as taking possession of the suit land, he was informed that the 1st Defendant Company was placed under receivership and asked to withhold the payment of the outstanding balance until such time when the 1st Defendant would advertise tender notices for the sale of the suit land, wherein he would be given priority as per the terms of the earlier agreement. He confirms that in 2012, the 1st Defendant advertised the tender notices upon which he successfully bid for the suit land and was sent for a Letter of Offer dated the 23rd August, 2012 whose terms he accepted. He avers that pursuant to the Letter of Offer dated the 23rd August, 2012, they mutually agreed with the 1st Defendant that he would continue to pay the outstanding purchase price until payment in full. He states that he resumed to make payments of the outstanding purchase price from the year 2012 after the bidding and receiving the letter of offer, which payment he completed in 2013 but to date, the 1st Defendant has refused to transfer the suit land to him. He insists the 2nd and 3rd Defendants have been interfering with the suit land and despite several warnings from the local chief, they have persisted to do so. He contends that in the year 2016, he realized the 2nd and 3rd Defendants had lodged a caution on the suit land on 18th October, 2012. He is apprehensive the 1st, 2nd and 3rd Defendants are at the verge of wasting and/or alienating the suit land.

The 1st Defendant's Counsel indicated that they were not opposing the instant application.

The 2nd Defendant opposed the application and filed a replying affidavit sworn by KAPAIKO NGUSSUR where he deposed that his real names are KAPAIKO NGUSSUR and not KAPAIKO PAPAIE NGUSSUR and he is hence a stranger to this suit. He claims the application and the suit as a whole is a non – starter, frivolous, vexatious, mollified and thus an abuse of the process of the court. He insists the application and the suit do not disclose a reasonable cause of action against him. He contends that he is the true owner of the suit land, which he purchased from FIDEI HOLDINGS LIMITED through a Sale Agreement dated the 1st August, 2012. He explains that before he entered into the Sale Agreement with FIDEI HOLDINGS LIMITED, he conducted a search at the Land Registry and confirmed that the vendor was the true owner of the suit land. He confirms paying Kshs. 2,330, 000 as the full purchase price and insists the Plaintiff does not merit the grant of orders sought, having voluntarily purchased the suit land without conducting a search to establish the status of the property at that time. He reiterates that if at all the Plaintiff has any claim, the same does not lie against him but rather the 1st Defendant. Further, that the Plaintiff acted indolently in the transaction leading to the purchase of the suit land and hence does not merit the discretion of court in granting the orders sought.

The 3rd, 4th and 5th Defendants did not oppose the application despite having been duly signed.

The Plaintiff and the 2nd Defendant filed their respective written submissions that I have duly considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 19th October, 2017 including the supporting and replying affidavits, as well as the annexures thereon plus the submissions from the Plaintiff and 1st Defendant, I find that the only issue in contention at this juncture is whether the Plaintiff is entitled to interim injunction pending the outcome of the suit.

The Plaintiff's main contention is that he purchased the suit land from the 1st Defendant in 2004 and despite paying the full purchase price, a transfer has not been effected in his favour. The 1st, 3rd, 4th and 5th Defendants did not oppose the application nor controvert the Plaintiff's claim. The 2nd Defendant opposed the application and stated that he is the proprietor of the suit land having purchased it on 1st August, 2012 from FIDEI HOLDINGS LIMITED for Kshs. 2,330,000. He annexed a copy of the title deed dated the 21st July, 2015 to refute the Plaintiff's claim.

The Plaintiff relied on the following authorities to support their claim: **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358 ; Mrao Vs First American Bank Ltd & 2 Others (2003) KLR and Republic Vs. Rosemary Wairimu Munene; and Ex – parte Applicant Vs Ihururu Dairy Farmers Co –**

operative Society Ltd. The Defendant relied on the cases of: **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** and **Mureithi Vs City Council of Nairobi Civil Appeal No. 5 of 1979.**

The principles for granting an injunction are well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** where the Court held inter alia:

"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."

As to whether the Plaintiff has established a prima facie case with a probability of success, I note the Plaintiff entered into an agreement with the 1st Defendant way back in 2004 and pursuant to a Letter of Offer dated the 23rd August, 2012, they mutually agreed with the 1st Defendant that he would continue to pay the outstanding purchase price until payment in full. I note the Plaintiff, completed the payment of the purchase price in 2013 but to date the suit land is yet to be transferred to him. The 2nd Defendant furnished Court with a Certificate of Official Search dated the 24th July, 2012 as annexure "KP 3" where I note that the 1st Defendant who sold the suit land to the Plaintiff had registered a Caution over it.

What is curious is that the person GEORGE N KARIUKI who signed as a director to the Vendor on 5th July, 2004 in the agreement with the Plaintiff is the same person who the 2nd Defendant paid to the purchase price of Kshs. 2,330,000 as evidenced by annexure 'KP4'. The question that comes to mind is whether FIDEI HOLDINGS LIMITED had a linkage with the 1st Defendant. As per the Plaintiff's annexure 'SLS 2' which is the Letter of Offer from the 1st Defendant dated the 23rd August, 2012, it offered the same suit land for sale to the Plaintiff who paid the full purchase price as evidenced by annexures '3a', '3b', '3c', '3d', '3e', '3f', and '3g' respectively. From the Plaintiff's annexure '4', which is an extract of the Green Card relating to the suit land, it is evident that a caution had been registered by the 1st Defendant on 25th July, 1996 yet the suit land was sold to the 2nd Defendant on 1st August, 2012. I find that these are issues that can only be determined after a full hearing and not at this stage.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: *' In civil cases, a prima facie is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.'*

In relying on the facts above including the cited judicial authorities, I find that the Plaintiff's rights have indeed been infringed upon as he was offered the suit land to purchase from the 1st Defendant but the same had already been sold to the 2nd Defendant. The Plaintiff who has been in actual possession of the suit land from 2004, tried to register a caution with the 4th Defendant to safeguard his interest but this was futile as the Green Card on the suit land was missing. The 2nd Defendant has also been bringing potential buyers to view the suit land. It is against the foregoing that I find that the Plaintiff has indeed established a prima facie case with a probability of success.

On the second limb as to whether the Plaintiff can suffer irreparable injury, which would not adequately be compensated by an award of damages. I note the Plaintiff purchased the suit land but the same is already registered in the 2nd Defendant's name. Further that from 2004, the Plaintiff has been in actual and open possession of the suit land, which fact is not controverted by any of the Defendants.

In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that *' ... the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be*

adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot ‘adequately’ be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. ‘

In relying on the facts above and the cited case, I find that the Plaintiff’s injuries are not speculative and his fear is real since the 2nd Defendant already has title to the suit land and has been bringing in potential buyers to view it. It is in those circumstances that I make a finding that the Plaintiff will indeed suffer irreparable injury if the orders sought are not granted.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the suit land is not preserved, it may be wasted away.

Since both the Plaintiff and the 1st Defendant are staking claim over the suit land, with 2nd Defendant already having a title to it, the Court finds that these are issues best determined at a full trial, I will decline to grant the orders as sought but will proceed to make the following order:

1. An inhibition order be and is hereby registered by the Land Registrar Kajiado North as against land parcel number KAJIADO /KIPETO /558 of any dealings, lease, subdivision, transfer or charge pending the hearing and determination of the suit.’
2. The obtaining status quo be maintained pending the hearing and determination of the suit

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Ngong this 25th day of April, 2018.

CHRISTINE OCHIENG

JUDGE