



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 3 OF 2017

PHILIP WANJOHI KARIUKI.....PLAINTIFF

VERSUS

KENNEDY NJENGA NYAMBURA.....1ST DEFENDANT

STEPHANIE NJERU NJOGU.....2ND DEFENDANT

LEONARD N. NJAU t/a

KINYANJUI & NJAU ADVOCATES.....3RD DEFENDANT

AND

SANKORI KARINU.....INTERESTED PARTY

RULING

What is before court is the Plaintiff's Notice of Motion dated 20th January, 2017 brought pursuant to section 3, 3A and 63(c) & (e) of the Civil Procedure Act, Order 36 Rule 1, Order 40 rules 1, 2, &8 and Order 51 rule 1 &3 of the Civil Procedure Rules and all the other enabling provisions of the Law.

The application is based on the grounds which in summary is that the Plaintiff entered into an agreement to buy five acres from title number Kajiado/Kaputiei - North/59924 hereinafter referred to as the 'suit land'. The Plaintiff already paid a total of Kshs. 6,250,000 towards the transaction over and above his obligation as per the sale agreement. The completion date is long past and the Plaintiff has established that the Defendants may not complete the transaction at all as there is a third party who has put a restriction on the larger parcel of land. The Plaintiff has also established that the Defendants are in the process of disposing of the entire parcel without taking care of his interests. The third Defendant has acted unprofessionally and in conflicting interest as the 2nd Defendant is his daughter.

The application is supported by the affidavit of PHILIP WANJOHI KARIUKI who is the Plaintiff herein where he deposes that on 25th August, 2015 he entered into a Sale Agreement with the 1st and 2nd Defendants to purchase five acres to be excised from suit land at a price of Kshs. 9,000,000 with the completion date being a period of 180 days from the said date. He avers that he already paid a total of Kshs. 6, 250,000 out of the agreed sum of Kshs. 9,000,000 and is remaining with a balance of Kshs. 2,750,000. The completion date is long past and the defendants have not been able to complete the transaction. He states that on 24th March, 2016 he discovered that one CALARUS SANKORI KARINO

had registered a restriction over the entire land and it has been difficult to get proper information from the 3rd Defendant who was their mutual advocate. He further states that on 1st November, 2016 he learnt from messrs Itaya & Co Advocates who had registered a restriction on behalf of CALARUS SANKORI KARINO that his client was owed Kshs. 19.7 million as part of sale price which had not been paid. He further avers that despite receiving a notice of completion dated 19th December, 2016 from his current advocates the defendants have totally refused to make full disclosures of the correct status of the transaction or even advise of the interested party's claim and do not appear keen to complete it, has established that the 2nd and 3rd Defendants are father and daughter, and that the defendants are in the process of fraudulently removing the restriction and disposing off the entire parcel of land to third parties without taking care of his interests.

The application is opposed by the 1st Defendant KENNEDY NJENGA NYAMBURA who filed a replying affidavit where he admitted receiving Kshs. 2.7 million as set out in the Sale Agreement but denies receiving the said 6.3 million. He deposes that the Plaintiff has always been aware of the dispute between himself and the original vendor SANKORI KARINO after being informed of the same by himself and the 3rd Defendant, but he indicated his willingness to wait for the issues to be resolved. He states that the search was done with his full knowledge as he had informed the plaintiff of the ongoing negotiations with the interested party who had agreed to remove the caution to allow them complete the sale. He avers that the allegations of fraud are malicious as he always intended to transfer the suit land to the Plaintiff once he succeeded in removing the caution lodged by the interested party. He further stated that he intended to enjoin the interested party SANKORI KARINO in this suit and that the Plaintiff cannot claim illwill from him as he allowed him to take possession of the suit land. He insists that once the caution is removed, he will complete the transaction and denies that there are any third parties interested in the suit land. He further avers that the matter should be referred to arbitration as provided for in the sale agreement.

