



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 804 OF 2017

(FORMERLY MILIMANI ELC No. 1402 of 2016)

DANIEL TUMBES OLONAPA.....PLAINTIFF

VERSUS

BRITON (K) LTD.....1ST DEFENDANT

HASSAN AHAMED MAHAMUD.....2ND DEFENDANT

ARALE HASSAN AHAMED.....3RD DEFENDANT

RULING

The Application for determination before Court is the Plaintiff's Notice of Motion dated the 14th November, 2016 brought pursuant to Order 40 rule 1 of the Civil Procedure Rules and Sections 1, 1A, 3, 3A of the Civil Procedure Act and all the other enabling provisions of the law.

It is based on the following grounds, which in summary is that on 22nd January, 2015 the Plaintiff entered into a Sale Agreement with the 1st Defendant for the sale of land to be excised from land parcel number Kajiado/Loodoriak/4453 hereinafter referred to as the 'suit land'. According to the terms and conditions stipulated in the Sale Agreement, the purchase price was Kshs. 90 million and the 1st Defendant only paid a deposit of Kshs. 920,000. The 1st Defendant has proceeded to have land the suit land subdivided and title deed issued in favour of the 2nd Defendant. Further that the 1st Defendant is in the process of selling the suit land to the 2nd Defendant vide a Sale Agreement dated the 31st July, 2015 for a total sum of Kshs. 70 million, and has already been paid Kshs. 28 million. The Directors of the 1st Defendant have fraudulently granted the Certificate of title to the 3rd Defendant to obtain a loan from a banker. As a result of this, the Plaintiff lodged a caution at the Kajiado Land Registry. The Plaintiff contends that he has established a prima facie case.

The application is supported by the affidavit of DANIEL TUMBES OLONAPA, the Plaintiff herein where he reiterated his claim and averred that the 1st Defendant has breached the terms and conditions of the Sale Agreement dated the 22nd January, 2015.

The 1st Defendant opposed the application and filed a replying affidavit sworn by NICHOLAS SANKOK TEEKA, its Director, where he confirmed entering into a Sale Agreement dated the 21st January, 2015 with the Plaintiff for the sale of the suit land. He confirms the purchase price was Kshs. 90 million and the 1st Defendant paid Kshs. 920,000. He claims it had been agreed that upon payment of the deposit, the title would be transferred to the 1st Defendant to enable it sell to third parties and proceeds realized therefrom to be paid to the Plaintiff. He insists the advocate for the parties was to transfer the suit land to the 1st Defendant but retain the Certificate of Title pending the completion of the Sale Agreement. He denies that the 1st Defendant has been involved in any act of fraud and insists the Plaintiff was fully aware that the suit land was transferred to the 1st Defendant and he would be paid from the proceeds of the sale of the sub divided plots. He reiterates that the 1st Defendant was unable to sell the plots on time and moved to sell a portion of the land to the 2nd Defendant. Further that the 1st Defendant seeks to invoke the default clause No. 12 of the Sale Agreement between the Plaintiff and itself.

All parties filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the materials presented by the Plaintiff and the Defendants in respect to the Notice of Motion dated the 14th November, 2016 including their written submissions, I find that the only issue for determination is whether the Plaintiff is entitled to the temporary injunction orders sought pending the outcome of the suit.

It is not disputed that the Plaintiff and the 1st Defendant entered into a Sale Agreement dated the 22nd January, 2015 to sell the suit land. It is also not in dispute that the 1st Defendant only paid Kshs. 920,000 as a deposit towards the purchase price. What is in contention is the fact that the 1st Defendant caused the suit land to be subdivided and transferred to the 2nd Defendant who gave the Certificate of title to the 3rd Defendant to get a loan from the bank, without the consent of the Plaintiff.

The principles of granting interlocutory injunction are well established in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** where the court held inter alia that for an injunctive order to be granted the Applicant has to demonstrate it has a prima facie case with a probability of success; it stands to suffer irreparable loss or injury which cannot adequately be compensated in damages; and if the court is in doubt, it should decide the application on a balance of convenience.

I note the 1st Defendant is yet to pay the full purchase price of Kshs. 90 million and has already caused the suit land to be transferred to a third party who has sought for a loan from a bank.

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 above cited judicial authorities, I find that the Plaintiff has indeed established a prima facie case with a probability of success as he is yet to be paid for the suit land but the 1st Defendant has proceeded to transfer the same to a third party.

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, I note the Plaintiff was only paid a deposit of Kshs. 920,000 out of the Kshs. 90 million, which was the purchase price, agreed upon. Further that the suit land has already been transferred to a third party who has continued to transact on it without considering the rights of the Plaintiff. 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 case above and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are not speculative as he has demonstrated the harm he will suffer if the injunctive orders are denied.

On the question of balance of convenience, from the evidence presented by the parties, I find that the balance tilts in favour of the Plaintiff whose rights have been infringed upon by the Defendants' that continue to deal with the suit land without his consent.

From the above, it is clear that Plaintiff has established a prima facie case to meet the threshold for the grant of orders of injunction.

It is against the foregoing that I find the Plaintiffs' Notice of Motion dated the 14th November, 2016 is merited and allow it as prayed.

Dated signed and delivered in open court at Ngong this 5th day of April, 2018

CHRISTINE OCHIENG

JUDGE