



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

CIVIL CASE NO. 213 OF 2017

CAPTAIN (RTD) PETER ISABOKE NYARERU.....PLAINTIFF

VERSUS

IRENE MORAA ONSOMU.....DEFENDANT

RULING

The application before this court is a Notice of Motion by the Plaintiff dated 15th February, 2017 and filed on 16th February, 2017 brought pursuant to Sections 1A, 1B, 3, 3A and 63(c) of the Civil Procedure Act and Order 40 Rule 2 (1) and 4 (1) and (2) and Order 51 Rule 1 of the Civil Procedure Rules and all the other enabling provisions of the Law. The application is premised on the grounds the Plaintiff purchased land parcel number NGONG/NGONG/63723(suit parcel) from the Defendant, which land was a resultant subdivision from NGONG/NGONG/49574 that produced the suit parcel and NGONG/NGONG/63724 respectively. That upon taking possession of the suit land some people came and excised a portion claiming it was a public utility plot. The Plaintiff avers that it appears the Defendant was well aware that a portion of the suit land was a public utility plot but failed to disclose this fact to the Plaintiff. The Plaintiff has suffered irreparable loss and damage as he cannot use the suit land for economic gain. The application is supported by the affidavit of CAPTAIN(RTD) PETER ISABOKE NYARERU who is the Plaintiff herein where he deposes that vide an agreement dated 26th February, 2014 he purchased a portion of land parcel number NGONG/NGONG/49574 measuring a quarter an hectare from the Defendant and paid the full purchase price. Further that pursuant to the said Sale Agreement, the Defendant caused the title no. NGONG/NGONG/49574(original title) to be subdivided into NGONG/NGONG/63723 and NGONG/NGONG/63724 respectively. The Plaintiff states that the Defendant transferred NGONG/NGONG/63724 to him, upon taking possession of the subject property, community members came and excised a portion of it as public utility land which matter was subject of litigation in **MACHAKOS ELC NO. 130 OF 2012 Gatecha Nganga Vs. Irene Moraa ONSOMU** . He further avers that the Defendant was at all times aware that a portion of the property known as NGONG/NGONG/64724 was part of public utility land but did not disclose this fact to him and as a result of the said omissions, he has suffered loss and damage. The Plaintiff seeks the Court to compel the Defendant to transfer a portion of her land NGONG/NGONG/63723 to compensate him for the land that was excised from his.

The Defendant opposed the application and filed a replying affidavit sworn by IRENE MORAA ONSOMU dated 28th March, 2017 where she deposed that she indeed sold the suit land to the Plaintiff but denied the presence of an access public utility road on the said land. She states that on 27th July, 2016 three persons namely Kimani Gathecha, Kioi Gathecha and Mwalimu Gathecha trespassed into her parcel of land and that of the Plaintiff, destroyed property thereon and she reported the matter to Ongata Rongai Police Station. She avers that the Plaintiff equally trespassed on her parcel of land and destroyed her property under disguised illegal notion that he could excise into a portion of her land to his. She reported the matter to Ongata Rongai Police Station and the Plaintiff was arrested for malicious damage to

property but she withdrew the charges. She further avers that in 2001, one Gathecha Kioi trespassed onto her land and purported to create an access road but she reported the matter to the District Land Registrar and the matter was ruled in her favour.

Both parties filed written submissions.

On 8th May, 2015 it is only the Plaintiff's Counsel Mr. Wabuyabo who highlighted his submissions and reiterated what was contained in the face of the application and supporting affidavit. He submitted that the Plaintiff was interested to purchase land free from any encumbrances and it is upon the Defendant as the seller to clear any existing encumbrances. He stated that the Defendant would suffer no prejudice if the injunctive orders sought were granted. He submitted that the Plaintiff has demonstrated that he purchased the subject property in good faith for economic gain but Defendant concealed the fact that a portion formed part of a public utility road which was subject of litigation. He relied on the case of **Giella Vs. Cassman Brown** and said the Plaintiff had established a prima facie case to warrant the injunction sought.

In her written submissions, the Defendant reiterated the facts of the case as stated in her replying affidavit and stated that the only way land can be acquired as public utility is prescribed under Article 40 of the Constitution which allows government to use its coercive power to force a transfer in public interest upon fair, prompt and adequate compensation. She submitted that there was no wrong doing on her part as she followed the due process to transfer land to the Plaintiff; he is not entitled to the remedies sought because he has not proved a prima facie case with a probability of success and has failed to prove his case on a balance of probability hence does not deserve any payment of damages. The Defendant reaffirms that she has no intention of disposing of her land as it is where her matrimonial home is situate and she resides therein with her husband, children and grand children.

Issues and Determination

Upon perusal of the motion, supporting affidavit, replying affidavit, written submissions and all the annexures thereon, the court notes that the only issue for determination is whether the Plaintiff is entitled to the injunctive orders sought.

It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I wish to interrogate the evidence presented. The Plaintiff bought a portion of land parcel NGONG/NGONG/ 63723 from the Defendant. The Plaintiff contends that the Defendant failed to disclose to him that there was a public utility way on the plot and yet he bought the plot free from all encumbrances. The Plaintiff stated that there was a Machakos ELC Case No 13 of 2012 concerning the suit land but never furnished the court with the proceedings and judgement. The Defendant insists she sold the plot free from all encumbrances and there is no public utility path on the suit land. She states that the Plaintiff should wad off trespassers from his land. She produced proceedings and decision by the Land Registrar Ngong that indicated there is no public utility path on the suit land. From the foregoing, the Court finds that the Plaintiff has not established a prima facie case to warrant the injunction sought as against the Defendant.

On the question of irreparable loss and damage, the Plaintiff alleged that third parties had excised a portion of his land and he has not been able to use it for economic gain as had been envisaged at the time of purchase. The court notes that the Plaintiff did not produce proof of the extent of the excision. The

Court hence finds that the Plaintiff has not proved any damage he has suffered.

On the question of balance of convenience, from the evidence presented by the parties, I am not convinced that the Plaintiff/Applicant is likely to suffer more inconvenience if the temporary injunction is denied as his title is intact and he only has an issue with the portion allegedly excised as public utility. This is an issue relating to a question of compensation from the Defendant and not to lay a caveat on the Defendant's separate title.

The Court finds that the Plaintiff/Applicant has not satisfied the three principles in granting injunction as established in the case of **Giella vs. Cassman Brown**. I hence decline to grant the orders sought in the Plaintiff's Notice of Motion dated 15th February, 2017 and filed on 16th February, 2017.

The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 20th day of July, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION.

Wabuyabo Lukoba for plaintiff

No appearance for defendant

Court Clerk- Mpoye