The 3rd Defendant LEONARD NJAU also opposed the application and filed a replying affidavit where he deposed that in December 2013, the Plaintiff approached him to draw a Sale Agreement between himself and a third party KAMAKIA NAKEEL. He drew the Sale Agreement where the Plaintiff was to purchase 3.25 hectares from the vendor for Kshs. 8 million and on various dates the Plaintiff deposited money into their account towards purchase of the said land but failed to clear the balance culminating in the agreement lapsing leading to the said vendor selling the land to a third party. He avers that the Plaintiff paid a total of Kshs. 4 million leaving a balance of Kshs. 4 million. He denies knowledge of the alleged deposits of Kshs. 6.3 million towards purchase of suit land as the deposits do not add up nor were they intended for this transaction. He confirms acting for both parties to the agreement with the 1st and 2nd Defendants not indicating any intention of selling the parcels of land already sold to the Plaintiff, to any third party. He states that it is the Plaintiff who entered into agreements with third parties namely HAMISI DULLA and ANTONY TSALWA selling the parcels he bought from 1st & 2nd Defendants. Further that when the caution was placed by SANKORI KARINO because of a dispute between himself and the 1st & 2nd Defendants, the Plaintiff was duly informed by the 1st Defendant and they agreed to cooperate to have the same removed to allow completion of the sale. He promised to complete the transaction once the caution is removed and doubted if the Plaintiff is ready to finalize the sale. He insists the Plaintiff was updated of the transaction and wanted the matter referred to arbitration.

The Plaintiff filed a supplementary affidavit where he reiterated that clause 4.2 did not provide that completion documents will be available upon completion. He insists he paid Kshs. 6,250,000 towards the transaction and that the completion date is long past with the Defendants not updating him of any challenges in relation to completing the said transaction. He denies taking possession of the suit land and insists the Defendants intentions are prima facie malicious and fraudulent. He admits entering into a Sale Agreement with KAMAKIA NAKEEL but avers that the same failed as the sons declined to endorse it. He reiterates that it is the vendor who has failed to complete the sale.

The Plaintiff and the Defendants filed their respective written submissions and on 28th July, 2017 the interested party's advocate Mr. Itaya informed court that he was not opposing the Plaintiff's application. I have considered the respective submissions.

Analysis and Determination

Upon perusal of the notice of motion including the respective affidavits filed herein plus the annexures, I find that the only issue in contention at this juncture is whether an inhibition should be registered against the suit parcel pending the outcome of this suit.

Looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Plaintiff over the suit land is not baseless. It is not in dispute that the Plaintiff entered into a Sale Agreement for purchase of 5 acres out of the suit land from the 1st & 2nd Defendants. The Plaintiff claims he has so far paid Kshs. 6,250,000 which the Defendants are disputing. The 1st Defendant admits to receiving only Kshs. 2.7 million while the 3rd Defendant admits receiving Kshs. 4 million over a different transaction which lapsed. The 3rd Defendant on the same breath admits in paragraph 8 of his affidavit that he acted for the Plaintiff, 1st Defendant and 2nd Defendant in the agreement relating to the suit land and reaffirms that they do not intend to sell the said land to any third party. The Defendants seem to blame the interested party for their woes because of the registration of a restriction over the suit land which has led to the delay in completing the transaction with the Plaintiff. All the Defendants insist the Plaintiff was aware of the challenges they had with the interested party and reaffirm they will complete the transaction once the said issues are resolved and restriction removed. The interested party on the other hand does not object to the Plaintiff's application to have an inhibition registered against the suit land.

In the case of **MRAO Vs. FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS CA NO. 39 OF 2002** the Court of Appeal states as follows:

' A prima facie case in a civil application 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 from the latter.'

In relying on this case, I find that the Plaintiff has indeed established a prima facie case as he indeed entered into a Sale Agreement dated 25th August, 2015 with the 1st and 2nd Defendants to purchase five acres from the suit land, and paid a deposit as per the terms within the said agreement. I find that since he already paid the said deposit and with the Sale not completed after the agreed 180 days, he would suffer irreparably if the orders sought are not granted.

As to the question on exact figure the Plaintiff had paid and whether he would be able to conclude the transaction, these are issues which can only be dealt with during the hearing of the main suit and not at this juncture.

On the issue of registering an inhibition against the suit land, Section 68 (1) of the Land Registration Act provides as follows" **' the court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.'**

Since the Plaintiff's claim to have purchased 5 acres out of the suit land from the Defendants is not refuted , while the interested party is claiming that the 1st Defendant had not paid him fully for the said suit land culminating in the registration of the restriction over the same, with the sanctity of the title being in dispute and the Plaintiff being an innocent purchaser, I find that these are triable issues best determined at a full trial, I will decline to grant the orders as sought but will proceed to rely on Section 68 (1) of the Land Registration Act and the make the following order:

'An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel number Kajiado/Kaputiei - North/59924 of any dealings, lease or charge pending the hearing and determination of the suit.'

The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 4th day of October, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

No appearance for plaintiff

Kinyanjui for defendant

No appearance for Aunga for interested party

Court assistant Mpoye