



REPUBLIC OF KENYA

IN THE E.L.C. COURT OF KENYA AT EMBU

E.L.C. NO. 87 OF 2016

JUSTIN KINYUA MACHARIA.....1st PLAINTIFF

MERCY MARIGU KINYA.....2nd PLAINTIFF

VERSUS

CHARLES NYAGA NTHIIRI.....DEFENDANT

RULING

1. By a Notice of Motion dated 10th February 2017, the Plaintiffs sought for two interlocutory orders. The first was to restrain the Defendant from entering the property known as Title No. KAGAARI/WERU/8621 and from interfering with their farming operations pending the hearing and determination of the application. The second order was in similar terms pending the hearing and determination of the suit.
2. The application was based upon the grounds set out on the face of the Notice of Motion which indicated the existence of a sale agreement between the parties. It was stated that the Plaintiffs had fully paid the agreed purchase price and that the Defendant had refused or failed to transfer the suit property to them but had instead started harassing and threatening them with physical harm. It was further stated that the Defendant had prevented them from harvesting the crops they had cultivated thereon which were ready for harvesting.
3. The said application was supported by the affidavit sworn by the 1st Plaintiff on 10th February 2017 in which he reiterated the grounds contained in the application. The 1st Plaintiff attached a copy of the sale agreement between the parties dated 21st May 2010 and a copy of the land register for the suit property.
4. Upon service of the said application, the Defendant filed a replying affidavit sworn on 28th February 2017 in which he admitted the existence of a sale agreement between the parties. The Defendant, however, swore that the Plaintiffs had breached the same by failing to pay the balance of the purchase price in the sum of Kshs 15,000/- in consequence of which he sold the suit property to a third party one, Alice Wanja Kariuki.
5. The Defendant further stated in his affidavit that he had offered the Plaintiffs a refund of the purchase price but they had declined to collect it. The Defendant attached a copy of the letter offering a refund of the purchase price.
6. The Respondent also stated that he was contesting the validity of the entire suit on the ground that the sale agreement forming the basis of the suit was drawn and witnessed by the advocate representing the Plaintiffs in court.

7. The Plaintiffs, with leave of court, filed a further affidavit on 8th March 2017 in which they denied breach of the sale agreement and insisted on having paid the full purchase price. They admitted the Defendant's offer to refund the purchase price but stated that it was declined because they were not in breach of the sale agreement at all. The Plaintiff's insisted on specific performance of the contract.

8. When the said application was listed for hearing on 8th March 2017, the parties agreed to dispose of the same through written submissions. The Plaintiffs were to file their written submissions by 20th March 2017 whereas the Defendant was to file his submissions by 27th March 2017. However, by the time of drafting this ruling, the Plaintiff's submissions were not on record.

9. In my view, there are two main issues for consideration in this application as follows;

a. Whether the Plaintiffs' suit is incompetent for having been filed by an advocate who drew and witnessed the sale agreement upon which the suit is based.

b. Whether the Plaintiffs have satisfied the requirements for the grant of an order of interlocutory injunction under **Order 40 of the Civil Procedure Rules.**

10. The first question was raised in the Defendant's notice of preliminary objection dated 20th February 2017 as well as the replying affidavit sworn on 28th February 2017. The crux of the objection is that the firm of J.K.N. Kamunyori and Co. Advocates is a potential witness in the proceedings and therefore they ought not to have taken up instructions to file suit on behalf of the Plaintiffs.

11. I have perused a copy of the sale agreement dated 21st May 2010 which was drawn by the firm of Kamunyori & Co Advocates and witnessed by J.K.N. Kamunyori Advocate on behalf of all parties thereto. The existence of the sale agreement is not disputed nor is the amount of the purchase price in contention.

12. The only issue in dispute is whether or not the purchase price was paid in full. It does not appear from the agreement that the purchase price was to be paid to or through the firm of J.K.N Kamunyori & Co advocates. In these circumstances, it does not appear to me that the advocate who drew or witnessed the agreement is a potential witness where the only issue which is disputed is full payment. It has not been alleged that Mr Kamunyori obtained or made use of any confidential information to the detriment of the Defendant. I, therefore, find no merit in this objection and it is hereby dismissed. The court finds that the suit as filed is *prima facie* competent.

13. The next issue is whether the Plaintiffs have met the requirements for the grant of an order of interlocutory injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358.** The Plaintiffs are required to demonstrate the following:

a. That they have a *prima facie* case with a probability of success.

b. That they shall otherwise suffer irreparable harm which cannot be compensated by an award of damages.

c. If the court is in doubt, that the balance of convenience tilts in their favour.

14. It is not in dispute that there was a sale agreement between the parties dated 21st May 2010. The consideration is not in dispute as well. What is disputed is whether or not it was even paid in full. The sale agreement indicates that the Defendant acknowledged receipt of Ksh 80,000/- upon execution of the sale agreement. The balance of Ksh 35,000/- to be paid on exchange of executed transfer and not later than 30 days after issuance of the Land Control Board Consent. Although the Plaintiffs did not attach documentary evidence of payment of the balance of purchase price, the list of documents which they filed with the Plaintiff has acknowledgement notes and a receipt which indicate payment of at least Kshs 115,000/- to the Defendant. These acknowledgements were not disputed by the Defendant.

15. The Plaintiffs have also exhibited a copy of the consent obtained from the relevant Land Control Board for transfer of the suit property to them. The letter of consent is dated 6th June 2014. However, it would appear that the process of transfer was never completed for another 2 years in consequence of which the Defendant transferred the suit property to a third party, that is, Alice Wanja Kariuki on or about 11th October 2016. It is after this transfer that the 2nd Plaintiff caused a restriction to be registered against the property.

16. The court is not, however, satisfied that the Plaintiffs have made out a *prima facie* case with a probability of success for the reason that the suit property has since changed hands. The current Defendant is no longer the registered owner of the suit property hence not in position to specifically perform the sale agreement dated 21st May 2010. He is in no position to transfer the suit property to the Plaintiffs.

17. The orders which are sought in the Plaint dated and filed on 28th December 2016 are as follows:

- a. An order that the Defendant should discharge his obligation under the sale agreement dated 21st May 2010 and transfer the portion KAGAARI/WERU/8621 to the Plaintiffs.
- b. An order that, should the Defendant fail or refuse to transfer the suit property, the Deputy Registrar be authorized to execute the relevant transfer documents to vest the suit property in the Plaintiffs.
- c. Costs of the suit and interest.

18. It is interesting that the Plaintiffs sought those reliefs against the Defendant on 28th December 2016 when they knew as far back as 14th November 2016, when they caused a restriction to be entered against the title, that the property had been transferred to a third party.

19. It is also very doubtful if a court of law would make an order for cancellation of the transfer to Alice Wanja Kariuki unless firstly, she is joined as a party to the suit, and secondly, the court is satisfied that she was not an innocent purchaser for value without notice.

20. The court is also aware that the order for an interlocutory injunction pending the hearing and determination of the suit is directed solely against the Defendant who is no longer the registered owner of the suit property. In the court's view, issuing any orders against the Defendant may be futile because the current registered owner may still take lawful steps to enter or take possession of the suit property. A court of law should not issue an order in vain.

21. For the foregoing reasons, the court is not satisfied that the Plaintiffs have demonstrated a *prima facie* case with a probability of success at the trial. In the event, it shall not be necessary for the court to consider the second and third principles for the grant of an order of injunction.

22. The upshot of the foregoing is that the Plaintiffs' Notice of Motion dated 10th February 2017 fails and the same is hereby dismissed with costs.

23. In spite of the dismissal of the Plaintiffs' application, the Plaintiffs shall be at liberty to harvest any crops or other foodstuff on the land, if any, within 30 days from the date hereon. The Defendant shall not interfere with the Plaintiffs during the said period. This order is made under section 3A of the CPA (Cap 21).

Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **12th** day of **APRIL, 2017**

In the presence of Mr Kamunyori for the Plaintiffs and Ms Wambugu holding brief for Mr Mugambi

Njeru for the Defendant.

Court clerk Jane/Leadys

Y.M. ANGIMA

JUDGE

12.04.17