



REPUBLIC OF KENYA

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

E.L.C. NO. 34 OF 2017

PETER MURIITHI NYAGA.....PLAINTIFF/APPLICANT

VERSUS

MADRINE KANINI MBUNGU.....1st DEFENDANT/RESPONDENT

CEASER MURIITHI GAKIABI.....2nd DEFENDANT/RESPONDENT

RULING

1. By a Plaint dated and filed on 22nd February 2017, the Plaintiff sued the Defendants on account of breach of two sale agreements for land. It was pleaded by the Plaintiff that he bought a portion of 0.4 Ha from Title No. KYENI/KIGUMO/1485 and another portion of 0.4 ha from Title No. KYENI/KIGUMO/1486.

2. It was further pleaded that in breach of the sale agreements, the Defendants had declined to effect transfer of the two portions of land. It was also pleaded in paragraph 8 of the plaint that the Plaintiff's claim against the Defendant was for "transfer of 0.4 ha portions out of parcel No. KYENI/KIGUMO/1485 and 1486 or refund of money paid for consideration of the said portions on execution of the sale agreements."

3. Contemporaneously with the filing of the Plaint, the Plaintiff also filed a Notice of Motion dated 22nd February 2017 in which he sought an interim injunction restraining the Defendants from selling, leasing, transferring, alienating or in any manner dealing with the suit properties pending the hearing and determination of the application or further orders of the court. The Plaintiff appears to have forgotten to seek a similar prayer pending the hearing and determination of the suit.

4. The said application was supported by the Plaintiff's own supporting affidavit sworn on the date of filing. He attached copies of the two sale agreements, a grant of letters of administration and a certificate of confirmation of grant. The court found the schedule at the foot of the certificate of confirmation hardly legible. The names of the beneficiaries and their respective shares are barely discernible.

5. The Plaintiff swore in his supporting affidavit that he had paid a substantial part of the agreed purchase price leaving a balance of Kshs 3000/- only. He further stated that he took possession and developed the portions he had purchased but the Defendants had totally refused to effect transfer of the land or to take steps towards completion.

6. The Plaintiff also filed a further affidavit sworn on 1st March 2017 pursuant to an order of this court issued on 22nd February 2017 in which he exhibited the certificates of official search of the two properties in issue. The certificates indicate that parcel No. 1486 is registered in the name of Kathie Gakiavi

whereas parcel No. 1485 which was in the name of the 2nd Defendant was closed upon subdivision to create new Nos. 7968, 7969 and 7970 on a date which is not specified in the search. The Plaintiff also supplied a copy of the search certificate for parcel No. 7968 which shows that it was cautioned at the instance of the Plaintiff claiming a purchaser's interest.

7. The Defendants did not file any response to the said application and they did not attend court on the hearing date. The court consequently allowed the Plaintiff to proceed ex-parte upon being satisfied that they were duly served.

8. The main issue for consideration is whether or not the Plaintiff has made out a case for the grant of an order of interlocutory injunction as set in the case of ***Giella Vs Cassman Brown & Co [1973] EA 358***. The first principle to be considered is whether the Plaintiff has established a *prima facie* case with a probability of success whereas the second is whether he has established that he could suffer irreparable injury which cannot be compensated by an award of damages. The third principle states that where the court is in doubt in respect of the first two, then it may decide the case on a balance of convenience.

9. The court has perused copies of the two sale agreements which are annexed to the Plaintiff's supporting affidavit. The agreement for the sale of a portion of parcel No. 1485 dated 6th August 2007 provides, *inter alia*, that the sale is "subject to the Land Control Board (LCB) consent to sub-division and transfer thereof being obtained." It is further provided in clause 1 of the said agreement that "should such consent be refused and or not obtained then this agreement shall be deemed to be cancelled and null and void and no claim either side (sic) save the consideration paid therein."

10. There is no statement in the Plaint or application that the said consent of the LCB was obtained. This was a conditional sale which was expressly made "subject" to such consent being obtained. There is no indication whatsoever in the pleadings or application that the condition was fulfilled. In those circumstances, it would be difficult to persuade the court that the Plaintiff has made out a *prima facie* case with a probability of success against the Defendant.

11. The court has also considered the certificates of official search which were annexed to the Plaintiff's further affidavit sworn on 1st March 2017. It is clear that parcel No. 1486 is currently registered in the name of one Kathie Gakiavi and not in the name of either the 1st or 2nd Defendants. The copy of the certificate of confirmation of grant is hardly legible and it is not possible to ascertain who is the beneficiary of this parcel of land. On the other hand, the register for parcel No 1485 was closed upon its sub-division to create parcel Nos. 7968, 7969 and 7970 of which only parcel No 7968 appears to be registered in the name of the 2nd Defendant.

12. In those circumstances, the court is not satisfied that the Plaintiff has made out a *prima facie* case with a probability of success as set out in the case of ***Giella Vs Cassman Brown & Co (supra)***. Accordingly, the Plaintiff has failed to meet the first principle for the grant of an order of interlocutory injunction.

13. In view of the above finding, it is not necessary to consider the other two principles for the grant of an order of injunction. The Plaintiff's application, therefore, fails at the first of the three hurdles. However, the Plaintiff shall have his day in court at the trial of the action when he will be accorded an opportunity to prove his case on the merits.

14. The upshot of the foregoing is that the Plaintiff's Notice of Motion dated 22nd February 2017 is hereby dismissed. There shall be no order as to costs since the Defendant did not appear to oppose the application.

Orders accordingly.

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

In the presence of Peter Muriithi Nyaga (Plaintiff in person).

No appearance for Respondents.

Court clerk Jane/Leadys.

Y.M. ANGIMA

JUDGE

12.04.17