



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC CASE NO 201 OF 2015

M'MBETSA CHIKOLOLO SUMA.....PLAINTIFF

VERSUS

KALUME KARISA MBITHA.....DEFENDANT

RULING

1. This is the Notice of Motion dated 23rd February 2017. It is brought under Section, 1A, of the Civil Procedure Act. Order 40 Rules 1, 2, 3, and 4, orders/Rules of the Civil Procedure Rules

2. It seeks orders;

1. Spent

2. That this Honourable Court be pleased to order that a temporary injunction is hereby issued against the Defendant/Respondent his agents, employees, servants restraining them from alienating, disposing, transferring and dealing with all that piece of land known as Plot Number 1003 within Mtwapa (original Title Number 284/100, section III MN Title number CR 23981) more particularly certificate of title No. Cr 655521 measuring 0.4047 hectare being sub division 8451 (original number 1003/2) as delineated on land survey plan number 061682 pending hearing and determination of this application and subsequent suit.

3. That this Honourable court be pleased to order that pending the hearing and determination of this application and subsequent suit the land Registrar Mombasa and/or otherwise by themselves their servants, agents be restrained from issuing and/or registering transferring and/or any other manner whatsoever and however dealing in that parcel of land known as Plot Number 1003 within Mtwapa (original title Number CR 23981) more particularly certificate of Title Number CR 65521 measuring o.4047 hectare being sub-division 8451 (original Number 1003/2) as delineated on land survey plan Number 061682 pending hearing and determination of this application and subsequent suit.

4. That costs of this application be in the case.

3. The grounds are on the face of the application running from paragraph 1 – 19. I do not need to reproduce them here.

4. The application is supported by the affidavit of M'mbetsa Chikololo Zuma the plaintiff/Applicant herein sworn on the 23/2/2017.

5. The application is opposed. There is a replying affidavit sworn by Kalume Karisa Mbitha the defendant/Respondent, sworn on the 6/4/2017.

6. I have considered the pleadings, the application and the response plus the annexures submissions of counsel and the authorities cited.

In written submissions counsel substantiated their clients a respective positions stated in their respective affidavits.

The issue of determination is whether the plaintiff/applicant's case has satisfied the conditions for grant of temporary injunctions.

7. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of **Giella –Versus- Cassman Brown And Company Limited (1973) EA 358**. First, the applicant must show a prima facie case with a probability of success. Secondly, that an interlocutory injunctions 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 should act on a balance of convenience.

8. In their submissions the plaintiff/Applicant contention is that on 18/10/2010 he entered into a sale agreement with the defendant/respondent for the sale of 0.04047 hectares of plot number 1003 within Mtwapa (original title no, 284/110 section II/MN title number CR.23981) for a consideration of Kshs.1,700,000.

That the parcel of land was to be excised from Plot Number 1003 measuring approximately 1,593 hectares registered in the name of one Mohamed Ahmed Nahdey that on 17/4/2011 a deed of variation of the sale agreement was done to mutually extend the completion period and to vary certain terms of the earlier agreement.

9. The defendant/respondent made a statutory declaration that he had transferred his interest in MN/Section III/8457 excised from 1003 to the plaintiff/applicant.

The effect of this was that the registered owner Mohamed Ahmed Nahdey was to transfer the parcel of land directly to the plaintiff/applicant. The plaintiff paid Kshs.1,100,000/= part payment of the purchase price. The balance of Kshs.600,000/= was to be paid upon successful transfer.

10. It is the plaintiff's contention that the defendant has breached the agreement and is now in the process of selling the suit property to a third party to his detriment.

It is the plaintiff's further contention that he has made out a prima facie case with a probability of success and that he is likely to suffer irreparable loss or injury should the defendant dispose the suit property to a third party. The plaintiff has relied on the cases of;

1) Daniel Kipkenda Rono –versus- James Kariuki Ng'ang'a And 4 others (2013) eKLR.

2) Naftal Ruthi Kinyua – versus- Patrick Thuita Gachure And Anotehr (2015) eKLR.

11. In his submissions the defendant/respondent does not dispute that he entered into a sale agreement with the plaintiff/Applicant.

That the agreement was frustrated by the plaintiff through a letter dated 14/8/2014.

That the plaintiff lost interest in the suit in 2014. He further states that the plaintiff is seeking a liquidated sum hence orders of injunction cannot issue.

That the plaintiff's case has not satisfied the conditions for grant of temporary injunctions. He said he is willing to refund the purchase price. That the plaintiff's claim is quantifiable hence he cannot suffer irreparable loss if the orders are not granted.

That the balance of convenience tilts in his favour as he is the registered owner of the suit property.

12. A look at the plaint dated 17/7/2015 SHOWS that the prayers are;

“REASONS WHEREFORE the plaintiff prays for judgment to be entered against the defendant for;

a) The sum of Kshs1,100,000/= together with interest therein at the base landing rate of commercial bank plus 10% over and above the said interest rate from 17th July, 2014 until payment in full.

b) Costs and expenses incurred by the plaintiff in pursuance of the agreement (Receipts to be produced)

c) In the alternative to (a) & (b) above the court be pleased to issue an order of specific performance directing the defendant to execute the transfer documents to plot No, MN/III/8451 being a piece of land excised from Plot Number 1003 measuring 0.4047 hectares in favour of the plaintiff.

d) In default of (c) the Deputy Registrar do execute the transfer documents for plot Number, MN/III/8451 being a piece of land excised from Plot Number 1003 measuring 0.4047 hectares in favour of the plaintiff.

e) Costs of the suit and interest in (a) & (b) above.

f) Any other relief this Honourable Court may deem fit to grant”.

13. It is therefore not true for the defendant to say the plaintiff's claim is for a liquidated sum.

As it can be seen from the prayers he also seeks specific performance.

14. I find that the plaintiff/Applicant has established a prima facie case with a probability of success.

He has paid Kshs.1,100,000/= being part of the purchase price. The balance of Kshs600,000/= was to be paid upon transfer.

The defendant/respondent has not effected transfer despite receiving the money. In the case **of Mrao Limited –versus- First American Bank Limited And 2 others (2003) KLR 125** the court in determining what amount to a prima facie case stated, “so what is a prima facie case? I would say that in civil cases it is a case in 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”.

As earlier stated I find that the plaintiff/applicant has shown that he has a prima facie case with a probability of success.

15. I also find that the plaintiff/Applicant has demonstrated that he is likely to suffer irreparable if the orders are not granted.

The defendant/respondent is now the registered owner there is a high likelihood that he may dispose the suit property to a third party. He told the court that he is ready to refund the purchase price. He has however failed to demonstrate to the court what steps he has taken since this suit was filed, to refunding the purchase price.

Has he made any proposals to the plaintiff? The answer is NO.

I therefore find the plaintiffs/Applicant fear is real. The defendant/respondent is likely to dispose the suit property to a third party. The plaintiff/Applicant is likely to suffer irreparable loss as he will lose the land and/or the purchase price if these orders are not granted.

I would say the balance of convenience tilts in favour of the plaintiff/Applicant. The Defendant/Respondents admits he entered into an agreement for sale of the property with the plaintiff he has not refunded the purchase price.

All in all I find merit in this application and I grant the orders sought namely;

a) That a temporary injunction do hereby issue against the defendant/respondent, his agent, employees, servants, restraining them from disposing, alienating transferring and dealing with all that piece of land known as plot number 1003 within Mtwapa (original Title Number 284/100, Section III/MN Title Number CR 23981 more particularly certificate of Title Number CR 655521. Measuring 0.4047 hectares being sub division 8451, original Number 1003/2) as delineated on land survey plan Number 0.61682 pending hearing and determination of this suit.

b) That a temporary injunction do hereby issue restraining the land Registrar Mombasa whether by himself, his servants, agents from issuing and/or registering, transferring and/or in any other manner whatsoever and howsoever dealing in that parcel of land known as Plot Number 1003 within Mtwapa (original title Number 284/100 section III MN Title Number CR 23981) more particularly certificate of title Number CR 65521 measuring 0.4047 hectares being sub division 8451 (original Title Number 1003/2) as delineated on land survey plan Number 061682 pending hearing and determination of this suit.

c) Costs of this application be in the cause.

It is so ordered.

L. KOMINGOI

JUDGE

27/9/2017