



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT NAIROBI

LAND&ENVIRONMENT DIVISION

ELC.NO.729 OF 2015

JOHN KANGEI KINYUA.....PLAINTIFF/APPLICANT

=VERSUS=

VIRGINIA NJOKI KAIGAI.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the plaintiffs Notice of Motion dated **28th July 2015**, brought under **Order 40 Rules (1) a & b** of the **Civil Procedure Rules** and **Section 3A & 63 (e)** of the **Civil procedure Act** and all other enabling provisions of the law. The applicant has sought for the following prayers;-

1. spent.

3. spent.

3. That a temporary injunction does issue against the defendant, her agents, servants, employees and /or anyone from claiming under her from entering ,selling, transferring, alienating and or developing any further upon the plaintiffs LR NO.KABETE/KARURA/1481 pending the hearing and determination of the plaintiffs suit.

4. That the cost of this application be provided for.

The application is premised on the grounds stated on the face of the application and on the supporting affidavit of **JOHN KANGEI KINYUA** the plaintiff/applicant herein. These grounds are;-

a. That the defendant is the registered owner of parcel of land known as LR.NO.KABETE/KARURA/1481.

b. That the plaintiff is the bonafide purchaser of 100*100 square feet of the suit property.

c. That the defendant has commenced construction on the suit premises.

d. That unless restrained by a court order of this honourable court the plaintiff stands to suffer loss and damage.

e. That it is in the interest of justice that orders sought are granted.

In his Supporting Affidavit the plaintiff, **John Kangei Kinyua** averred that on **26th November 2010** he entered into a sale agreement with the defendant for purchase of suit premises as per **annexture JKK-I' and** upon signing the said agreement paid **kshs.100,000/=** as per annexture **JKK-II'**.

The plaintiff further alleges that on **14th December 2010** made a further payment of **Kshs. 20,000/=** as per annexture **JKK-III'** again on **11th March 2011** vide a further agreement, paid the defendant **Kshs.100,000/=** amount which was to facilitate subdivision of the suit property as per annexture **JKK-IV.**The plaintiff averred that the balance of **Kshs.480,000/=** was to be paid upon the defendant obtaining a consent to transfer the suit property to the plaintiff.The plaintiff further averred that sometimes on **11th July 2011** through **M/s M.Ndwiga & co. Advocates** the plaintiff demanded that the defendant do transfer the suit premises in plaintiff's favour as per annexture **JKK-V'** and that despite both verbal and written demands the defendant has refused to transfer the suit property in the plaintiff's name.That sometimes in **July 2014**, the plaintiff learnt that the defendant has commenced construction on the suit property.The plaintiff alleges that he was ready to fulfil his part of sale agreement.The plaintiff averred that unless restrained by a Court order he stands to suffer loss and damage.

The application is opposed and **VIRGINIA NJOKI KAIGAI** swore a Replying Affidavit on **17th September 2015** and averred that she did enter into a sale agreement with the plaintiff for sale of a portion of land measuring **100x100** feet exercised out of **LR.NO.KABETE/ KARURA/ 1481.**The defendant averred that the purchase price for the said portion was **Kshs.700,000/=** and which she admits receiving **Kshs.200,000/=** only from the plaintiff.The defendant alleged that before the said transaction could be completed a dispute arose on suit property(as per annexture **UNK 1'**) though it was settled and the plaintiff called to complete on his part of said agreement, but was adamant and citing lack of funds and that he was not interested in buying disputed land.

The defendant further averred that despite writing to the plaintiff to complete his, part he remained adamant as per annexture **UNK 2'**.The defendant alleged that the said agreement stands vitiated by the effluxion of time and she has since disposed off the said portion of land to another willing purchaser and the same has since changed hands.The defendant alleged that she has always been willing to refund the purchase price to the plaintiff minus the penalty and that she offered the plaintiff /applicant an alternative parcel of land but the plaintiff refused.The defendant further averred that she was willing to refund the amount advanced to the plaintiff considering the close family ties.The defendant urged the court to dismiss the prayers sought in the application.

The application was canvassed by way of written submissions.The Law Firm of **Kamau Mwangi & Co. Advocates** for the plaintiff/applicant filed their written submissions on **5th February 2016** and urged the court to grant the orders sought in the application dated **28th July 2015.**

The Law Firm of **Osero & Co.Advocates**, for the defendant filed their written submissions on **22nd March 2016** and urged the Court that the plaintiff/applicant is undeserving of the orders sought and will not suffer any grave injustice as the suit property has already been sold to a 3rd party and the respondent is willing to refund the money.

The Court has carefully considered the instant **Notice of Motion** which is seeking to restrain the defendant,her agents,servants or employees claiming under from entering,selling,transferring,trespassing,alienating and or developing any structure upon the plaintiff/applicants **LR.No.Kabete/Karura/1481** pending the hearing and determination of the suit.

The court has noted that in the main suit,the plaintiff/applicant has sought for various prayers among them a permanent injunction and that he be declared the rightful purchaser for **100 x100** square feet of the land being a subdivision of **LR.No.Kabete/Karura/1481** .The borne of contention herein is breach of Sale Agreement dated **26th November 2010**, where the defendant/respondent was to sell a portion of land being **100ftx100ft** to the plaintiff/applicant from the parcel of land **Kabete/Karura/1481.**The plaintiff/applicant was not to purchase the whole portion of land but apart of it.The Sale Agreement was entered on **26th November 2010** and an addendum to the same was signed on **11th March 2011.**From the available evidence, that is the Sale Agreement,the purchase price was **Kshs.700,000/=** and so far the

plaintiff/applicant paid a sum of **Ksh.220,000/=** to the defendant/respondent. Further it was the term of the sale agreement that the purchaser who is the plaintiff/applicant was to pay the balance of the purchase price on or before expiry of **30 days**. However it is evident that by the time the plaintiff/applicant filed this suit, he had only paid **Ksh.220,000/=**. The plaintiff/applicant therefore had not fulfilled his part of the bargain.

The defendant has alleged that she intended to sell a portion of the suit property to the plaintiff/applicant but a dispute arose over the said property and therefore the plaintiff/applicant refused to carry on with the transaction. That she sold the suit property to one **Jane Muthoni Kornfuehrer** as evident from the Sale Agreement dated **17th March 2011**. The said portion of land was sold for **1600,000/=** and the terms of payment were stipulated in the said sale agreement. Therefore, this portion of land was sold in the year **2011**. The plaintiff/applicant came to court in year **2015** and sought for the injunctive orders. What the plaintiff/applicant is seeking to injunct has already taken place. Injunctions are issued to prevent occurrence of future event but not an event that has already taken place. See the case of **Esso Kenya Ltd vs Mark Makwata Okiya C.A Civil Appeal No. 69 of 1991**, where the court held that;

“An injunction is not to be granted if the event meant to be restrained has taken place”

Further in the case of **Jane Kemunto Mayaka Vs Municipal Council of Nakuru & others, High Court Civil case No.124 of 2005**, the Court held that;-

“Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure an applicant and are not issued where such an event has taken place”

The applicant has acknowledged that there is development being undertaken on the suit premises. Applicant purchased a portion of land from the suit land and not the whole of it. Why he is seeking for an injunction against the whole parcel of land. The defendant has produced a Sale Agreement to show that she has already sold the portion of land to a 3rd party. The court cannot injunct what has already taken place. Further an injunction is an equitable remedy and it is evident that **“equity aids the vigilant and not the indolent”**. If the cause of action arose in the year **2011**, why did the plaintiff/applicant wait for so long before filing the suit. He is guilty of laches.

Having now carefully considered the available evidence, the court finds that the Notice of Motion dated **28th July 2015**, filed by the plaintiff/applicant is not merited the same is dismissed entirely with costs to the defendant/respondent.

It is so ordered.

Dated, Signed and Delivered this **17th** day of **February, 2017**

L.GACHERU

JUDGE

In the presence of:

Mr Mwendwa for Maina for the Plaintiff/Applicant

None appearance for the Defendant/Respondent

Steve :Court Clerk

Court:

Ruling read in open Court in the presence of the above stated advocate and absence of Advocate for the Defendant though served with a Ruling Notice.

L.GACHERU

JUDGE