



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.66 OF 2018

GEDRAPH MUIRURI KIMATTA.....PLAINTIFF

VERSUS

WILSON NJAU THAIRU.....1ST DEFENDANT

PETER MUKIRAI WANJAU.....2ND DEFENDANT

SAMSON NGAHU KAGAKIL.....3RD DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff having entered into a purchase agreement with the 1st and 2nd defendants for the purchase of 4 plots of land; one of the plots later transferred to the 3rd defendant; 2nd defendant who sold the plot to the 3rd defendant not filing anything to explain why he sold the plot to the 3rd defendant; prima facie case established; application for injunction allowed)

1. This suit was commenced by way of a plaint which was filed on 6 February 2018. In the plaint, the plaintiff pleaded that he entered into an agreement with the 1st and 2nd defendants, who are brothers, for the purchase of 4 plots measuring 50 X 100 feet, out of the land parcel Bahati/Bahati Block 1/157. At this time the land was registered in the name of the mother of the 1st and 2nd defendants (deceased), and it was agreed that the 1st and 2nd defendants, would apply for letters of administration then transfer the 4 portions to the plaintiff. The land parcel Bahati/Bahati Block 1/157 was thereafter subdivided and the four plots that the plaintiff claims to be entitled to are the land parcels Bahati/Bahati Block 1/4835, 4836, 4837 and 4838. Later in time, the plaintiff avers that he conducted a search of the 4 plots and discovered that the plot numbers 4835, 4837 and 4838 are registered in the name of the 1st defendant but the plot number 4836 is in the name of the 3rd defendant, a stranger to him. He has contended that the sale of this plot No. 4836 in the name of the 3rd defendant was fraudulent in that the same was sold to him in the knowledge that it had previously been sold to the plaintiff. In the suit, the plaintiff wishes to have a declaration that he is the lawful owner of the 4 mentioned plots and an order for revocation of the title of the 3rd defendant, and a further order, that the 1st defendant be compelled to transfer all the 4 plots to him.

2. Alongside the plaint, the plaintiff filed an application for injunction seeking preservation of the 4 suit properties. In his supporting affidavit, the plaintiff inter alia averred that he purchased the 4 plots from the 1st and 2nd defendant, vide a sale agreement entered into on 8 September 2011. The selling price for each plot was Kshs. 105,000/=, of which he paid Kshs.180,000/= on execution, and the balance was to be paid after the vendors obtained a confirmed grant of letters of administration. He avers that he made further payments, leaving a balance of Kshs. 60,000/=. He was thus surprised when he found out that one of the plots has been sold to the 3rd defendant.

3. In the course of the hearing of the application, the 1st defendant agreed to transfer to the plaintiff, the plots which are registered in his name, being the plot numbers 4835, 4837 and 4838, and a consent was entered compromising the suit, in respect of these three properties. The only property that is left in dispute is thus the land parcel No. 4836, registered in the name of the 3rd defendant.

4. On their part, the 1st and 2nd defendants have contended that the plaintiff did not pay the balance of the purchase price in accordance with the sale agreement that they had. The 1st defendant in replying to the motion has averred that his brother, the 2nd defendant, then sold the land parcel No. 4836 to the 3rd defendant.

5. The 3rd defendant in his replying affidavit, has deposed that he purchased this parcel of land in the year 2012 from the 1st and 2nd defendants, and he has exhibited a sale agreement dated 28 November 2012. Consent of the Land Control Board was then obtained, and the land transferred to him; he became registered as proprietor on 5 September 2013.

6. The 2nd defendant did not file any affidavit to the application and I therefore do not have his position on the matter.

7. It is trite law that to succeed in an application for injunction, the applicant needs to demonstrate a prima facie case with a probability of success, show that he stands to suffer irreparable loss if the application is not allowed, and where the court is in doubt, it will decide the application on a balance of convenience. These principles were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*.

8. I have seen from the sale agreement dated 8 September 2011, that the plaintiff had with the 1st and 2nd defendants, that it was agreed amongst them, that the plaintiff would purchase the 4 plots at a total consideration of Kshs. 420,000/=. The sum of Kshs. 180,000/= was paid on execution of the agreement and the balance was to be paid upon the vendors obtaining the Certificate of Confirmation of Grant with the name of the plaintiff appearing as beneficiary, and production of title deeds in his name. It was also agreed that the plaintiff, as purchaser, would be at liberty to take possession of the plots on 1 November 2011, and may continue to develop the same without interference from the vendors or any other person claiming an interest through them.

9. I note that no time frame was placed in respect of full payment and it appears that the balance thus fell due upon the event of the confirmation of grant taking place; however, I do not know when the 1st and 2nd defendants obtained the confirmed grant of letters of administration, as none was annexed, and none of the parties provided any detail on this. Nevertheless, I do note that the 1st and 2nd defendants did receive further payments from the plaintiff on 23 December 2011, when the plaintiff paid Kshs. 100,000/= jointly to the 1st and 2nd defendants; Kshs. 20,000/= paid on 1 June 2012 to the 1st defendant; Kshs. 40,000/= paid on 5 December 2011 to the 2nd defendant; and finally Kshs. 20,000/= paid to the 1st defendant on 3 January 2013. There is a balance of Kshs. 60,000/=, of which it was agreed in the consent between the plaintiff and 1st defendant, that the plaintiff would pay Kshs. 45,000/= to facilitate transfer of the 3 plots registered in the name of the 1st defendant being shared pro rata among the 4 plots. What is left is therefore Kshs. 15,000/=.

10. I observe that the 1st defendant got registered as proprietor of the 3 plots which are now not in issue on 10 September 2012. I would therefore assume that as at 28 November 2012, when the 3rd defendant entered into the second sale agreement to purchase the one plot in dispute, the 1st and 2nd defendants had already obtained confirmed grants and already had the 4 plots registered in their names. I further note that the sale agreement exhibited by the 3rd defendant, was between him and the 2nd defendant, without the 1st defendant being involved. It is thus very probable that the plot No. 4836 was after confirmation of the grant, transferred solely to the name of the 2nd defendant, and that is why the sale agreement is only with the 2nd defendant without involving the 1st defendant.

11. While the 2nd defendant was entering into the sale agreement with the 3rd defendant on 28 November 2012, he was at the same time receiving money from the plaintiff, as noted in the receipt of Kshs. 40,000/= on 5 December 2012. This is just about a week after the sale agreement with the 3rd defendant. It therefore means that the 2nd defendant still deemed the sale agreement that he had with the plaintiff as being alive, and that being the case, an explanation needs to be given as to why he entered into a second sale agreement with the 3rd defendant.

12. At this stage of the proceedings, I cannot say with finality, whether or not the 2nd defendant was entitled to sell the suit property to the 3rd defendant. It is also not possible to determine at this juncture, whether the 3rd defendant is an innocent purchaser for value, who needs to be protected. Suffice it to say that the plaintiff has demonstrated, prima facie, that he purchased 4 plots, which he paid for, and which he believed he was entitled to have the same transferred to him. In my view, the plaintiff has given sufficient reason, to at least be entitled to have the properties preserved pending the hearing and determination of the suit. If the 3rd defendant enters into any dealings over the plot in issue, the plaintiff may suffer irreparably as the subject matter may very well be transferred to other parties. It is therefore necessary that an order of inhibition be issued to preserve the subject matter of the suit.

13. With regard to possession, I have already mentioned that in their sale agreement of 8 September 2011, the 1st and 2nd defendants gave possession of the 4 plots to the plaintiff. I am therefore persuaded that it is the plaintiff who is in possession of the plot No. 4836 and not the 3rd defendant. I will allow the plaintiff to remain in possession pending hearing and determination of this suit. However, the plaintiff will not make any structures on the land but may utilize the land for ordinary agricultural activities and plant seasonal crops if he is minded to do so.

14. I believe that I have dealt with all issues in this application and now make the following orders :-

(i) That an order of injunction is hereby issued, barring the 3rd defendant from selling, charging, leasing, or entering into any dealings whatsoever over the land parcel Bahati/Bahati Block 1/4836 until this case is heard and determined.

(ii) That there is hereby issued an order of inhibition, inhibiting the registration of any disposition in the register of the land parcel Bahati/Bahati Block 1/4836 until this case is heard and determined.

(iii) That in so far as possession of the land parcel Bahati/Bahati Block 1/4836 is concerned, the same to be in possession of the plaintiff. However, the plaintiff is barred from making any structures on the land, but may utilize the same for agricultural activities and plant seasonal crops if he is minded to do so.

(iv) That the costs of the application will be costs in the cause.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 19th day of September 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Gikonyo present for the plaintiff/applicant.

1st defendant acting in person – Absent.

2nd defendant has not entered appearance- Absent.

3rd defendant in person – Absent.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU