



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC CASE NO. 15 OF 2018**

**PAUL PKEMOI KIDE.....PLAINTIFF**

**VERSUS**

**PHILIP KIMUTAI KIBOR.....1<sup>ST</sup> DEFENDANT**

**AGRICULTURAL FINANCE CORPORATION.....2<sup>ND</sup> DEFENDANT**

**RODSTAR CONSTRUCTION CO. LIMITED.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. The applicant brought an application dated **8/2/2018** seeking the following orders:-

(a) ....spent

(b) .....spent

(c) **That there be an interim injunction restraining the 3<sup>rd</sup> defendant from alienating, offering for sale, transferring, excising any part of or in any way dealing with the suit property being Kitale LR. No. 6125/10 pending hearing and determination of this application interpartes.**

(d) **That there be an interim injunction restraining the 3<sup>rd</sup> defendant from alienating, offering for sale, transferring, excising any part of or in any way dealing with the suit property being Kitale LR No. 6125/10 pending hearing and determination of the suit.**

(e) **That costs of this application be provided for.**

2. The grounds upon which the application is brought are that in the **year 2007**, the plaintiff entered into a sale agreement with the 1<sup>st</sup> defendant to acquire **50 acres** portion to be excised from **Kitale LR. No. 6125/10**; that the plaintiff paid the sum of **Kshs.7,500,000/=** being the agreed purchase price for the property; that the property had been charged as security for the loan; that part of the amount was paid directly to the 2<sup>nd</sup> defendant as redemption for the loan the 1<sup>st</sup> defendant had taken; that the 2<sup>nd</sup> defendant was supposed to discharge the property to facilitate excision but have fraudulently withheld the fact that they advanced a **further loan** to the 1<sup>st</sup> defendant and thereafter clandestinely sold the property; that they subsequently transferred the property as Chargee when the 1<sup>st</sup> defendant defaulted; that it has now emerged that the 2<sup>nd</sup> defendant transferred the land to the 3<sup>rd</sup> defendant without excising the portion that the plaintiff had paid for to the 2<sup>nd</sup> defendant directly; and that his portion is now part of a sub-division being undertaken by the defendants herein yet the plaintiff has been residing and farming on his **50 acres** portion of the suit land continuously since **2007**.

3. The 1<sup>st</sup> respondent filed a replying affidavit on **15<sup>th</sup> March, 2018** and owned up to transferring the suit land to the 3<sup>rd</sup> respondent following a successful transaction with it. He further avers as a follows: that the funds paid by the plaintiff were then meant to avert the imminent auction of the suit land by the 2<sup>nd</sup> respondent; that in any event the plaintiff paid only **Kshs. 4,500,000/=** in instalments instead of the **Kshs. 7,500,000/=** in disregard of the imminent threat of auction; that out of the paid amount, **Kshs. 1,005,000** was rent for the plaintiff's lease of **150 acres** out of the suit land and should not be deemed as purchase price; that the piecemeal payment by the plaintiff was in breach of an agreement entered into by the plaintiff and the 1<sup>st</sup> defendant and by reason of that breach the 2<sup>nd</sup> defendant never discharged or released the title to the land to enable the transaction between the plaintiff and the 1<sup>st</sup> defendant to be completed; that no consent to subdivide the land was applied for; that owing to several notices by the 2<sup>nd</sup> defendant which were issued as the plaintiff watched, the 1<sup>st</sup> respondent was

compelled by the circumstances to sell off the land to the 3<sup>rd</sup> defendant; that the 50 acres earlier intended to be sold the plaintiff were not even demarcated for the foregoing reason; and that the suit for specific performance is misconceived.

4. The 3<sup>rd</sup> respondent filed a replying affidavit on **9<sup>th</sup> March, 2018** sworn by its director who deponed as follows: that **LR No 6125/10** the subject matter of this suit no longer existed the same having been subdivided into 6 portions and transferred to the 3<sup>rd</sup> defendant; that the intention of the plaintiff is to perpetuate his occupation, said to be illegal, of **50** acres of the 3<sup>rd</sup> defendant's property contrary to **Section 22** of the **Land Control Act** and that there is no privity of contract between the plaintiff and the 3<sup>rd</sup> defendant nor a valid agreement between the 1<sup>st</sup> defendant and the plaintiff capable of orders of specific performance.

5. The plaintiff filed his submissions on **24/10/2018**. I perused the record and I found no submissions filed on behalf of the defendants in respect of the instant application as at the time of the writing of this ruling.

6. Having regard to the response of the 1<sup>st</sup> defendant, I find that he does not deny that he obtained some kind of aid in staving off imminent auction of the suit premises. It is not yet established to what extent this aid was effective for the purpose. That can only be conclusively determined upon the hearing of the main suit. However it is clear from that response that the agreement between the plaintiff and the 1<sup>st</sup> respondent was entered into on the **9<sup>th</sup> February 2007** yet between that date and a certain date in the year **2008** the auction never took place. Nevertheless the correspondence attached to the replying affidavit demonstrates that the 2<sup>nd</sup> defendant kept up the pressure on the 1<sup>st</sup> defendant to repay the loan balance. I also note that the letter dated **6<sup>th</sup> November 2006** exhibited in the replying affidavit of the 1<sup>st</sup> defendant as "**PKK1A**" reads as follows:

***"In reference to my previous letter in which I suggested that I had found a buyer the fact is that yes the buyer was identified and he did make a deposit of Kshs. One Million (1,000,000/=) although he has not been forthcoming as promised this is due to the sudden climatic change. The unforeseen rain has disrupted his harvesting plan. I am therefore requesting you to give me up to December 31<sup>st</sup> to make payment".***

7. **Exhibit "PKK1B"** in the same affidavit shows that some of the 1<sup>st</sup> respondent's assets had been repossessed and sold over the loan balance before **15<sup>th</sup> June 2006** way before the agreement. It is noteworthy that the agreement for purchase of 50 acres from the suit land exhibited by the plaintiff is dated **9/2/2007**. That agreement mentions at **paragraph 2** that on **5<sup>th</sup> June 2006** the plaintiff paid the sum of **Kshs. 1,000,000/=** to the 1<sup>st</sup> defendant by depositing the said sum of money in the defendant's account with the 2<sup>nd</sup> defendant. Only one lumpsum of **Ksh 1,000,000/=** is admitted by the 1<sup>st</sup> defendant in **paragraph 6** of the replying affidavit as having been paid on **5/6/2006**. No breakdown has been attributed to the other lumpsums so as to clarify how the allegation that **Ksh 1,005,000/=** out of the moneys paid by the plaintiff could have been lease money. In my view the allegation by the 1<sup>st</sup> defendant that some of the funds paid by the plaintiff were lease moneys has not yet been proved yet the amount paid by the plaintiff towards any purpose intended between him and the defendant remains substantial. In my view the issues that may arise in this suit are complex such as to require the parties to proceed to the full hearing of the main suit to enable the final orders defining the parties' rights to be made at the judgment stage.

8. Further the 3<sup>rd</sup> defendant has admitted that the plaintiff is in possession of some **50** acres of which the 3<sup>rd</sup> defendant is now in possession of title.

9. In an appropriate case this court has the power to order nullification of titles. The very fact that the original land has been transferred and subsequently subdivided and new titles issued to a person other than the 1<sup>st</sup> defendant is no bar to the exercise of that power provided the proper circumstances obtain. Those circumstances can only be established at the hearing of the main suit. It is notable that the entire parcel known as **LR 6125/10** was transferred to the 3<sup>rd</sup> defendant as a single parcel and thereafter subdivided presumably at the 3<sup>rd</sup> defendant's instance.

10. The defence of the 3<sup>rd</sup> defendant emphasizes on the absence of consent to transfer to the plaintiff but this court does not wish to delve into that substantive issue at this stage.

11. It suffices that the plaintiff paid a substantial amount of money pursuant to an admitted written contract for the sale of **50** acres of land and that the plaintiff is in possession of the **50** acres on the ground as admitted by the 3<sup>rd</sup> defendant and tacitly admitted by the 1<sup>st</sup> defendant. That agreement is grievously deficient in timelines or compulsion borne upon the plaintiff to accomplish the redemption of the suit property single handedly within a given period. In my view it would not be proper at this stage to turn a blind eye to the plaintiff's efforts to help the 1<sup>st</sup> defendant redeem the 1<sup>st</sup> defendant's land from the jaws of auction by the 2<sup>nd</sup> defendant. How this will be treated at the hearing and determination of the main suit can not be foretold now.

12. I need not say more in this application so as not to prejudice the hearing of the main suit. I find that the plaintiff has established a prima facie case and that having been in possession he may suffer damage that may not be compensable by way of damages if the orders sought are not granted.

13. However the application was not amended at any point in time to read the proper land reference numbers that exist at present. The effect of the subdivision of the land is that if the orders were granted as prayed there would be no order capable of being registered against the **LR. 6125/10** as it does not exist. Though that is the case, the defendants acknowledge that **LR. 6125/10** previously existed and the 3<sup>rd</sup> defendant's defence and counterclaim has linked it directly to some **6** subdivisions being **LR 6125/11, LR 6125/12 LR 6125/13 LR 6125/14 LR 6125/15 and LR 6125/16**.

14. The plaintiff entered into an agreement for purchase of the land while it was not yet subdivided. He knew it as a single parcel. It is not yet known whether the subdivisions overlap the land he occupies. It is therefore safe to issue an order that covers all the subdivisions. I therefore

grant the application dated 8/2/2018 and order as follows:

**(a) That there be an interim injunction restraining the 3<sup>rd</sup> defendant from alienating, offering for sale, transferring, excising any part of or in any way dealing with the land comprised in LR. Nos 6125/11, LR 6125/12 LR 6125/13 LR 6125/14 LR 6125/15 and LR 6125/16 - Kitale being subdivisions of LR No. 6125/10 Kitale pending hearing and determination of the suit.**

**(b) The costs of this application shall be in the cause.**

**Dated, signed and delivered at Kitale on this 15<sup>th</sup> day of November, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**15/11/2018**

Coram

Before - Hon. Mwangi Njoroge Judge

Court Assistant: Picoty

Mr. Kaosa holding brief for Samba for defendant

Mr. Teti for applicants

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**15/11/2018**