



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 71 OF 2016

KIMARU KIPLAGAT BONGOI.....

.....**PLAINTIFF**

VERSUS

CHRISTOPHER KIBET BARNO.....

.....**1ST DEFENDANT**

JACKSON KIPROTICH KEMBOI.....

.....**2ND DEFENDANT**

RULING

Kimaru Kiplagat Bongoi hereinafter referred to as the plaintiff/applicant applies for orders against *Jackson Kiprotich Kemboi* and *Christopher Kibet Barno* hereinafter referred to as the respondents for orders that the defendants, their servants, agents and or any other person claiming under him be restrained by way of temporary injunction from selling, offering for sale, alienating, evicting the plaintiff and in any manner adversely dealing with the parcel Pioneer Ngeria/(Block 1)/12423 to the detriment of the plaintiff pending the hearing and determination of this suit.

The application is based on grounds that the 1st defendant has refused to transfer the land Pioneer/Ngeria/12423 and has threatened the plaintiff’s eviction. The 1st defendant has transferred the suit land to the 2nd defendant the suit land still sub-suit. The plaintiff is in possession of the suit land and that the agreement has not been revoked.

The application is supported by the affidavit of Kimaru Kiplagat Bongoi who states that on the 8.8.2011, he entered into an agreement of sale of land parcel No. Pioneer Ngeria/Block 1 (EATEC)/972, measuring 1 acre at a consideration of Kshs.2,000,000/=, which the plaintiff has completed.

The defendant subdivided his parcel of land and sals the same to 3rd parties including the portion occupied by the plaintiff despite the fact that the plaintiff took possession. The 1st defendant transferred the land to the 2nd defendant.

The 1st defendant filed a replying affidavit stating that the plaintiff took long to pay the balance after paying Kshs.500,000/=. The 1st defendant states that he has not sold the property to the 2nd defendant and that he is willing to transfer the property to the plaintiff but have been prevented to do so because the documents are with one Moses Sang because of an alleged debt.

The 1st defendant filed another undated affidavit on 26.4.2016 which I do find that has no evidential value

because it is undated and that the date of commission is not known.

The 2nd defendant filed a replying affidavit stating that he is the registered owner of the property having purchased the same on willing buyer, willing seller basis and that the same was transferred to him by the 1st defendant.

The 2nd defendant filed submissions whose gist is that the sale agreement dated 8.8.2011 is no longer enforceable both in constitution and statute under the Land Act, 2012 and the Land Control Act, Cap. 302. The 2nd defendant argues that the contract was rescinded by the 1st defendant.

In a nutshell, the 2nd defendant argues that the plaintiff failed to comply with the Land Control Act, Cap. 302, Laws of Kenya that the agreement was rescinded and that the 2nd defendant was a bonafide purchaser without notice of any fraud but quickly adds that no fraud has been proved.

On irreparable loss, the 2nd defendant argues that the plaintiff can be compensated in damages.

On balance of convenience, the 2nd defendant argues that it lies with the 2nd defendant's possession as it has been shown that he acquired the property for Kshs.4,200,000/= and undertook all processes and the land was transferred to him hence the law recognizes him.

I have considered the evidence on record in the affidavits and the subsequent submissions and do find that the property in dispute is registered in the names of the 2nd defendant. It is not in dispute that the property was registered in the names of the 2nd defendant after due process. There is no evidence of fraud. On the other hand, the plaintiff purchased the property but rested on his laurels and did not even demonstrate that he attempted to obtain the consent of the Land Control Board. The agreement between the plaintiff and the 1st defendant became stale 6 months after it was made after the parties failed to obtain the consent of the Land Control Board. Moreover, it appears that the contract has rescinded by the 1st defendant.

On the above facts, the court finds that the plaintiff does not establish that he has a prima facie case with the probability of success.

On irreparable loss, I do find that the plaintiff's recase is for a refund of the purchase price which can be quantified.

On balance of convenience, I do find that the 2nd defendant being the reported owner is likely to be inconvenienced if the injunction is granted as he is not entitled to compensation for the plaintiff and therefore, is likely to lose his money plus the land if injunction is granted, which the plaintiff will not be inconvenienced as he can be compensated in monetary terms.

The upshot of the above is that the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 14TH DAY OF MARCH, 2017.

A. OMBWAYO

JUDGE