REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

IN THE ENVIRONMENT AND LAND COURT

ELC.NO. 336 OF 2017

KENETH NJIRIRI MWANIKI……PLAINTIFF/APPLICANT

VERSUS

DAVID CHIRA KAGIRI……..….1ST DEFENDANT/RESPONDENT

JOYCE WANGARI KARIUKI……...….2ND DEFENDANT/RESPONDENT

GUOTAN INVESTMENTS LTD…….…3RD DEFENDANT/RESPONDENT

EPHANTUS NGANGA NJIHIA…...…..4TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff/applicant's Notice of Motion application dated ***15th March 2017*** ,brought under ***Order 40 Rule 1(a), Order 50 Rule 1 of the Civil Procedure Rules*** and section ***1A,1B and 3A*** of the Civil Procedure Act and all other enabling provisions, of law. The applicant has sought for the following orders:-

> ***1. That the honourable court be pleased to issue an order directing the OCS Ngoliba Police Station –Thika East Division to ensure compliance with the interim orders and any other subsequent orders issued by the honourable court.***
>
> ***2. That the honourable court be pleased to issue a temporary injunction restraining the defendants/respondents by themselves their agents or servants from carrying out any works and from interfering with the applicant's quite possession of 3 acres out of LR No. 289 Munyu, pending the hearing and determination of this suit.***
>
> ***4. That the costs of this application be provided for.***

This application is supported by the grounds stated on the face of the application on the Supporting Affidavit of ***Kenneth Njiriri Mwaniki***. These grounds are:-

> ***1. That the plaintiff/applicant is in occupation of land parcel No. 289, Munyu Settlement Scheme having purchased the same from the 1st and 2nd defendants as pleaded in the Plaint herein.***

2. That the 1st and 2nd defendant have prevailed upon the 3rd and 4th defendants to encroach over the portion of land sold to the plaintiff and are harvesting building stones thereon thus interfering with the Plaintiff's quiet user of the said parcel of land.

3. That the Plaintiff stands to suffer irreparable loss and damage if the said encroachment and harvesting of building stones continues as the 1st and 2nd defendants are ignorate of the sale agreement and are highly unlikely to compensate the plaintiff for damages.

4. That it is in the interest of justice that the application is heard and allowed.

In his supporting Affidavit, the applicant alleged that on ***5th December 2011***, the 2nd Defendant sold one acre of land to him out of parcel number ***289 Munyu settlement scheme*** which land was to be transferred to the Plaintiff after completion of a Succession Cause ***No. 101 of 2010***. He further alleged that he paid to the 2nd Defendant the full purchase price which was ***Kshs, 250,000***/=, as evident from annexture ***"KNM1'***. The applicant also averred that by two agreements dated ***28th March 2013***, and ***3rd December 2013***, respectively, the 1st Defendant sold to the Plaintiff ***three (3) acres*** out of his interest in ***L.R No. 289, Munyu settlement scheme***, at a consideration of ***Kshs.1,500,000/***= as per annexture ***"KNM2'*** He also alleged that he took possession of the said portion of land immediately after execution of the said Sale agreement as per clause No. 6 of the same and has been in possession until ***October 2016***. Further that after completion of payment of the purchase price, he has prevailed upon the 1st and 2nd defendants to effect transfer of the land to him to no avail. It was his contention that the 1st and 2nd Defendants have now prevailed upon the 3rd and 4th Defendants to encroach on the suit land where applicant is in possession with view of harvesting stones, thereon thus interfering with his quiet use of the said land. Further that the 1st Defendant has threatened to evict him from the land on the basis that he has not paid the full purchase price which is not true. He also alleged that he has now discovered that the 1st Defendant interest on the suit land is 2 acres and not 3 acres, which fact the 1st Defendant had failed to disclose to the applicant.

It was his further contention that he has attempted to reach a compromise with the Defendants but there has been no positive responses and hence the suit. He also contended that the 3rd and 4th Defendants are harvesting building materials from the suit land and hence putting the land into waste and despite him notifying the 3rd and 4th Defendants of his interest on the land, they have refused to stop the excavation and harvesting of the building materials from the said parcel of land. He urged the Court to allow the application.

The application is contested and respondent filed grounds of opposition and alleged that :

1. That the 1st respondent is the registered owner of the suit premises and his rights therefore are above all the rest until the contrary is proved.

2. That the 1st respondent admit having sold to the applicant the land in question but the applicant did not comply with the sale agreement and adopted a hostile approach to the 1st respondent and therefore the sale could not go through and it failed.

3. That accordingly no Land Control Board Consent was obtained and therefore the two agreements are null and void and cannot be enforced in court of law.

4. That the 1st respondent is ready and willing to refund to the applicant the purchase price paid to him as provided in the agreement and no more no less.

5. That it is not true that the applicant had been occupying the suit premise or any part thereof.

6. That the 1st respondent has entered into an agreement with the 2nd and 3rd and 4th respondents to extract stones for commercial use and he has all the right to do so because it is his land and the applicant has no legal basis to stop the 1st respondent from doing so.

7. Without prejudice the 1st respondent is ready and willing to negotiate and settle his matter amicably outside the court for a reasonable figure to be agreed as per the agreement.

This application was canvassed by way of written submissions. The Law Firm of R. Muthike Makworo & Co.Advocates, for the Plaintiff/applicant filed their written Submissions on ***28th May 2017***, and urged the Court to allow the application. The applicant relied on various decided cases among them the case of ***Films Rover International Ltd Vs Cannon Films Sale Ltd (1986) 3 ALL ER 772,*** where the court stated that:

"A fundamental principle to be considered is that the court should take whichever cause appears to carry the lower risk of injustice if it should turn out to have been wrong".

He further relied on the case of ***Nguruma Ltd Vs Jan Bonde Nieleson & others (2014) KLR,*** where the Court held that:

"The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrate, injury that cannot adequately be compensated by an accord of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature monetary compensation of whatever amount will never be adequate remedy"

It was his submissions that taking into account all the principles stated in the quoted decided cases, the balance of convenience tilts in favour of the applicant.

The Law Firm of ***Karuga Wandai & Co. A***dvocates, for the Respondents filed their written submissions on ***26th May 2017***, and urged the Court to dismiss the applicant's Notice of Motion application. It was their submissions that the applicant is in breach of the entered sale agreements and since the 1st Defendant is the registered owner of the suit premises, then his right is superior over his own land than any other person. It was further submitted that it would be wrong for any orders to be made restraining him from use of his own land. It was also submitted that Para 9 of the entered sale agreements provided for liquidated damage for the offending party to the innocent party which is sufficient compensation. They urged the Court to dismiss this application.

This Court has now carefully considered the instant Notice of Motion which is brought under Order 40 rule 4(1)(a) which provides that:-

"any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree or that the Defendant threatens, or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be destructed or delayed in the execution of any decree that may be passed against the Defendant in the Court the Court may order or grant a temporary injunction to restrain such act"

The Court has considered the pleadings in general, the annextures thereto and the relevant provisions of law and it renders itself as follows:-

The applicant has sought for injuctive relief which is an equitable relief granted at the discretion of the Court. However the said discretion must be exercised judicially. See the case of ***David Kamau Gakuru Vs National Industrial Credti Bank Ltd, Civil Appeal No 84 of 2001,*** where the Court held that:-

"It is trite that the granting of an interim injunction is an exercise of judicial discretion and the appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially"

The order sought herein being an injunctive relief, the applicant needed to establish the principles set out in the case of ***Giella Vs Cassman Brown Co***. ***Ltd***, for grant of Injuctive Orders. These principles are:

"***First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience"***

There is no doubt that the Plaintiff herein entered into a sale agreement with the 1st and 2nd Defendants to purchase their interest from ***LR No 289, Munyu Settlement Scheme***. This parcel of land was not in the names of the 1st and 2nd Defendant's but in the name of their father and was subject of Succession Cause ***No. 101 of 2010,*** filed at Thika Law Courts. There is no doubt that the said sale agreements contained terms and conditions and the parties therein were bound by the terms and conditions of the said sale agreements. The applicant alleged that he paid the entire purchase price as stated in the sale agreements. He attached annextures to his Supporting Affidavit to show that he indeed paid the full purchase price. However the Respondents have alleged that the Plaintiff breached the Sale agreements and or as provided by clause of 9 of the said sale agreements, the innocent party was entitled to be compensated by an award of damages. Indeed I have seen the two sale agreements in respect of ***David Chira Kagiri*** and it is evident that the purchase price was supposed to have been paid on or before ***30th May 2014*** in monthly instalments of ***Kshs. 146,000/=*** as per ***KNM2***. However from ***KNM3***, it is clear that the Plaintiff was still paying the purchase price as late as on ***18th April 2016***. There is no evidence as to whether the said sale agreements were reviewed to give extension of the period of payment. For the Court to decide, whether there was breach of contract or not, the Court cannot do so through affidavit evidence. The parties need to call evidence through the main trial and then the said evidence be tested through cross-examination.

At this juncture, the court is not called upon to decide the very issue that would only be decided in final trial. See the Case of ***Airland Tours and Travel ltd Vs National Industrial Credit Bank, Nairobi HCCC No. 1234 of 2002,*** where the Court held that:

"In an interlocutory application, the Court is not required to make any conducive definitive findings of fact on Law, most certainly not on the basis of contradictory affidavit evidence on disputed propositions of Law"

This Court finds that certainly, the sale agreements provided for payment of purchase price within a definite period and on clear monthly instalments. No evidence was availed to the effect that the applicant did adhere to the said terms. However that can only be determined at the main trial. For the above reasons, this court finds that the applicant has not established that he has a prima-facie case with probability of success.

On the second limb, the Court finds that the three sale agreements have a provision for default clause. That any party in breach of the agreement will be liable to the other at 20% of the purchase price and any other costs incurred as a result of the agreement. The said default clause has therefore provided liquidated damages. The applicant cannot be heard to say that he cannot be compensated by an award of damages. See the case of ***Wairimu Mureithi Vs City Council of Nairobi Civil Appeal no. 5 of 1979,*** where the Court held that:

"However strong the Plaintiff's case appear to be at the stage of Interlocutory application for Injuction, no injuction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them"

Equally, on this case, the Court finds that the sale agreements are very clear on what would happen in the event of breach of the agreement. Therefore, the court finds that damages would suffice in the instant case.

Further, the Defendant have alleged that not ***Land Control Board Consent*** was obtained in the instant transactions. The applicant has not disputed that allegation and no evidence of any consent from Land Control Board was availed. The court will consequently hold and find that no ***Land Control Board Consent***, was obtained herein. If that is the case, then Section 6 of the ***Land Control Board Act***, is very clear that the purchaser (Plaintiff herein) is only entitled to refund of the purchase price. The applicant herein should pursue that route and enforcement of the terms of their sale agreements for payment of the default penalty.

On the balance of Convenience, the Court finds that the 1st and 2nd Defendants are the beneficiaries of ***2 acres and 1 acres*** from plot ***No 289 Munyu Settlement Scheme.***

Furthermore, there is one ***Bonface Mugoiri Kimani*** , who is entitled to 5 acres from the suit land and who is not a party to this suit. The applicant is asking the Court to injuct the Respondents from dealing or Interfering with applicants quiet possession of 3 acres out of ***L.R 289, Munyu Settlement Scheme.*** However, it is not evident which portion of ***LR 289 Munyu*** S***ettlement*** is owned by the 1st and 2nd Defendant given that there are no certificate of titles attached to the application. The Court finds that it would not be fair to injuct a portion of ***3 acres***, out of ***LR. No 289 Munyu Settlement*** without evidence that indeed that was the portion owned by the 1st and 2nd Defendants. The Court finds that the balance of convenience tilt in favour of not granting any injunctive order as sought by the applicant. This Court is of the humble opinion that this matter needs to go for full trial and be decided on merit but not through affidavit evidence.

For the above reasons, the Court finds that the Plaintiff's Notice of Motion dated ***15th March 2017***, is not merited. The same is consequently dismissed entirely until costs being in the cause.

It is so ordered.

Dated, Signed and delivered this 31st May 2017.

L. GACHERU

JUDGE

31/5/2017

In the presence of

M/s Muthike for Plaintiff/Applicant

Ms Karuga Wandai for Defendants/Respondents

Court Clerk: Rachael