



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 250 OF 2016

TARZAN LIMITED.....PLAINTIFF

VERSUS

KOIMA DEVELOPERS LIMITED.....1ST DEFENDANT

ELGEYO BORDER INVESTMENT LIMITED.....2ND DEFENDANT

RULING

Tarzan Limited, (hereinafter referred to as the Plaintiff) has come to court against **Koima Developers Limited and Elgeyo Border Investments Limited (hereinafter referred to as the defendants)** praying for orders an order compelling the 1st and 2nd defendants jointly and severally to perform their part of the contract and to execute documents of transfer and to cause the transfer of portion of land measuring approximately 100 acres purchased by the plaintiffs in parcel known as L. R. 10930, 6802 and 7557/2 in favour of the plaintiff. In the alternative, the plaintiff claims for an order of the refund by the 1st and 2nd defendants jointly and severally of the consideration for 100 acres at the current market and sale value. The plaintiff further prays for an order that the agreement between the plaintiff and the 1st defendant for the purchase of parcel as Eldoret Municipality Block 14/29 has been rescinded by the plaintiff's director Phylis Jerotich Mutwol and is cancelled and nullified.

Moreover, an order compelling the 1st defendant by itself, its director David Bett Langat or any other shareholder, appointee, nominee, agent or servant of the 1st defendant company to return the certificate of lease for parcel No. Eldoret Municipality Block 14/29 back to the plaintiff and an order of permanent injunction to restraining the 1st and 2nd defendants by themselves, their appointees, agents, servants or any purported subsequent beneficiary of the parcel of land known as Eldoret Municipality Bloc 14/29 from entering into, fencing, developing, leasing out, transferring, disposing off or in any other way dealing with or interfering with the plaintiff's ownership, use and enjoyment of land known as Eldoret Municipality Block 14/29. Lastly, special and general damages and Cost of this suit and interest at court rates.

The Plaintiff is accompanied with an application under 40 Rule 1 and 2 of the Civil Procedure Act, 2010. Section 13 of the Environment & Land Court and Section 3, 3A of the Civil Procedure Act praying for orders that this Honorable court be pleased to issue an order of injunction restraining the 1st and 2nd defendants jointly and severally by themselves, their agents, servants from transferring or in any other way disposing off parcels of land known as Eldoret Municipality Block 14/29 and the parcel measuring approximately 100 acres situated on parcels known as L. R. 10930, 6802 and 7557/2 pending the hearing and determination of the main suit.

The plaintiff further prays for a temporary order of inhibition to issue to the Chief Registrar, Uasin Gishu County to inhibit against any registration of any instruments of transfer of parcel No. Eldoret Municipality Block 14/29 and parcel measuring approximately 100 acres situated on parcels known as L. R. 10930, 6802 and 7557/2 pending the hearing and determination of the main suit.

The application is based on grounds that parcels No. Eldoret Municipality Block 14/29 and parcels measuring 100 acres situated on parcels known as L. R. 10930, 6802 and 7557/2. Parcels No. Eldoret Municipality Block 14/29 belongs to the plaintiffs and who sold it to the 1st defendant on understanding that she would buy 100 acres on parcels known as L. R. 10930, 6802 and 7557/2. The 1st and 2nd defendants are reluctant to complete the contract and conveyance over 100 acres in parcels known as L. R. 10930, 6802 and 7557/2 in favour of the plaintiff. The plaintiff is apprehensive that the defendants may dispose off the parcels of land to her detriment.

In the supporting affidavit of Phylis Jerotich Mutwol, one of the Directors of the Plaintiff, she states that the company purchased 100 acres of the land known as L. R. 10930, 6802 and 7557/2 situated in Uasin Gishu County.

They paid 50% of the consideration which was Kshs.55,000,000. They paid registration fees of Kshs.100,000. The completion face was to be 60 days.

Upon payment of the deposit, they were sent to M/s Kipkenda & Company Advocates through the executed agreement of sale between themselves and Koima Developers Ltd for the same parcel and same consideration. They went out of their way to get the consideration. The

plaintiffs never executed any documents of transfer in his favour since in his mind, he knew he would so once the 1st defendant had transferred 100 acres.

After some time, the Director of the 1st defendant became hesitant to complete the transaction. He later refunded Kshs.10,000,000 to the plaintiff's account.

The 1st defendant filed grounds of opposition stating that the plaintiff has no cause of action against the 1st defendant. The 1st defendant states that Eldoret Municipality Block 14/29 was fully paid for and the plaintiff has no claim over the same.

Mr. Joseph Toroitich Cherono, one of the Directors of Elgeyo Border wheat farm states that the 2nd defendant bought the parcel of land known as Elgeyo Border wheat farm under reference Nos. 10930/6802 and 7557/2 from Koima Developers Ltd.

He states that the 2nd defendant distributed the land to members of the investment. The plaintiff is not a member of the Elgeyo Border Investments Ltd. Company and that Koima has not added to 2nd defendant 100 acres to give the plaintiff.

Moreover, that the 2nd defendant has refunded the amounts deposited to its accounts by the plaintiff through the 1st defendant.

David Bett Langat, the Director, Koima Developers Ltd states that the plaintiff sold Eldoret Municipality Block 14/29 to the 1st defendant at an agreed purchase price of Kenys Shillings 20,000,000 which was paid immediately and settled in full. He denies any other land transaction between 1st defendant and the plaintiff but admits that any other claim between the plaintiff and the 1st defendant saw the settlement through refunds. He states that the plaintiff has been paid in full in respect of the sale of Eldoret Municipality Block 14/29.

Joseph Toroitich Cherono filed a further affidavit on 11.5.2018 stating that the plaintiff agreed to purchase 100 acres of L. R. 10930, 6802 and 7557/2 at an agreed consideration of Kshs.55,000,000 and that the plaintiff paid only Kshs.17,000,000 leaving a balance of Kshs.38,000,000. That the defendants cannot transfer the sold parcel of land until the entire purchase price is paid.

I have considered the application, supporting affidavit, grounds of opposition and replying affidavit and do warn myself that the evidence on record has not been tested through cross examination and therefore, it is not conclusive.

For the court to grant injunctive orders, it has to apply the principles set out in *Giella Vs Cassman Brown*. The plaintiff ought to establish a prima facie case with a likelihood of success.

The plaintiff has established that on 24.1.2014, the 1st defendant offered the plaintiff 100 acres of land to be excised from L. R. No. 10930, original No. 901/1/1, L. R. No. 6802 and L. R. No. 7557.2. The 1st defendant was the vendor whilst the plaintiff was the purchaser. The purchase price was Kshs.55,000,000. A deposit of Kshs.20,000,000 was paid in compliance with the terms of the agreement. The defendants have not transferred 100 acres of land to the plaintiff as agreed and therefore, there is a prima facie case with a likelihood of success.

On the issue as to whether the plaintiff is likely to suffer irreparable harm, this court finds that the damage likely to be incurred by the plaintiff cannot be easily quantified, verified and be refunded by the defendants.

The plaintiff has already sold Eldoret Municipality Block 14/29 and the 1st defendant has bought the same for Kshs.20,000,000. The plaintiff's loss might not be easily compensated in damages.

The balance of convenience tilts towards granting an order of injunction restraining the defendants from transferring Eldoret Municipality Block 14/29 and 7557/2 because the plaintiff will be more inconvenienced if both parcels of land are transferred.

The upshot of the above is that I do grant an order of injunction restraining the 1st and 2nd defendants jointly and severally by themselves, their agents, servants from transferring or in any other way disposing off parcels of land known as Eldoret Municipality Block 14/29 and the parcel measuring approximately 100 acres situated on parcels known as L. R. 10930, 6802 and 7557/2 pending the hearing and determination of the main suit.

I do further grant a temporary order of inhibition to issue to the Chief Registrar, Uasin Gishu County to inhibit against any registration of any instruments of transfer of parcel No. Eldoret Municipality Block 14/29 and parcel measuring approximately 100 acres situated on parcels known as L. R. 10930, 6802 and 7557/2 pending the hearing and determination of the main suit. Costs in the cause.

Orders accordingly.

Dated and delivered at Eldoret this 7TH day of December, 2018.

A. OMBWAYO

JUDGE