



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

ELC NO 116 OF 2018

MARGARET NJOKI MWARIRI.....PLAINTIFF

VERSUS

RUSI CHELAGAT KANGOGO.....1ST DEFENDANT

GEORGE KIPKETER CHEPKWONY.....2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff having purchased the suit land from the 1st defendant; 2nd defendant claiming to have purchased the land much earlier from the 1st defendant; 1st defendant denying the allegation that she had sold the land to the 2nd defendant; no sale agreement displayed by the 2nd defendant to prove the sale of the land; no rights demonstrated by 2nd defendant over the suit land; plaintiff establishing a prima facie case; injunction issued).

1. The application before me is that dated 19 March 2018, which is an application for injunction that was filed contemporaneously with the plaint. The plaintiff's case is that through an agreement dated 20 June 2016, she purchased from the 1st defendant the land parcel Naivasha/OI Jorai Phase II/1330 for a consideration of Kshs. 1, 900,000/=. A deposit of Kshs. 500,000/= was paid on execution of the agreement and the balance was to be paid on 21 June 2016, which the plaintiff avers that she paid. The plaintiff then went to transfer the land but found that the 2nd defendant had placed a restriction, claiming that the 1st defendant had borrowed from him, the sum of Kshs. 150,000/= as a friendly loan. The plaintiff avers that she confronted the 1st defendant to have her clear the debt of the 2nd defendant but she has failed to do so. She has also pleaded that the 2nd defendant has moved into the suit property and is cultivating the same despite the existence of the agreement. In the suit, she has asked for a permanent injunction to restrain the defendants from the suit land, and for an order of removal of the restriction.

2. In this application for injunction, the plaintiff has asked that pending hearing of the suit, the defendants be restrained from charging, leasing, mortgaging, selling, transferring to third parties, or to themselves, or interfering with the plaintiff's possession of the suit land. She has also asked for orders withdrawing the restriction within 7 days.

3. The position of the plaintiff seems to have support from the 1st defendant. In her replying affidavit, she has acknowledged selling the suit property to the plaintiff and has affirmed that she has been paid all the money. She has deposed that she has never sold the suit land to the 2nd defendant, and had only allowed the agents of the 2nd defendant to plough the land, and in return the 2nd defendant would assist her in paying school fees. She has averred that the 2nd defendant advanced to her a loan of Kshs. 150,000/= on a friendly basis but there was no agreement that the suit land would be used as security.

4. The application is however opposed by the 2nd defendant. He has deposed that sometimes in the year 2004, he purchased the suit land from the 1st defendant. He has averred that the suit land's title was under the Agriculture Development Corporation and the land was to be transferred to him. He has annexed copies of transfer of land by the Settlement Fund Trustees and Discharge of Charge instruments. He stated that he fell sick soon thereafter and could not complete the transaction, but that on 25 February 2016, he lodged the transfer documents at the Lands Office in Naivasha. He has annexed the executed transfer documents, stamp duty assessment and paying slip, receipts and PIN Certificates. He has averred that at the time that these documents were lodged, the 1st defendant swore an affidavit to state that the original discharge of charge instrument got lost. He has deposed that the 1st defendant also executed an application for consent of the Land Control Board, a copy of which he has annexed, and he has averred that consent to transfer was issued in the year 2012. He later learnt that the 1st defendant wants to resell the property and he lodged a restriction on 23 June 2016. He has contended that he has been in occupation since the year 2014 and has fenced the land and developed it. He has denied the allegation that he advanced a friendly loan of Kshs. 150,000/= to the 1st defendant, his position being that he purchased the land.

5. I have considered the matter alongside the rival submissions of counsel for the plaintiff and counsel for the 2nd defendant. I take the following view of the matter.

6. What is before me is an application for injunction. In order to succeed in an application of this nature, the applicant needs to demonstrate a prima facie case with a probability of success; show that he stands to suffer irreparable loss if the injunction is not granted; and where the court is in doubt, it will decide the application on a balance of convenience.

7. The case of the applicant is that she purchased the suit property for consideration. She has annexed a copy of the sale agreement which is dated 20 June 2016, and has also annexed copies of payment slips to demonstrate that she has paid in full. On the other hand, the 2nd defendant also contends to have purchased the suit land from the 1st defendant. However, despite claiming to have purchased the land, I have not seen any sale agreement, and all that the 2nd defendant has averred, is that the sale was sometimes in the year 2004. It is also not disclosed what consideration he may have paid for the purchase of this land. In as much as he has displayed a consent to transfer, issued by the Land Control Board, if he is to succeed in any claim for transfer of the said land, he will need to show a sale agreement, for under Section 3(3) of the Law of Contract Act, Cap 23, Laws of Kenya, unless an agreement for sale is reduced into writing, the same cannot be enforced. That provision of the law is drawn as follows :-

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act ([Cap. 526](#)), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

8. Now, given that the 1st defendant has denied selling any land to the 2nd defendant, it is incumbent upon the 2nd defendant to avail some evidence of sale, and as I have pointed out above, it will be a tall order for the 2nd defendant to try and enforce any claimed sale without there being proof of an agreement for sale. So far, I have not been shown any right that the 2nd defendant has over the suit land. Moreover, although the 2nd defendant has claimed that they lodged a transfer instrument in his favour, I have not seen any evidence of this. What I have seen is evidence only of the transfer between the 1st defendant and the Settlement Fund Trustees. The 2nd defendant did annex a copy of a draft transfer, but the same has not been lodged, and of course, there is the contention of the 1st defendant that she never entered into any sale with the 2nd defendant, which contention cannot be wished away given that there is no sale agreement exhibited by the 2nd defendant. There may have been some sort of transaction, or relationship between the 1st and 2nd defendant, but I cannot at this stage point ascertain exactly what sort of relationship they had. What is important to me, is that the 2nd defendant has not shown any sale agreement with the 1st defendant.

9. I am therefore of the view, that the plaintiff has demonstrated a prima facie case with a probability of success. The plaintiff thus deserves orders to have the title to the suit land preserved and is further entitled to the order that there be no dealings with the same. I am not however persuaded at this juncture to issue orders raising the restriction filed by the 2nd defendant. Maybe, the 2nd defendant will exhibit something that will demonstrate his rights over the suit land in future and I see no point in raising the restriction at this stage of the proceedings.

10. Both plaintiff and 2nd defendant have fought over who is to retain possession of the suit land pending hearing of the suit. At this point in time, I am not persuaded that the 2nd defendant has any right over the suit land. Pending hearing of the suit, possession will therefore be with the plaintiff.

11. The plaintiff shall also have the costs of this application.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th day of November 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. F.K Maina holding brief for Mr. Opar for the applicant.

Ms. Langat holding for Mr. Kimatta for the 1st respondent.

Mr. Yogo holding brief for Mr. Kiplagat for the 2nd respondent.

Court Assistants :Nelima Janepher Carlton Toroitich

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU