



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
E.L.C NO. 100 OF 2017
MIRIAM MUGURE WAMITI - PLAINTIFF/APPLICANT
(Suing as the administrator of the estate
of Henry Wamiti Nganga (deceased)
VS
DAVIS NDERI NG'ANG'A - DEFENDANT/RESPONDENT

RULING

1. On the 8th November 2016 the Applicant filed a Notice of Motion seeking the following orders:-
 - a). Spent
 - b). That the Respondent be restrained from wasting, damaging, alienating or dealing with the 0.7-acre remainder of the parcel of land known as LOC 9/ICHICI/164 pending the hearing and determination of this application.
 - c). That Athi Water Services Board (the Government Parastatal that acquired the one acre portion of the suit property) be restrained from paying out compensation for the 1.0 acre portion of the parcel of land known as LOC 9/ICHICI/164 which it compulsorily acquired pending the hearing and determination of the suit.
 - d). That in the alternative this Court do issue an order for specific performance of the sale agreement entered into between the plaintiff's husband and the defendant.
 - e). That the defendant/Respondent bears the costs of this application.
2. The application is supported by the affidavit sworn by Applicant and dated the 8th November 2016. The Applicant deponed that she is the administrator of the estate of her late husband Henry Wamiti Nganga who purchased the suit property from the Respondent sometime in 1997 at the price of Kes. 161,500/-. The deceased paid Kes. 75,000/- on signing of the agreement for sale and the balance was paid later, the last payment being made on the 8th February 2007. That the deceased took possession of the suit property since 8th April 1997 and lives there todate. That the Respondent has however refused to transfer the land to the deceased in his lifetime or to her as the administrator and hence the orders for specific performance prayed for in the suit. In her further affidavit, she states that there is evidence that the Respondent is intent on selling the property to Athi River Water Services Board who are already using part of the property as a spoil area.

3. The Respondent resisted the application by filing a replying affidavit on the 19th December 2016 where he states that the deceased was in breach of the agreement of sale in failing to complete the purchase price as agreed; that the transaction is void because the land control board consent was not obtained in time or at all; that he has asked the Applicant to vacate the suit land and collect the refund of Kes. 75,000/- paid as deposit for the transaction; he urged the Court to dismiss the application as being unmeritorious.

4. The applicant in response to the replying affidavit filed a further affidavit on the 6th April 2017 detailing how the balance of the purchase price was paid over a period of over ten years and each time the respondent accepted payments which payments were in various modes ranging from a cow, timber and cash, the last one being Kes. 25,000/- paid through the respondent lawyers Messrs R.M Kimani Advocate on the 8th February 2007.

5. Parties have filed written submissions in support of their positions and I have carefully considered the application, rival affidavit and annexures as well as written submissions and now proceed to determine the application.

6. The question for determination before this Court is whether the Applicant is entitled to the order of temporary injunction pending the determination of this suit.

7. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are: that firstly, an applicant must show a prima facie case with a probability of success ,secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and thirdly, if the court is in doubt, it will decide an application on a balance of convenience.

8. The Court of Appeal in **Mbao vs First American Bank of Kenya Ltd & two others C.A. No. 39 of 2003 eK.L.R** defined a prima facie case in the following terms;

“A prima facie case in a civil application include but is not confined to a genuine and arguable case. It is 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 or rebuttal from the latter”

9. It is not in dispute that the Applicant is the legal representative of Henry Wamiti Nganga hence has the right to institute this suit on behalf of the estate of her late husband. The applicant has attached a copy of the letters of grant of administration dated the 16th August 2005. It is on record that the said applicant's husband and the respondent entered into a contract of sale in respect to the suit property. See the agreement of sale annexed to the application and dated the 9th January 1997. The respondent has not challenged the agreement for sale save on grounds of partial performance and lack of validity.

10. It is common among the parties that the purchase price was paid and indeed it is the applicants case that she actually paid the respondent in full. That the payments continued to be received and acknowledged by the respondent way passed the completion date and as late as 2007. The respondent argues that though the purchase price was paid, it was only paid partially. It is also agreed by the parties that the applicants were put in possession by the respondent in May 1997. The respondent retorts that though the applicant was given possession the same was not quiet- that it was interrupted vide his demand to vacate issued by the applicant to vacate in 2007.

11. The Court has put weight on the contractual obligations of the parties, the acceptance of the purchase price (whether whole or partial) and possession and the only conclusive inference is that these were done in anticipation of concluding the transaction whose clear intention can be gleaned from the pleadings was to confer interest in the suit land from one party to the other.

12. In that regard, the applicant has established a prima facie case with a probability of success. To

preserve this property until this suit is heard and determined the application is allowed in terms of the prayers as follows;

a) That the defendant be restrained from wasting damaging alienation or dealing with the 0.7 acre remainder of the parcel of land known as Loc 9/Chichi/164 pending the hearing and determination of the suit.

b) The defendant to bear the cost of this application.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH JULY 2017.

J. G. KEMEI

JUDGE