



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 189 OF 2016

NAFTALI MWANIKI MUCHAI.....PLAINTIFF

VERSUS

ANTHONY MBUTHI KABUI.....DEFENDANT

RULING

This is in respect to the plaintiff's Notice of Motion dated 17th November 2016 in which the plaintiff seeks the following orders:

1. Spent.

2. Spent.

3. That this Court do issue a temporary injunction restraining the defendant, his servants and agents, lessees and anyone claiming under him from carrying out any dealings with land parcel No. MUTIRA/KAGUYU/1275 at the Lands office or carrying any activities on the ground pending hearing and determination of this suit or further orders of the Court.

4. Costs be provided for.

The application is based on the grounds set out therein and supported by the applicant's affidavit also dated 17th November 2016 and annexures thereto.

The gravamen of the application is that the plaintiff and his brother one **DAVID MUNENE MUCHAI** were the joint owners of land parcel No. MUTIRA/KAGUYU/1275 (hereinafter the suit land) and that sometime in 2006, the defendant advanced him Ksh. 36,495 which was repaid but the defendant then proceeded to obtain the suit land fraudulently without obtaining the consent of the Land Control Board and after making the plaintiff sign papers that he had received Ksh. 250,000 yet the suit land is worth over Ksh. 1 million. That it was not until 2016 after the death of **DAVID MUNENE MUCHAI** that the plaintiff discovered that the suit land was no longer in his names.

The application is opposed and in his replying affidavit, the defendant has deponed, inter alia, that the plaintiff sold his share of the suit land to him but is now misrepresenting the facts. That he met the plaintiff in 2003, not 2006 as alleged, and they entered into an agreement by which the plaintiff sold him his (plaintiff's) share of the suit land which he jointly owned with his late brother **DAVID MUNENE MUCHAI** a copy of which is annexed – annexure **AMK 1**. That both the plaintiff and his late brother attended the Land Control Board on 20th April 2004 and consent was granted and the plaintiff received the purchase price and acknowledged receipt thereof. That after the plaintiff had received the purchase price, his wife lodged a complaint with the Registrar of titles and the parties were summoned after which

the plaintiff wrote a note to the District Land Officer stating that he had no dispute with the defendant over the sale agreement. Thereafter, the suit land was registered in the joint names of the defendant and the plaintiff's late brother.

In a supplementary affidavit, the plaintiff took issue with the Land Control Board consent dated 20th April 2004 arguing that it has no official rubber stamp and neither does it indicate the consideration paid. That it also offends **Section 42 of the Land Registration Act** and the parties had entered into a friendly loan agreement and not a sale. That the sale agreement does not bear the name of the drawer nor is it witnessed or bear a stamp as per the **Stamp Duty Act**.

The application was canvassed by way of written submissions which have been filed both by **MS THUNGU** advocate for the plaintiff and **MR. MURIGU** advocate for the defendant.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

The following are not in dispute:

- 1. The suit land was previously registered in the joint names of the plaintiff and his late brother DAVID MUNENE MUCHAI.***
- 2. It is now registered in the joint names of the defendant and the said DAVID MUNENE MUCHAI.***

According to the plaintiff, he never entered into any agreement to sell his share of the suit land to the defendant but only obtained a loan of Kshs. 36,495. The defendant on the other hand depones that he entered into a sale agreement with the plaintiff in 2003 and paid the purchase price, obtained the necessary consent of the Land Control Board and was registered as joint owner of the suit land with the late **DAVID MUNENE MUCHAI**. He has denied having obtained the land fraudulently.

An application for temporary injunction must be determined in line with the principles laid down in the case of **GIELLA VS CASSMAN BROWN 1973 C.A 358** which are that:

- 1. The applicant must show a prima facie case with a probability of success.***
- 2. An interlocutory injunction will not normally be granted unless the applicant must otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.***
- 3. If in doubt, the Court will decide the application on the balance of convenience.***

A prima facie case is defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002** as:

“..... a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter”.

In the case of **NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No. 77 of 2012**, the Court of Appeal stated that:

“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation”

Finally, as was held in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILM SALE**

LTD 1986 3 ALL E.R 776, a Court considering such an application should take the route which appears to carry the lower risk of injustice if it should turn out to have been “***wrong***”.

The plaintiff is pleading fraud on the part of the defendant. An allegation of fraud is a serious one that has to be proved to a standard higher than in ordinary civil cases. That will however be a matter for trial by evidence and cannot be determined at this stage. Indeed in an application such as this one, the Court cannot make any definitive findings on issues that must await trial. As was held in the case of ***NGURUMAN*** (supra), I can only at this stage confine myself in determining whether the plaintiff “***has a right which has been or is threatened with violation***”. Or, as was held in the ***MRAO*** case (supra),

“whether there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter”.

It is clear from the annexures herein that the parties executed a sale agreement on 18th November 2003 whereby the plaintiff sold his share of the suit land to the defendant at a consideration of Ksh. 250,000 of which a sum of Ksh. 120,000 was paid upon execution of the agreement and the balance of Ksh. 130,000 was to be paid upon demand. The defendant was to take possession of his share in February 2004. The plaintiff denies all this and has pleaded in paragraph six (6) of his supporting affidavit as follows:

“That if he ever got me to sign a sale agreement, it was through mis-representation”.

For now, this Court can only look at the documents availed by the parties and having done so, it is clear, unless the misrepresentation is established, that the parties entered into a sale agreement by which the plaintiff sold his share of the suit land to the defendant way back in 2003. The requisite Land Control Board’s consent was obtained and the suit land was subsequently registered in the names of the defendant and the late **DAVID MUNENE MUCHAI** with each owning half a share. And until that registration is established by evidence to have been obtained fraudulently, the defendant is entitled to enjoy all the rights and privileges that belong or are appurtenant thereto as provided by ***Section 24 of the Land Registration Act***. Such registration is also prima facie evidence that the defendant and **DAVID MUNENE MUCHAI** are the absolute and indefeasible owners of the suit land subject only to the encumbrances, easements, restrictions or other conditions noted on the title. Given those circumstances, I do not see what prima facie case the plaintiff has established to warrant the grant of an order of injunction. Clearly, the plaintiff has not shown which of his rights have been or are threatened with violation. If there were any irregularities with the Land Control Board’s consent or the sale agreement, those are issues that will be canvassed at the trial. The plaintiff, in my view, has not surmounted the first hurdle as laid down in the ***GIELLA*** case (supra) and his application for a temporary injunction must therefore be rejected. I need not consider the other two tests because, as was also held in the ***NGURUMAN*** case (supra):

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration”.

The up-shot of the above is that the plaintiff’s Notice of Motion dated 17th November 2016 is wholly without merit. It is hereby dismissed with costs and for the avoidance of doubt, the interim order of injunction issued on 21st November 2016 is hereby vacated. The parties to comply with the pre-trial directions so that the main suit can be heard and determined within twelve (12) months.

It is so ordered.

B.N. OLAO

JUDGE

16TH JUNE, 2017

Ruling delivered, dated and signed in open Court this 16th day of June 2017

Ms Njiru for Ms Thungu for Plaintiff present

Ms Kiragu for Mr. Murigu for Defendant present.

B.N. OLAO

JUDGE

16TH JUNE, 2017