



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.NO.132 OF 2017

ISAACK KABIRU.....PLAINTIFF/APPLICANT

VERSUS

JAMES NGUGI GITHAHU.....DEFENDANT/RESPONDENT

RULING

The matter for determination is an application dated **4th December 2015**. The plaintiff/Applicant has sought for the following prayers:-

1. Spent

2. Spent.

3. Spent.

4. That temporary injunction be issued restraining the Defendant whether by himself, his agents, servants and/or employees from trespassing, alienating, dealing with, selling and/or committing acts of waste in LR.No.76/373 Thindigua measuring 40ft x 83ft or thereabout within Kiambu County pending the hearing and determination of the Plaintiff herein.

5. That a temporary injunction be issued restraining the Defendant whether by himself, his agents, servants and/or employees from continuing with the illegal sale and transfer of the suit property pending the hearing and determination of the suit herein.

6. That an order for specific performance of the contract between the Plaintiff and Defendant be granted.

7. That costs be in the cause.

The application is supported by the grounds stated on the face of the application and on the annexed affidavit of **Isaack Kabiru**. These grounds are:-

a. The Plaintiff/Applicant has lodged a Civil Suit which is arguable and has high chances of succeeding.

b. The Plaintiff/Applicant is apprehensive that the Defendant/Respondent will proceed and

interfere with the suit property and continue modifying and/or disposes off the suit property as he already has a buyer who has shown intentions of buying the suit property despite their being a Sale Agreement between the Plaintiff and the Defendant and the Defendant having paid more than 80% of the purchase price.

c. The Defendant is in breach of the Sale Agreement that they both executed willfully.

d. If the Defendant/Respondent disposes off or interferes with the suit property in any way as he already intends to, the Plaintiff/Applicant will suffer irreparable financial loss unless the orders sought herein are granted.

e. The application was brought without unreasonable delay since the institution of the Civil Suit.

f. That it is in the interest of justice that this application be granted.

g. That the Defendant/Respondent herein shall suffer no prejudice if the orders herein are granted as the suit property will be preserved.

In his **Supporting Affidavit**, **Isaack Kabiru** reiterated the averments on the grounds in support of the application and averred that he is the buyer of **LR.No.76/373 Thindigua** measuring **40ftx83ft** within **Kiambu County** annexture **"IK-1"**.

The Plaintiff/Applicant further averred that the suit premises belonged to Defendant's late father and that the Defendant is a beneficiary of estate of **Sospeter Githahu Njoroge**, **Succession Cause No.867 of 2013**. The deponent deposed that he bought the suit premises from the Defendant/Respondent as per **Sale Agreement** dated **31st July 2013**, and currently the Defendant has the intentions of disposing it off by way of **sale** to a **3rd party**.

The Plaintiff claimed that it was agreed between him and the Defendant that he will transfer his parcel of land in Nyandarua for **Kshs.1,200,000/=** to reduce the purchase price of initial Sale Agreement as per annexture **"IK-2"**

The Plaintiff further averred that the Defendant approached him for financial help sometimes in the year **2015** to be deducted from the purchase price and that he advanced to him a sum of **Kshs.40,000/=** and **Kshs.12,000/=** in cash on diverse dates, within the month of **September 2015**. The Plaintiff claimed that he has been paying for the purchase price and the balance stands at **Kshs.388,000/=** as per **"IK-3"** and **"IK-5"**

The Applicant further alleged that on paying the last instalment to the Defendant, he was supposed to be furnished with the necessary documents to facilitate transfer of the suit premises which has not happened. The Plaintiff averred that the Defendant/Respondent wrote to the tenants on the suit premises directing them to pay rent directly to him via Mpesa instead of paying to Applicant as per annexture **"IK-6"**.

The Plaintiff/Applicant averred that he had commenced construction of residential units on the suit premises but the Defendant insist on disposing off the suit premises and that Defendant's Advocate wrote to him a letter to vacate suit premises.

The Application is **opposed** by the Defendant herein, who filed a **Replying Affidavit** and averred that the Plaintiff breached the sale agreement and also introduced matters not earlier on agreed in the Sale Agreement of which he was not consulted. The Defendant further averred that the Plaintiff was a cheat and was out to con him since he is not aware of the existence of **Nyandarua/Ol'Kalou Central/3222**. The Defendant averred that he took control of the suit premises when he realized that the Plaintiff cannot be trusted and that the title for the suit premises could not be generated since there were regulations on the size of land that qualifies for a title.

