



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 65 OF 2016

KENNETH AMMON MWANGI KIBEPLAINTIFF

VERSUS

HARRISON KAHIGA WAITINDI.....1ST DEFENDANT

HILDA NYARUAI THUKU2ND DEFENDANT

AGNES WANJA MAATHAI3RD DEFENDANT

THE NAKURU LAND REGISTRAR.....4TH DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff claiming that he left his title deed with 1st defendant after borrowing money from him; plaintiff alleging that 1st defendant then fraudulently transferred the land to the 2nd defendant who then transferred it to 3rd defendant; defendants claiming that plaintiff had a sale agreement with 2nd defendant; no evidence that plaintiff ever borrowed money from 1st defendant; no evidence that plaintiff deposited his title deed with 1st defendant; wealth of evidence that plaintiff had a sale agreement with 2nd defendant; doubts as to plaintiff's case but 3rd defendant, owner of the land not opposing the application; order of inhibition made but possession to remain with 3rd defendant).

1. The suit herein was commenced by way of plaint on 5 May 2016. Together with the plaint, the plaintiff filed an application for injunction, seeking to have the defendants restrained from the land parcel Kampi Ya Moto/Menengai Block 1/133, the subject matter of this case, until this suit is heard and determined.

2. The case of the plaintiff is elaborated in his plaint and in the application for injunction. It is his position that he is the lawful owner of the land parcel Kampi Ya Moto/Menengai Block 1/133 (hereinafter "the suit land"). He has averred that in the month of July 2013, he borrowed a friendly loan from the 1st defendant, which sum was to be paid within 3 months. He has stated that it was mutually agreed that the plaintiff would, as a sign of good faith and commitment to pay, deposit his original title deed since they had an advocate/client relationship. Towards the end of the year 2013, the plaintiff was informed by his mother, who owns a neighbouring land, that there were strangers visiting the suit land. The plaintiff then conducted a search and realized that the title had been transferred to the 2nd and then to the 3rd defendant. It is his view that this was done fraudulently by the 1st defendant. He has contended that he has never dealt with the 2nd and 3rd defendants who are strangers to him. He has also averred that no Land Control Board consent was ever issued.

3. In the suit, the plaintiff wants a declaration that he is the lawful owner of the suit land and cancellation of the title of the 3rd defendant. In his application for injunction, the plaintiff wants the defendants restrained from dealing, subdividing, remaining, entering, disposing off, charging, alienating or in any other way, interfering with the suit land.

4. The 1st defendant filed a statement of defence and a replying affidavit. He has denied that the plaintiff ever borrowed money from him as alleged or at all, or on the strength of the subject title. He has stated that the plaintiff attended his law firm to be assisted in entering into a sale agreement with the 2nd defendant. The 1st defendant has stated that he is not even the one who witnessed the agreement which was done by another advocate, a Mr. Kibet Cheboswony, of his firm. He however knows the plaintiff as he represented his brother's company in a separate suit and also acted for his brother in a traffic matter. At some point, the plaintiff approached him stating that he was in financial distress and wished to sell the suit land and that he had already found a buyer. He then came to the offices of the 1st defendant's law firm, on a day that the 1st defendant was not in, and the sale agreement was drawn. He even paid legal fees for the agreement, a copy of which the 1st defendant exhibited. The 1st defendant has averred that the 2nd defendant received all the documents necessary for the transfer of the property and had the property transferred to herself. The next time the 1st defendant got involved is when the plaintiff's mother came to see him, to inquire whether the sale agreement could be rescinded. He then introduced her to the 2nd defendant because her contacts were in the office.

5. There is also a further replying affidavit sworn by Mr. Elijah Cheboswony Kibet, an advocate in the law firm of M/s Mirugi Kariuki & Company Advocates. He has deposed inter alia that he did witness an agreement between the plaintiff and the 1st defendant over the suit land. He was present and saw the plaintiff execute all the necessary documents. He also witnessed the plaintiff receive all documents of transfer. He has averred that he is not aware of any other agreement between the plaintiff and 1st defendant.

6. The 2nd defendant also filed a replying affidavit to the motion. She has deposed inter alia that she was introduced to the plaintiff by her brother, one Andrew Kibe. She has averred that she is a car dealer, and the plaintiff asked her to dispose for him one of his cars as he had a pressing need for money. The car did not sell quickly and the plaintiff came back asking whether she could assist him in disposing off the suit land. She agreed to buy the land and they entered into a sale agreement in the offices of M/s Mirugi Kariuki & Company Advocates. She has averred that the plaintiff handed over to her the transfer form, application for land control board consent, copy of his identity card, PIN and passport size photographs. At the time of purchase, the land had a maize crop planted by the plaintiff's mother and she requested that she be allowed to harvest the same before the 2nd defendant could take possession, which the 2nd defendant agreed. The crop was harvested in November 2013 after which the 2nd defendant took possession. She then had the land transferred to her. Later she wished to sell the land and she informed Mr. Andrew Kibe, the plaintiff's brother, to shop for a buyer. It is then that she was introduced to the 3rd defendant. They transacted and she transferred the land to the 3rd defendant. She has averred that since transacting with the plaintiff, she has never heard from him. When she was sued, she took steps to have the documents said to have been executed by the plaintiff investigated by the CID, and a forensic hand-examiner's report was done which she has annexed. The same concludes that the sale agreement, which the plaintiff claims never to have signed, was truly signed by the plaintiff.

7. The Nakuru Land Registrar, sued as the 4th defendant, filed a replying affidavit stating that he could not find the records of the suit property and offered that it is best that the matter proceeds for full hearing.

8. The plaintiff filed a supplementary affidavit whereby he inter alia deposed that the fact that the land parcel file cannot be found, presents doubt as to the existence of any transaction. He has reiterated that he never entered into any dealings over the suit land.

9. So far, the 3rd defendant, has not entered appearance to the suit, and has not filed anything to oppose the application, despite being served. It is the 3rd defendant who is currently registered as proprietor of the suit land.

10. I have considered the application for injunction alongside the submissions of counsels.

11. To succeed in an application of this nature, one has to display a prima facie case with a probability of success and also show that irreparable loss will be suffered if the injunction is not granted. Where the court is in doubt, it will decide the application on a balance of convenience. These principles were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*.

12. In order to make a determination of whether or not a prima facie case has been laid out, inevitably, the court needs to make a preliminary assessment of the case as presented so far by the parties. This is only preliminary, aimed at determining the application for injunction, and does not bind the court, which may very well reach a different conclusion after hearing the suit on merits.

13. It is of course the case of the plaintiff that he never entered into any transaction over the suit land. He has contended that all he did was borrow money from the 1st defendant and that he deposited the title deed to the suit land in his office as a sign of commitment to pay. He claims to have no knowledge of how the property was transferred to the 2nd and later the 3rd defendant. He of course blames the 1st defendant for his woes.

14. At this stage of the proceedings, based on the material that has been presented before me, I have no evidence of any transaction between the plaintiff and the 1st defendant, whereby the 1st defendant lent any money to the plaintiff, as alleged by the plaintiff. I have also no evidence that the plaintiff deposited his title deed with the 1st defendant as a sign of commitment to pay the alleged amount borrowed from the 1st defendant. There is absolutely nothing, save for the plaintiff's own words, to back these allegations. I however have a wealth of evidence, demonstrating that there was a sale agreement between the plaintiff and the 2nd defendant. There is also the document examiner's report, which concludes that the sale agreement was executed by the plaintiff. This evidence cannot be wished away on the mere words of the plaintiff.

15. I have serious doubts on the plaintiff's case, based on what has been presented so far.

16. That said, I do appreciate that the essence of an injunction is to preserve the subject matter of the suit. Since the 3rd defendant, who is the registered proprietor, did not deem it fit to oppose the application, I will issue an order of inhibition, stopping the registration of any disposition in the register of the suit land until this case is heard and determined. I also issue an order stopping the construction of any developments on the suit land. However, I am unable to give any order of possession to the plaintiff. Possession will remain with the 3rd defendant or to her assigns, who are at liberty to utilize the land as they may wish, save that they should not construct any structures.

17. The costs of this application will be in the cause.

18. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th day of June 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :

Ms. Gitau holding brief for Mr. Karanja for the 1st defendant/respondent.

No Appearance on the part of counsels for the plaintiff /applicant and 2nd and 4th defendants/respondents.

No appearance for 3rd defendant

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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