



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 139 OF 2016

WILLY KAMUKEA KACHEPKONAPPLICANT

VERSUS

JANE CHEPKUKAT S. LOKWEE.....1ST RESPONDENT

LINA CHEPNGETICH2ND RESPONDENT

RULING

(Application for injunction; principles to be applied; plaintiff claiming to have purchased the suit land from the previous owner; this position supported by the previous owner; defendants also claiming that the previous owner sold the land to them; contested facts which cannot be determined at this stage of the proceedings; application best decided on a balance of convenience; balance of convenience tilts towards maintaining the status quo; order of inhibition also issued)

1. This suit was commenced by way of plaint filed on 25 April 2016. Together with the plaint, the plaintiff filed an application for injunction, seeking to restrain the defendants from the suit property, which is land parcel Kampi Ya Moto/Kampi Ya Moto Block 3/243, pending hearing and determination of this case. It is that application which is the subject of this ruling.

2. It is the plaintiff's case that on 25 September 2008, he entered into an agreement with one Kaggai Thiong'o whereby he purchased the suit land, which was then identified as Plot No. 11, and which was to be excised from the larger land parcel Kampi Ya Moto/Kampi Ya Moto Block 3/196. He avers that he paid the full purchase price and got the land transferred to him. He has stated that he now holds title to the suit land. It is claimed that in April of 2016, the 1st defendant, without any colour of right, trespassed into the plaintiff's land and started erecting structures. When he confronted her, she alleged that the 2nd defendant had sold the land to her in the year 2013. The plaintiff sought clarification from Kaggai Thiong'o, who informed him that he does not know the two defendants and he has never dealt with them. In this case, the plaintiff has sought orders to have the sale between the 1st and 2nd defendant over the suit land declared as fraudulent, null and void. He has also sought cancellation of the title held by the 1st defendant and a permanent injunction to restrain the defendants from the suit land.

3. In the application for injunction, the plaintiff wants to have the defendants restrained from constructing, or dealing with the property until this case is heard and determined. To his supporting affidavit, the plaintiff has annexed a copy of the agreement dated 25 September 2008 that he had with Kaggai Thiong'o, a subdivision sketch of the parent title, and the application for consent to transfer from the Land Control Board. When he heard that there were developments taking place on the suit land, he

went to it and was given the phone number of the 1st defendant. He called the number and spoke to the 1st defendant who informed him that she purchased the land from the 2nd defendant. She even scanned for him a copy of the transfer and her title deed which shows that it was issued on 3 March 2015.

4. There is also a supporting affidavit of Kaggai Thiong'o. He has deposed that he did sell to the plaintiff the suit land which was a subdivision of his land parcel No. 196. He has stated that he executed to the plaintiff the requisite transfer forms.

5. The 1st and 2nd defendants entered appearance and filed a replying affidavit sworn by the 2nd defendant to oppose the motion. She has deposed that the land was purchased by her late husband from the plaintiff and that the sale agreement was drawn by the law firm of M/s Kiplenge & Kurgat Advocates. There is an affidavit attached, sworn by Mr. Amos Andama, of the said law firm, which affirms this position, and states that the sale agreement was witnessed by Mr. Job Kurgat Advocate, of their firm but who is now deceased. She has further deposed that the land was then transferred to her with the authority of her late husband after consulting with Kaggai Thiong'o, the original owner of the land. It is said that Kaggai Thiong'o proceeded to process the title to her.

6. The plaintiff and Kaggai Thiongo, both swore supplementary affidavits. The plaintiff has deposed that the personal details in the agreement for sale annexed by the defendants were criminally lifted and forged. He has deposed that the 2nd defendant called him and confessed that a neighbour deceived her that the suit land was on sale and asked him to negotiate with her so that the 1st defendant is not prejudiced, which he declined. He has denied meeting Luka Rotich Chesire the alleged husband of the 2nd defendant. He has doubted the sale agreement annexed by the 2nd defendant which he feels is too shoddy to have been the work of Mr. Kurgat. On his part, Mr. Kaggai Thiong'o, has deposed further that he has never met Luka Rotich Chesire and that he has never received any instructions from such a person to transfer the suit land to the 2nd defendant.

7. I have considered the matter. What is before me is an application for injunction. The court assesses an application of this nature on the basis of the principles laid down in the case of ***Giella vs Cassman Brown (1973) EA 358***, which is, that the applicant must demonstrate a prima facie case with a probability of success; demonstrate that he/she stands to suffer irreparable loss if the injunction is not allowed; and where the court is in doubt, it will decide the application on a balance of convenience.

8. In this case, both parties are on common ground that the suit land was previously owned by Kaggai Thiong'o. The plaintiff alleges to have purchased the suit land from Kaggai Thiong'o, and Kaggai Thiong'o himself, supports this position. Kaggai Thiong'o has denied ever dealing with the defendants. The defendants have of course contended that Kaggai Thiong'o dealt with them and transferred the land to the 2nd defendant under instruction from the late husband of the 2nd defendant.

9. At this stage of the proceedings, it is difficult to know where the truth lies. This can only reveal itself after a full hearing on merits. Given the rival positions of the parties, and the hotly contested facts, it is my view that this application is best decided on a balance of convenience. In my view, the balance of convenience tilts towards maintaining the status quo on the property. It does appear that either the 1st or 2nd defendant had embarked on construction. This needs to stop or else the suit land stands the risk of being permanently wasted. Possession however seems to be with the defendants and they can thus remain in occupation pending hearing of the suit but with no permission to embark on any structural developments. I further order that no party should sell, charge, lease, or enter into any dealings over the suit property. To safeguard the title, I issue an order of inhibition, inhibiting the registration of any disposition in the register of the suit land, which is Kampi Ya Moto/Kampi Ya Moto Block 3/243. These orders to subsist until this suit is heard and determined.

10. On costs, the same shall be in the cause.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 28th day of June 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr. Miritu instructed by M/s Omwenyo & Company Advocates for the plaintiff/applicant.

No appearance on the part of M/s Cherutith & company Advocates, for the defendants/respondents.

Court Assistant: Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU