



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 378 OF 2017**

**(formerly ELC 177 of 2014 Consolidated with 187 of 2014)**

**TIMOTHY MALINGI KOE.....1<sup>st</sup> PLAINTIFF**

**CAROLINE BUSHURU SHYANGUUYA.....2<sup>nd</sup> PLAINTIFF**

**VERSUS**

**CHRISTOPHER MITEI.....3<sup>rd</sup> DEFENDANT**

**RULING**

What is before court is the Plaintiffs' notice of motion application dated 25th November, 2014 and Defendant's notice of motion application dated 19th November, 2014.

The Defendant's application is brought pursuant to Section 3A of the Civil Procedure Act and Order 40 Rules 1 and Order 51 Rule 1 of the Civil Procedure Rules and enabling provisions of the Law. The Defendant's application is premised on the grounds which in summary is that the Defendant is the registered owner of land parcels number KAJIADO/KITENGELA/21086 and KAJIADO/KITENGELA/21232 (suit lands) which are now subdivided into L.R Nos KAJIADO/KITENGELA/63935, 63936, 63937, 63038, 63939, 63940, 63941, 63942, 63943, 63944, 63945 and 63946 respectively. That as per the Sale Agreement dated 27<sup>th</sup> June, 2011 the Plaintiffs were required to deposit Kshs. 1,260,000 being the 10% on execution but only paid Kshs. 1,210,000 instead as at 16<sup>th</sup> July, 2011 and the completion date was to be 25<sup>th</sup> September, 2011. Further that the Defendant issued a completion notice seeking the Plaintiffs to pay Kshs. 11,390,000 within 21 days and upon the lapse of the said Notice the Defendant rescinded the contract and later in September 2013 subdivided the two suit lands. The Plaintiffs have trespassed on the suit lands and allowed their servants to occupy a temporary structure thereon. It is fair and just if the Plaintiffs' are restrained from interfering with the same. The said application is supported by the affidavit of CHRISTOPHER MITEI the Defendant herein, and opposed by the Plaintiffs' who filed a replying affidavit sworn by CAROLINE BUSHURU SHYANGUUYA.

The Defendant CHRISTOPHER MITEI deposes that on 25<sup>th</sup> October, 2011 he issued a 21 days' notice to the Plaintiffs' through his advocates messrs Mwenda Kinyua & Company demanding payment of the balance of the purchase price. He claims in October, 2013 the surveyors had put beacons on the suit lands but the Plaintiffs moved the same. Further that on 3<sup>rd</sup> November, 2013 he realized the Plaintiffs had encroached on the suit land and put servants in the temporary structures thereon.

The 2<sup>nd</sup> Plaintiff CAROLINE BUSHURU SHYANGUUYA deposed that the Plaintiffs are bona fide purchasers of the suit lands having acquired interest in the same. She contends the Sale Agreements for the two parcels of land were distinct and as for KAJIADO/KITENGELA/21086 they paid Kshs. 660,000 which was 10% deposit of the Kshs. 6.6 million purchase price while for KAJIADO/KITENGELA/21232 they paid Kshs. 600,000 which was 10% for the purchase price of Kshs. 6 million and also paid legal fees amounting to Kshs. 50,000. She confirms that the completion date was delayed because the Defendant refused to deliver the original titles of the suit lands. She avers that the alleged notice to rescind the Sale Agreement is a forgery and was never brought to their attention nor their advocates. Further that the Plaintiffs could not commit themselves any more after the Defendant declined to deliver the title deeds to the Bank to finance the transaction and he indeed contributed to the delay in the completion. She affirms that the Defendant subdivided the suit lands so as to terminate the existence of the two plots and that the 10% deposit paid for the two parcels means the Plaintiffs have indeed fully paid for one parcel and hence there is no encroachment. Further that after paying the Kshs 5 million the Defendant failed to acknowledge receipt, switched off his phone and went silent.

The Plaintiffs' Application is brought pursuant to Section 1,1A, 3A and 63(e) of the Civil Procedure Act and Order 40 Rules 1, 2, 3, 4 & 9 and Order 51 Rule 1 of the Civil Procedure Rules, Section 13 of the Environment and Land Court Act and enabling provisions of the Law. It is premised on the grounds that the Plaintiffs' are purchasers for value of a portion of land measuring 0.65 hectares and 0.58 hectares or thereabout respectively being portion of land known as KAJIADO/KITENGELA/21086 and KAJIADO/KITENGELA/21232 vide a Sale Agreement dated 27<sup>th</sup> June, 2011. In spite of the substantial payment of deposit done, the Defendant has refused to release the original title deed to the Plaintiffs' financiers. The Plaintiffs were waiting for the release of the original title deeds from the Defendant to facilitate registration of transfer of the suit properties as set out in the Agreement but he has acted in bad faith and reneged on the Agreement. The

Defendant has acted in breach of the Sale Agreement and caused land parcel number KAJIADO/ KITENGELA/2132 to be subdivided and obtained new parcel numbers KAJIADO/KITENGELA/63935, 63936, 63937, 63038, 63939, 63940, 63941, 63942, 63944 and 63945; and is in the process of selling the same to third parties.