The application was canvassed by way of **Written Submissions**. The **Law Firm** of **Ngugi Mwaniki &**

Co. Advocates for the Defendant/Respondent filed their Written Submissions on **8th February 2017**, and urged the Court to dismiss the instant application with costs. They relied on the decided case of

Giella..Vs..Cassman Brown & Co.Ltd(1973)EA 358 where the Court held that:-

- a. The Applicant must establish a prima facie case with probability of success,*
- b. The Applicant must make a clear showing that unless the injunction is granted, Applicant stands to suffer irreparable harm which cannot be adequately compensated by an award of damaged, and*
- c. The balance of convenience lies in favour of granting the injunction.*

The Plaintiff filed his written submissions in person **on 18th September 2016**, and urged the Court to allow the application as it is. He relied on the decided case of *Duncan Waitthaka Ndegwa & Another..Vs..Sigal Investments Limited (2010) eKLR*... where the Plaintiff sought order of specific performance as one of the prayers and he was granted.

The Court has carefully considered the instant application and the written submissions filed by the parties herein. The Court has also considered the court records and the Court makes the following findings;

There is no doubt that the Plaintiff and the Defendant did enter into a **Sale Agreement** for sale and purchase of a portion of land measuring **40ft by 83ft** from the land known as **LR No.76/373 Thindigua**. It is evident that the said parcel of land was **registered** in the name of **Sospeter Githahu Njoroge (deceased)** who was the father of the Defendant herein. It is also evident from the sale agreement that the Defendant/Respondent was to transfer the purchased parcel of land to the Plaintiff/Applicant after the **Succession Cause** had been finalized in respect of the **Estate of Sospeter Githahu Njoroge**.

From the affidavit evidence, it is also not in doubt that after the signing of the Sale Agreement and payment of some instalments towards the setting of the purchase price, the Plaintiff/Applicant herein took possession of the property and had been collecting rent from the tenants therein. It is also evident that the Defendant/Respondent herein did write a letter to the agents on the suit property and directed them to stop remitting the rent to **Isaack Kabiru**, the Plaintiff/Applicant herein but to pay the same to the Defendant/Respondent through his **Mpesa Account** for **no.0727653417**. The said letter prompted the Plaintiff herein to file this suit together with the instant application. The Court has also seen several acknowledgements of receipt of several payment of instalments from the Plaintiff/Applicant to the Defendant/Respondent towards settling the purchase price for sale of a portion of **40ftx83ft** out of **LR No.76/373**, the suit property herein.

From **"IK-4"** which is a document drawn on **30th July 2014**, it is clear that by that date the balance was **Kshs.440,000/=**. Further, the said acknowledgement receipts do refer to title deed for **LR.No.Nyandarua/**

Ol'Kalou Central/3222 which is a certificate of title in the name of the Defendant/Respondent.

From the said acknowledgements, the Plaintiff/Applicant was to keep the original title deed until the successful transfer of the portion of **40ft by 83ft** out of **LR No.76/373** to the Plaintiff/Application herein. The Defendant has however denied knowledge of the said title deed and also denied the Plaintiff's/Applicant's annexures **"IK-3"**, **"IK -4"** and **"IK-5"**.

The Court has considered the Sale Agreement in issue and noted that indeed the Plaintiff was to pay the purchase price in several instalments shown in **Clause C** of the said agreement. In **Clause C (4)** the balance of **Kshs.400,000/=** was to be paid upon putting the Plaintiff/Applicant in possession of the suit property and availing to him the completion documents. It is not evident whether the Defendant has availed the said completion documents to the Plaintiff/Applicant. However, the Plaintiff/Applicant has alleged that he has paid a larger portion of the purchase price and he has only a **balance** of about

Kshs.388,000/= on the terms of the sale agreement dated **31st July 2013**, and he now wants to sell the same to another purchaser or 3rd party.

All the allegations that have been leveled by the Plaintiff/Applicant have been disputed by the Defendant/Respondent. The said allegations cannot be resolved at this stage through affidavit evidence. The same have to await the calling of evidence in the main trial and interrogating the said evidence through cross-examination.

Since the Plaintiff/Applicant has made allegations and the Defendant/Respondent has disputed them, then the Court finds that at this stage, the issue for determination is whether the Applicant/Plaintiff is deserving of the interlocutory orders sought.

As the Court embarks on determination of the above issues, the Court will take into account that it is not required to make any conclusive or definitive findings of facts or law on the basis of contradicting affidavit evidence or disputed propositions of law. All that the Court is entitled is to determine whether the Applicant/Plaintiff is entitled to grant of interlocutory orders based on the usual criteriasee the case of ***Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002***, where the Court held that:-

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria---“

In determining whether the Applicant/Plaintiff is entitled to the orders sought, the Court will be guided by the principles set out in the case of ***Giella..Vs.. Cassman Brown & Co. Ltd 1973 EA 358*** and which principles have been repeated in other judicial pronouncements. These principles are:-

- a. The Applicant must establish that he has a prima facie case with probability of success.***
- b. That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c. When the Court is in doubt, to decide the case on a balance of convenience.***

Firstly, the Applicant has to establish that he has a ***prima facie*** case with probability of success. The Court has considered the available evidence and the annexures thereto. There is no doubt that the Plaintiff did purchase a portion of **40ftx83ft** from land parcel **76/373 Thindigua** which the Defendant was entitled to through a Succession Cause. The Sale Agreement shows that the purchase price was **Kshs.2,600,000/=**. From the annexures attached to the Plaintiff's application, it is evident that the Plaintiff/Applicant has paid a large portion of this purchase price. Plaintiff/Applicant alleged that he transferred **LR. No.Nyandarua/Ol Kalou Central/3222** to the Defendant/Respondent worth **Kshs.1,200,000/=** as part payment of the purchase price. A title deed in the name of **James Ngugi Githahu**, the Defendant herein is attached as **“IK-2”** which was issued on **8th October 2013**. That was also within the period that the Plaintiff was supposed to have paid **Kshs.1,200,000/=** towards finalization of payment of the purchase price. The Defendant has denied receipt of the said amount and averred that he was not aware of the title deed in his name. The said denial by the Defendant/Respondent can only be determined at the main trial by calling of evidence. It cannot be determined at this juncture through affidavit evidence.

What is evident is that there is a title deed in the name of the Defendant

for **Nyandarua/Ol Kalou Central/3222**. Therefore the Plaintiff/Applicant's allegations sounds probable. In the case of ***Habib Bank AG. Zurich..Vs..Eugene Manon Yakub, Civil Application no.43 of 1982***, the Court held that:-

“probability of success means that court is only to gauge the strength of the Plaintiff's case and

not to adjudge the main suit at that stage since proof is only registered at the hearing stage.”

The Court finds that from the available evidence, the Plaintiff has established that he has a ***prima facie*** with probability of success.

On the second condition of irreparable damage, the Court finds that the Plaintiff/Applicant has alleged that the Defendant intends to sell the suit property to another third party. It is evident that the Plaintiff/Applicant has initially been allowed to collect rent from the tenants but vide a letter dated 30th July 2015, the Defendant/Respondent asked the tenants to stop remitting the monthly rent to the Plaintiff/Applicant. The Plaintiff has alleged that he transferred ***LR. No.Nyandarua/Ol Kalou Central/3222*** worth ***Kshs.1,200,000/=*** to the Defendant/Respondent as part payment of the purchase price. There is a title deed produced as ***“IK-2”*** to that effect. If indeed the suit property would be sold to a 3rd party by the Defendant/Respondent, then it would be difficult to recover it and it is evident that the Plaintiff/Applicant will suffer irreparable loss which may not be recoverable by payment of damages. This Court will borrow from the findings of the court in the case of ***Osuna.Vs.Abdul Ziwa, Kampala High Court, Civil Suit No.246 fo 1994 (1994) III KALR 28***, where the Court held that:-

“The purpose of temporary injunction is to preserve matters in status quo until the question to be investigated in the main suit can be finally disposed.”

Equally in this matter, there are several questions to be investigated in the main suit. Therefore the matters should be preserved vide maintaining of the ***status quo*** before the dispute arose.

On the balance of convenience, this Court finds that it is not in doubt. However, if court was to be in doubt, the balance of convenience would tilt in favour of the Plaintiff who had paid a huge amount towards settlement of the initial purchase price.

Having considered the instant ***Notice of Motion*** dated ***4th December 2015***, the Court finds that the Plaintiff/Applicant has established the threshold principles for the grant of temporary orders. The upshot of the foregoing is that the Plaintiff/Applicant’s application dated ***4th December 2015***, is allowed in terms of ***prayer no.4*** and ***5*** herein with costs being in the cause.

However on ***prayer no.6***, both parties have accused each other of breach of the ***Sale Agreement*** dated ***31st July 2013***. The Court needs to hear evidence from both parties herein to determine whether the Plaintiff/Applicant is deserving of the said equitable remedy. The law is very clear on the issue of grant of specific performance as was held in the case of ***Gharib Suleiman Gharib.Vs.Abdulrahnan Mohammed Agil, Civil Appeal No.112 of 1998***, where the Court of Appeal held that:-

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages, the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”

The Court can only be in position to make the above determination after evidence has been tendered and interrogated in the main trial through calling of witnesses and production of exhibits. For now the Court finds and holds that it cannot issue an order of specific performance.

Having now carefully considered the available evidence, the Court allows the Plaintiff/Applicant’s ***Notice of Motion*** dated ***4th December 2015***, in terms of ***prayers no.4*** and ***5*** only with costs being in the cause.

It is so ordered.

Dated, signed and delivered at THIKA this 27th day of July 2017.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Applicant though served

No appearance for Defendant/Respondent though serves.

Court clerk – Rachael.

L. GACHERU

JUDGE

27/7/2017