



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO 332 OF 2016

PIUS MUTUNE.....PLAINTIFF

VERSUS

JOHN KAINGU KENGA

JOSPHAT KAHINDI KAPANGA

JACKSON KAZUNGU.....DEFENDANTS

RULING

1. By a Notice of Motion application dated and filed herein on 7th December 2016, the Plaintiff Pius Mutune, a donee of a power of attorney from one Pauline Ngori prays for a temporary order of injunction restraining the Defendants from interfering with the suit premises or carrying out any development therein pending the hearing and determination of the main suit.
2. The said application which is supported by an annexed brief Affidavit sworn on the same day is premised on the Plaintiff's averments that on 5th December 2014, the said Pauline Ngori purchased the disputed parcel of land measuring 80ft by 90ft at Takaye within Plot M1 from the 3rd Defendant.
3. Sometime in 2015, the said purchaser was informed that he 2nd Defendant was claiming an interest in the said parcel of land having purchased it from the 1st Defendant. According to the Plaintiff, the 1st Defendant thereafter went into hiding and the 2nd Defendant has since commenced carrying out developments on the said plot of land. The Plaintiff therefore contends that she stands to suffer irreparable damage unless the Defendants are restrained from dealing with the land.
4. Responding to the application, Josephat Kenga Chipanga (the 2nd Defendant) has sworn a Replying Affidavit filed herein on 11th April 2017 in which he states that he purchased the said land from the 1st Defendant on 16th July 2013 being a plot measuring 92 x 82 ft and that the Plaintiff cannot therefore purport to buy what was already belonging to him.
5. The 2nd Respondent further avers that the 1st Defendant never sold the subject land to the 3rd Defendant as the agreement that they entered into was vague and did not specify which plot was being sold or the measurements therefor.
6. On his part, the 3rd Defendant Jackson Kazungu has equally filed a Replying Affidavit on 5th October 2017 in which he refutes the contention by the 2nd Defendant that he was the first to buy the suit premises. The Defendant avers that he purchased the subject plot way back on 16th July 2012 from the 1st Defendant. At the said time the only developments on the land were one mango tree and two cashewnut trees. It is his case that that remained the position until the time he sold the same to the Plaintiff.
7. I have considered the application and the responses thereto. I have equally considered submissions of the 2nd Defendant thereon.
8. The principles for the grant of an interlocutory injunction were long stated in the often-cited case of *Giella –vs- Cassman Brown & Company Ltd (1973)1EA 358*, where Spry VP stated 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.”

9. Arising from the foregoing, the first question for this Court to consider is whether the Applicant has established a prima facie case with a probability of success. In *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003)eKLR*, a prima facie case was defined as follows:-

“In civil cases, a prima facie case 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.”

10. From the material placed before me, it is apparent that the 1st Defendant herein sold the disputed parcel of land to the 3rd Defendant on 16th July 2012 for a sum of Kshs 55,000/-. The said portion of land which is unsurveyed and unregistered is situated in Takaye Village. On or about 16th July 2013, the very same 1st Defendant sold the same parcel of land to the 2nd Defendant for a sum of Kshs 180,000/-

11. From the documents annexed to the 3rd Defendant’s Replying affidavit, it is apparent that the dispute first went to the Area Chief where an attempt was made to resolve the same. It is apparent from an un-dated letter prepared by the Assistant Chief Shella Sub-Location that at first, the 1st Defendant agreed to be given time to give the 2nd Defendant an alternative parcel of land when he was confronted with the fact that he had sold the same parcel of land twice.

12. As it were, after being granted time to do so, the 1st Defendant committed an offence and was arrested and jailed. While in custody, the 1st Defendant again tried to sell the parcel of land thereby prompting the 2nd Defendant to commence construction on the disputed plot of land.

13. In the circumstances of this case, it is evident to me that the land in question had earlier been sold to the 3rd Defendant who rightfully transferred the same to the Plaintiff. As at the time he purported to sell the land to the 2nd Defendant, the 1st Defendant had no interest in the land capable of being transferred in the manner he purported to do.

14. As it were, the 2nd Defendant commenced his construction on the land fully aware of the Plaintiff’s claim thereon. In the circumstances, I am satisfied that the act of construction by the 2nd Defendant constituted an infringement of the Plaintiff’s right to the said property and the Plaintiff is therefore entitled to the protection of this Court.

15. The upshot of all this is that I find merit in the Plaintiff’s application. The same is allowed with costs.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE