



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 305 OF 2017

METHODIST CHURCH IN KENYA REGISTERED TRUSTEES.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH GACHOKI GITARI T/A GEO-ACRE SURVEY.....1ST DEFENDANT/RESPONDENT

MICHAEL MULI MUSEMBI (*sued as the administrator of the Estate of JOSEPHAT GEORGE*

MUSEMBI KITAVI).....2ND DEFENDANT/RESPONDENT

MONICA NDUNGE MUSEMBI.....3RD DEFENDANT/RESPONDENT

RULING

1. In the Application dated 13th July, 2017, the Plaintiff is seeking for the following orders:

a. That this Honourable Court be pleased to issue an order of temporary injunction against the Defendants/Respondents by themselves, their servants, agents, employees or any other persons authorized or instructed by them from continuing to threaten, harass, intimidate and/or in any way interfere with the Plaintiff's occupation and quiet enjoyment of land parcel Mavoko Town Block 3/3 plots 9, 10, 37 and 38 pending the hearing and determination of this suit.

b. That this Honourable Court be pleased to issue an order of temporary injunction against the Defendants/Respondents by themselves, their servants, agents, employees or any other persons authorized or instructed by them from charging, selling, disposing or in any manner whatsoever dealing with land parcel Mavoko Town Block 3/3 plots 9, 10, 37 and 38 pending the hearing of this Application inter-partes.

c. That this Honourable Court be pleased to issue an order of temporary injunction against the Defendants/Respondents by themselves, their servants, agents, employees or any other persons authorized or instructed by them from charging, selling disposing or in any manner whatsoever dealing with land parcel Mavoko Town Block 3/3 plot 9, 10, 37 and 38 pending the hearing and determination of this suit.

d. That costs of this Application to be provided for.

2. The former Presiding Bishop of the Plaintiff deponed that amongst the Plaintiff's churches is Methodist Church, Joska, located along Kangundo road in Machakos; that the Plaintiff paid the purchase price for the said properties in installments and that the suit properties were excised from a parcel of land known as Mavoko Block 3/3 which belonged to the 1st Defendant.

3. It is the Plaintiff's case that upon paying the purchase price, the 1st Defendant issued it with a share certificate whereafter it took possession of the land and that the Plaintiff has spent approximately Kshs. 5.7 million to develop the land.

4. According to the Plaintiff's Bishop, in the year 2015, it learnt that the 1st Defendant had disagreed with the original owners of the suit land whereafter the said original owners (*the 1st and 2nd Defendants*) demanded from the Plaintiff a sum of Kshs. 900,000 per plot. It is the deposition of the Plaintiff's Bishop that the Plaintiff stands to suffer irreparable loss if the 2nd and 3rd Defendants are left to carry on with their threats of evicting the Plaintiff from the suit land.

5. The 2nd and 3rd Defendants filed a Notice of Preliminary Objection dated 18th September, 2017 in which they averred that there is no Sale

Agreement in respect to the suit land as required under Section 38(1) of the Land Act and Section 3(3) of the Law of Contract Act and that the inclusion of the 2nd Defendant in the suit is a gross misjoinder. The Defendants further averred that the suit is fatally defective because the Verifying Affidavit to the Plaintiff does not disclose that the deponent has been authorized to swear it.

6. In the Replying Affidavit, the 3rd Defendant deponed that the 1st Defendant bought parcel number Mavoko Town Block 3/3 from her late husband; that when the 1st Defendant issued a cheque which was dishonoured, her late husband nullified the Sale Agreement and that after the death of her husband, the 1st Defendant sold a portion of the suit land to the Plaintiff.

7. The 3rd Defendant deponed that through her son, the 2nd Defendant, they filed CMCC No. 1239 of 2008 in which an injunctive order was issued and that the said suit was heard and determined in their favour.

8. The 3rd Defendant deponed that they have never appointed the 1st Defendant to act as their agent and that the possession of the suit land by the Plaintiff was done in disregard of a court order.

9. The 2nd Defendant associated himself with the deposition of the 3rd Defendant. According to the 2nd Defendant, as one of the administrators of the Estate of his late father, his role ended on 22nd April, 2014 upon successful transmission of Mavoko Town Block 3/3 to its rightful owner.

10. On the part of the 1st Defendant, it was his deposition that the Plaintiff has failed to disclose the contents of the agreement between them and that the Plaintiff only paid the purchase price for two plots.

11. In the Further Affidavit, the Plaintiff's Chairman deponed that the 1st Defendant sold his plots without any written agreements. The Plaintiff and the 2nd and 3rd Defendants' advocates filed their respective submissions which I have considered.

12. The Plaintiff's claim is that he purchased four (4) portions of land which form part of parcel of land known as Mavoko Town/Block 3/3 from the 1st Defendant. After the said purchase, the 1st Defendant issued to the Plaintiff certificates of ownership. The Plaintiff has exhibited two certificates of ownership in respect of plot numbers 9 and 38. The said certificates of ownership do not indicate the dates that they were issued.

13. Although the Plaintiff's former Bishop deponed that they purchased the suit properties from the 1st Defendant, they did not exhibit the Sale Agreement. Indeed, in his Further Affidavit, the Plaintiff's Chairman admitted that they did not have an agreement in respect of the suit land.

14. All transactions involving the sale of land must comply with the provisions of Section 38(1) of the Land Act and Section 3(3) of the Law of Contract Act. According to those provisions, no suit shall be brought upon a contract for disposition of an interest in land unless the contract upon which the suit is founded is in writing; is signed by all the parties thereto; and the signature of each party signing has been attested by a witness who was present when the contract was made. This did not happen in this case.

15. Having admitted that the Plaintiff did not enter into a written contract for the sale of the suit land with the 1st Defendant, the Plaintiff's suit is unlikely to succeed. Indeed, the Plaintiff did not adduce any evidence to show that the 1st Defendant had a legal or beneficial interest in the suit land to enable him transfer it to the Plaintiff.

16. The 3rd Defendant has produced evidence showing that the court in CMCC No. 1239 of 2008 conferred ownership of the suit land on her, and not the 1st Defendant. Consequently, until the decision in CMCC No. 1239 of 2008 is set aside, the Plaintiff's claim over the suit land is unlikely to succeed.

17. For the above reasons, and considering that the suit land is currently registered in favour of the 3rd Defendant, I find that the Plaintiff has not established a prima facie case with chances of success. I therefore dismiss the Application dated 13th July, 2017 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE