



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.426 OF 2016

FREDRICK MISUKO ONGERI.....PLAINTIFF

VERSUS

JACKLINE KWAMBOKA NYANG'WECHI.....1ST DEFENDANT

DENNIS OMANGI.....2ND DEFENDANT

LAND REGISTRAR, NAKURU.....3RD DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff stating that he bought the suit land from the previous owner; defendants tabling some evidence that the vendor was outside the country when the transaction took place and claiming that the sale agreement is fraudulent; application decided on a balance of convenience; no party to utilize or deal with the land until the conclusion of the suit)

1. The application before me is one for injunction which was filed contemporaneously with the plaint on 10 October 2016. The case of the plaintiff, who is represented by the law firm of M/s Ochieng Gai & Company Advocates, is set out in the plaint and elaborated in the supporting affidavit to the application. He has averred that between 25 and 28 July of 2016, he was informed by one Peter Ndubi, that there was a plot for sale. This plot is the land parcel Njoro/Ngata Block 2/2793 which is in issue in this case (hereinafter referred to as "the suit land"). He was then taken to the suit land by the said Peter Ndubi and another person named Douglas Bosire, and he liked the land. The quoted price was Kshs. 2.8 Million but they agreed and settled at Kshs. 1.7 Million. He then conducted a search which revealed that the land was owned by the 1st defendant. A sale agreement was then drawn in the offices of M/s Ochieng Gai & Company Advocates. The plaintiff has deposed in his supporting affidavit, that the 1st defendant came to the advocate's office accompanied by the mentioned Douglas Bosire, signed the sale agreement and accepted the purchase price in the said office. She then handed over the original title deed, gave out copies of her identity card and PIN and also signed the transfer forms and the application for land board consent. The plaintiff then had the property transferred to himself and he is now the registered proprietor. Subsequently, the plaintiff was called by the 2nd defendant and CID officers from Nakuru who informed him that they wanted to interrogate him alleging that he had been involved in a fraudulent transaction. He has averred that the 2nd defendant alleged that the title deed had been stolen from him and used by a fraudulent person to sell the suit land to the plaintiff, at a time that the original owner, the 1st defendant, was out of the country. The plaintiff has pleaded that the 2nd defendant and CID officers have wrongfully continued to harass the plaintiff and have used the 3rd defendant to have a restriction registered. He has asserted that he purchased the land through a genuine transaction after following all procedures and that

the defendants are scheming and colluding to obtain money from him in order to sell the land a second time.

2. In the suit, the plaintiff has asked for an order that he be declared to be the rightful and legal owner of the suit land; costs and interests. In his application for injunction, the plaintiff has sought for orders to have the defendants restrained from cancelling his title deed, arresting, harassing, or intimidating the applicant, interfering with the land parcel, or with his peaceful and quiet possession of it, or using pending the hearing and determination of this suit.

3. The 1st and 2nd defendants have entered appearance and have filed a joint defence through the law firm of M/s Robert Ndubi & Company Advocates. There is also filed a replying affidavit to oppose the application for injunction sworn by the 2nd defendant. He has inter alia averred that he holds a Power of Attorney from the 1st defendant dated 21 September 2016 which he has annexed to his affidavit. He has deposed that the 1st defendant is his daughter in law and that she relocated from Kenya to the United States of America (USA) on 4 June 2015, to join her husband, who had moved there earlier, and that since then, she has never been back to Kenya. He has annexed copies of her passport and visa to demonstrate this. He has deposed that the 1st defendant purchased the suit property in the year 2009 and was issued with a title deed on 12 August 2010 while she was a resident of Nakuru and has annexed a copy of the title deed. It is his view that the sale agreement relied upon by the plaintiff, is a forgery since at the time it is said to have been drawn, the 1st defendant was outside the country. He has pointed out that the plaintiff has not exhibited any evidence of the payment of the purchase price, either in form of banker's cheque, RTGS, or bank slips. He has also averred that there is no evidence of any Land Control Board consent. He has also stated that there is no proof that the transfer documents were lodged and stamp duty paid. He is also suspicious of the speed within which the transfer was effected given that the sale agreement was drawn on 16 July 2016 which was a Friday, and the title deed issued on 19 July 2016, which was a Tuesday. He has averred that he received a call from neighbours in September 2016, that there were people on the suit land. He travelled from Nyeri, where he is situated, and proceeded to the suit land. He did find some people on it. He then proceeded to the Lands office in Nakuru where he confirmed that the land has been transferred to the plaintiff which forced him to lodge a restriction. He also reported the matter to the CID offices in Nakuru. He has faulted the plaintiff for failing to cooperate with the agencies yet they are only out to uncover the truth. He does not think that the plaintiff merits an equitable order. He has also denied that the plaintiff is in occupation of the suit land.

4. The plaintiff filed a supplementary affidavit wherein he has questioned the Power of Attorney displayed by the 2nd defendant. He has stated that the same is not signed by the donee and is not registered. He has averred that he is not aware of the allegations that the 1st defendant relocated to the United States. He has denied that the sale agreement is a forgery. He is of the view that the 1st defendant is a busy body. He has stated that no criminal charges have been preferred against him.

5. At the hearing of the application, I took in the submissions of Mr. Gai for the plaintiff and Mr. Ndubi for the 1st and 2nd defendants. The 3rd defendant did not participate in the application. In his submissions, Mr. Gai reiterated the position of the plaintiff and argued that the Power of Attorney is not proper. He pointed me to Sections 108, 109, 110, 111, 112 and 116 of the Registered Land Act, as requiring registration of a Power of Attorney.

6. On his part, Mr. Ndubi pointed at the narrative of the plaintiff, and submitted that there is no mention of any negotiations with the real owner. He was also suspicious of the fact that there is no record of any payments. He was of the view that the plaintiff was fully aware that he was engaging in a fraudulent transaction. He submitted that if indeed he was an innocent purchaser, he would have cooperated with the investigators. On the Power of Attorney, he submitted that the same was drawn and executed in accordance with the laws of the State where it was done, in the USA. He offered that the Registered Land Act, relied upon by the plaintiff's counsel was repealed 5 years ago.

7. I have considered the application. It is one for injunction and the principles upon which an application of this nature is assessed, were laid down in the case of **Giella vs Cassman Brown (1973) EA 358**. In the said case, it was held that one needs to 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. The case of the plaintiff is that he purchased the suit land on 15 July 2016. There is a sale agreement annexed by the plaintiff which I have noted was drawn by the law firm of M/s Ochieng Gai & Company Advocates, who also act for the plaintiff herein. Now, that sale agreement is hotly contested and I think it is wise if Mr. Gai considered ceasing to act for the plaintiff in this litigation for the reason that he may very well be called as a witness. The agreement as I have said, is disputed and it may need to be proved during trial.

9. The 2nd defendant has asserted that at the time of agreement, the 1st defendant, the then registered proprietor, was not present to sign it, as she was away in the USA. I have seen a copy of the 1st defendant's passport and visa, which appear to show that the 1st defendant left the country on 4 June 2015, and I have not seen an entry back into the country. There may be substance in the claims of the 2nd defendant that the sale agreement was not executed by the 1st defendant and the same is a fraudulent document. Despite being challenged to provide particulars of payment of the money, the plaintiff has not offered any. There is no record of any withdrawal of money, deposit of money, or money transfer between accounts. The sale agreement itself states that all payments were made in cash, which is rather unusual. I have also not seen displayed the consent of the Land Control Board, yet both parties appear to agree that the suit land falls within a controlled area. Neither is there shown, any payment of stamp duty or transfer fees, despite the plaintiff being challenged to table these by the 2nd defendant.

10. Mr. Gai has of course attacked the Power of Attorney held by the 2nd defendant, and argued that the same must be registered. He pointed me to provisions of the Registered Land Act, but it is trite that the Registered Land Act was repealed by the Land Registration Act, Act No. 3, of 2012, and it ceased being in operation. The matters herein have taken place after the repeal of the statute and I do not see how it can be said to apply. The sections of the law referred to me no longer exist. That said, since the suit herein relates to immovable property, I will insist before I can hear the 2nd defendant any further on behalf of the 1st defendant, that the Power of Attorney that he holds from the 1st defendant, be formally registered.

My total assessment of this application is that it is best decided on a balance of convenience. Reading between the lines, I believe the property is a vacant plot. Let it remain vacant and unused by both parties until this case is heard and concluded. Let no party move to develop it or alter its character. I also order that no party should sell, lease, charge, or enter into any other dealings over this land. To preserve the title, I do issue an order of inhibition, inhibiting the registration of any instrument in the register of the suit land, which is Njoro/ Ngata Block 2/ 2793.

11. I do observe that in his prayers, the plaintiff also asked for orders that there be an injunction to stop the defendants from arresting, harassing or intimidating him. I am afraid that I cannot stop the relevant authorities from investigating whether there is a criminal element in the transaction herein. I will therefore not make any orders in respect of this aspect of the application.

12. On costs, I order that the same be costs in the cause.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22nd day of June 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -