



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.43B OF 2016

DOUGLAS MUSA MACHAGE.....PLAINTIFF

VERSUS

SAMUEL NGIGI KARURI.....1ST DEFENDANT

EUNICE WARIARA NGIGI.....2ND DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff alleging to have purchased land from the defendants and having taken possession; defendants wishing to evict the plaintiff on the argument that the plaintiff only had a lease; not wise at this stage of the proceedings to delve into whether the parties had a sale agreement or a lease agreement; application decided on a balance of convenience; status quo ordered to be maintained and property to be preserved meaning no dealings pending hearing of the suit)

1. This suit was commenced by way of plaint filed on 1 March 2016. The case of the plaintiff is that sometimes in the month of February 2011, he entered into a verbal agreement with the defendants to purchase two portions of 5 acres out of the defendants' land parcel LR No. 4815/3 at the consideration of Kshs. 600,000/= per acre. Some payments were made on 3 March 2011 totaling Kshs. 3 Million and a formal agreement was drawn on 12 March 2011. It is averred that it was agreed that the balance of Kshs. 3 Million will be paid later in reasonable time. Thereafter, the plaintiff took possession of the land and commenced farming wheat. It is pleaded that the plaintiff did subsequently pay the balance of Kshs. 3 Million, and a sum of Kshs. 300,000/= to facilitate transfer into his name, and that he expected to be issued with title from the year 2014, but none has been forthcoming. It is pleaded that on 15 April 2015, the defendants delivered to the plaintiff a new and further demand for the sum of Kshs. 1,600,000/= which the plaintiff contested. On 8 February 2016 the 1st defendant declared that the agreement is rescinded and stated that he would take possession once the plaintiff harvests his wheat. In this suit, the plaintiff has inter alia asked for a permanent injunction against the defendants; an order of specific performance, and in the alternative, refund of Kshs. 6,300,000/= paid to the defendants and an additional sum of Kshs. 12,000,000/= as compensation for loss of appreciation of the land in question.

2. Contemporaneously with the suit, the plaintiff filed an application for injunction which is the subject of this ruling. In the application, he seeks that the defendants be restrained from dealing with the land parcels LR No. 4815/5 and 4815/6, being subdivisions of the parcel LR No. 4815/3, or interfering with his possession of the land pending hearing and determination of this suit.

3. The defendants have responded to the application through the replying affidavit of the 1st defendant. He has contended that what he had with the plaintiff was a lease agreement whereby it was agreed that the plaintiff would lease the parcels LR No. 4815/5 and 4815/6 for six years at the rate of Kshs. 600,000/= per acre. He has stated that this was a verbal agreement and at no point was a written agreement drawn. He has refuted the sale agreement annexed by the plaintiff which he contends to be a forgery.

4. I have considered the application. What I have before me is an application for injunction and the principles were laid down in the case of *Giella vs Cassman Brown (1973) EA 358* where the Court of Appeal held that 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 will 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.

5. There is already contention as to whether the plaintiff has a sale agreement or a lease agreement. The plaintiff argues that he has a sale agreement with the defendants whereas the defendants refute this and alleges that what the plaintiff has is a lease agreement. That is a matter in deep controversy and goes to the very root of this case. It is not an issue that I would wish to dwell too much at this stage of the proceedings.

6. In my view, it is best that this application be determined on the basis of the balance of convenience. I hold the opinion that the balance of convenience tilts towards maintaining the status quo until the suit is heard and determined. There is no dispute that the plaintiff is in possession and use of the suit properties. I do direct that this position be maintained until this suit is finalized. It is also important that there be no further dealings by either plaintiff or defendants and in that regard, I do bar both the plaintiff and the defendant from selling, charging, leasing or in any other manner entering into any additional dealings over the two five acre portions in dispute. This position is to subsist until the suit is finalized.

7. As to costs, I do order that the same be costs in the cause.

8. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 2nd day of March 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr.Omae forthe plaintiff/applicant

Mr.Kirui holding brief for Opar for the defendants/respondents.

Court Assistant :Nelima

MUNYAO SILA

JUDGE

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