



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 178 OF 2016

SIMON WANJOHI MURAGEPLAINTIFF/RESPONDENT

-VERSUS-

SOLOMON WAIGANJO MBURU.DEFENDANT/APPLICANT

RULING

1. The defendant **Solomon Waiganjo Mburu** (hereafter referred to as the applicant) filed the notice of motion dated **29th September, 2016** seeking an injunction that the plaintiff be restrained from interfering with his quiet possession, utilisation, cultivation and management of Plot No 302 at Riverside Estate in Kiganjo, popularly known as Kibiriti farm (hereafter referred to as the suit property) pending the hearing and determination of the suit. He also prays that he be allowed to utilise the suit property and that costs of the application be provided for.
2. The application is premised on the grounds on its face and is supported by the affidavit sworn by the applicant on **29th September, 2016**. He depones that he purchased the suit property from the plaintiff at a total cost of kshs.280,000; that he made a down payment of Kshs.30,000 and later paid Kshs.150,000 but the plaintiff has refused to transfer the suit property to him and has fenced it off. He prays that the court restrains the plaintiff from interfering with his quiet possession.
3. The plaintiff, **Simon Wanjohi Murage** (hereafter referred to as the respondent) opposed this application vide his replying affidavit sworn on **16th January, 2017**. He depones that the total purchase price for the suit property was Kshs.300,000; that the applicant has only paid him Kshs.150,000 and has failed to clear the balance of Kshs.150,000; that the applicant at some point intimated to him that he was not willing to proceed with the sale and this was the reason why he fenced off the suit property.
4. According to the respondent, this matter had been referred to Naromoru police station where parties agreed that the applicant would vacate the suit property and the respondent would refund the money he had received from the applicant as soon as he was able to dispose off the suit property to another person. However, the applicant failed to vacate the suit property prompting the filing of this suit by the respondent.
5. The respondent further depones that the applicant has admitted not utilising the suit property and further that he is not willing to proceed with the sale. On his part, he has no problem refunding the applicant his money at the earliest opportunity.
6. The application was heard on **18th January 2017**, in the presence of both parties who were

unrepresented.

7. The applicant reiterated what was contained in the grounds of his application and supporting affidavit and prayed that he be allowed to continue utilising the suit property.

8. In response, the respondent submitted that the parties entered into an oral agreement for the sale of the suit property for Kshs 280,000 on 2nd June, 2013. He admitted being paid Kshs 180,000 by the applicant (Kshs 30,000 after which the applicant took possession and Kshs 150,000 on 2nd July, 2013). He stated that after the applicant made the aforesaid payment, he disappeared; that the respondent sent several emissaries to him urging him to complete payment but the applicant refused, leaving him with no option but to fence off the suit property. Unhappy with this action, the applicant reported the matter to the police station where the parties agreed that the respondent would refund the money he had received from the applicant and the respondent would vacate the suit property.

Analysis and determination

9. This being an application for injunction, I am guided by the conditions set down in the case of **Giella v. Cassman Brown [1973] EA 358** thus:-

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”

10. These principles are to be applied sequentially; the court need not consider the second and third principles if it finds that the appellant has a *prima facie* case. However, traditionally, courts have always considered all the three principles.

11. The question before the court is whether the applicant has established a *prima facie* case. In answering this question, I begin by pointing out that the parties have no written sale agreement with respect to the suit property. However, the parties agree on certain facts: that the total purchase price was agreed at Kshs.280,000; that the applicant has paid the respondent a total of Kshs 180,000 in two instalments of Kshs 30,000 and Kshs 150,000; That the balance is Kshs 100,000 and that the applicant has been in possession of the suit property with the respondents consent.

From the facts stated herein above, I am satisfied that the applicant has established a *prima facie* case to warrant the issuance of the orders sought.

12. From the facts stated herein above, I am satisfied that the applicant has established a *prima facie* case. He has made substantial payment towards purchase of the suit property and he has also been utilising the land.

13. On the second limb, although the applicant could easily be compensated by way of damages because what is in dispute is land whose value can be established and damages assessed. I am of the view that the suit property should be preserved until the matter is heard and determined to avoid changing the substratum of the suit property.

14. The balance of convenience also tilts in the applicant's favour as he has been in possession of the suit property and has been utilising it with the consent of the respondent. If the orders sought are not granted, the applicant faces a real danger of being evicted and losing the part payment he has paid towards purchase of suit property.

15. **Ojwang Ag, J** (as he then was) in **Amir Suleiman v Amboseli Resort Limited [2004] eKLR**, held;

“Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in

Giella v Cassman Brown, the Court has had to consider the following questions before granting injunctive relief: (i) is there a *prima facie* case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.”

16. Applying the aforesaid principle to the circumstances of this case, I find that If the orders sought are not granted, the applicant would face a higher risk of injustice than the respondent. For the above reason, I allow his application as prayed.

Dated, signed and delivered in open court at Nyeri this 23rd day of February, 2017.

L N WAITHAKA

JUDGE.

In the presence of:

Simon Wanjohi Murage – plaintiff/applicant

Solomon Waiganjo Mburu – Defendant/respondent

Court clerk - Esther