The Plaintiffs' operate a school (RISING SUN EARLY LEARNING CENTRE) which is adjacent and bordering the suit properties and purchased with an intention of expanding it. The Plaintiffs' efforts to remedy the issue had been frustrated by the indolence, refusal and or blatant disregard by the Defendant of the agreement, consideration paid and covenants between the parties despite repeated demands to do so. The Plaintiffs' shall suffer irreparable loss as it shall be denied its lawful right to use of its property and or conclude intended developments to the suit land. The Plaintiff has obtained funds to develop the portion and unless the actions of the Defendant is restrained the Plaintiff shall incur massive losses and damage.

The application is supported by the affidavit of CAROLYNE BUSHURU SHYANGUYA the 2<sup>nd</sup> Plaintiff herein where she deposes that she is one of the proprietors of RISING SUN EARLY LEARNING CENTRE Kitengela. She avers that sometime in June 2011, she was approached by the Defendant to purchase his property located in Kitengela and on 27<sup>th</sup> June, 2011 they entered into an agreement where the Defendant sold KAJIADO/KITENGELA/21086 at a consideration of Kshs. 6.6 million. She states that on 27<sup>th</sup> June, 2011 they entered into another agreement with the Defendant for the sale of the entire land parcel number KAJIADO/KITENGELA/21232 at a consideration of Kshs. 6 million and she paid the Defendant Kshs. 5million on 9<sup>th</sup> November, 2011, Kshs. 200,000 on 2<sup>nd</sup> July, 2011, and Kshs. 250,000 on 16<sup>th</sup> July, 2011 being the deposit for the purchase price which amount was acknowledged. She contends that it was a term of the said agreements that part of the purchase price would be financed by Equity Bank, upon delivering the original title deeds. She reiterates that it was her expectation that upon payment of the 50% and 10% for the respective titles, the Defendant would surrender the title deeds to the financiers to Charge the titles and release finances to pay the Vendor. She states that despite performing her part of the Agreement the Defendant failed to do so as agreed. Further the agreement stipulated a completion notice of 90 days upon execution which was 27<sup>th</sup> September, 2011, and due to this delay she gave the Defendant a Completion Notice. She reaffirms that the Defendant has todate failed to furnish her with the title deeds and has proceeded to subdivide the two suit lands culminating in her registering a caution to bar any dealings on the same. She insists the Defendant's actions smacks of bad faith, impunity and ill motives and depriving her of the right as a bona fide purchaser for value. She contends that she has a prima facie case with a high probability of success.

The Defendant opposed the application and filed a replying affidavit sworn by CHRISTOPHER CHEMITEI, the Defendant herein where he deposes that he is the registered owner of land parcels number KAJIADO/KITENGELA/21086 and KAJIADO/KITENGELA/21232 which are now subdivided into L.R Nos KAJIADO/KITENGELA//63935, 63936, 63937, 63038, 63939, 63940, 63941, 63942, 63943, 63944, 63945 and 63946 respectively. He confirms that he sold the parcels of land to the Plaintiff on 27<sup>th</sup> June, 2011 as per the Sale Agreement and according to clause 3.1 of the said Agreement, the Plaintiff was required to deposit Kshs. 1,260,000 being the 10% on execution but only paid Kshs. 1,210,000 instead as at 16<sup>th</sup> July, 2011 which was short of the 10% required. Further that under clause 1.1(a) of the Sale Agreement, the transaction was to be completed in 90 days on 27<sup>th</sup> September, 2011. He avers that as per clause 5 of the Sale Agreement, Equity Bank of Kenya Limited was supposed to partly finance the transaction and the Plaintiff's advocates and financiers were to facilitate issuance of a professional undertaking which was not done. He insists that within the loan facility document, the balance of the purchase price was to be secured by a legal charge over a different parcel of land namely KAJIADO/KITENGELA/22308 and the balance of Kshs. 5.6 million was to come from the Plaintiff's contribution and it is hence false for the Plaintiff to claim that his titles number KAJIADO/KITENGELA/21086 and KAJIADO/KITENGELA/21232 were to be utilized as security. He claims that 27<sup>th</sup> September, 2011 the Plaintiffs had failed, refused and or neglected to pay the balance of the purchase price. Further that on 25<sup>th</sup> October, 2011, he issued a twenty (21) days' notice to the Plaintiffs' advocates messrs Malonza & Company Advocates requiring the Plaintiff to pay Kshs. 11, 390,000 failure of which he would rescind the Sale Agreement in accordance with clause 12.1.

He confirms that upon receiving the said notice, the Plaintiffs deposited a further sum of Kshs. 5 million on 9<sup>th</sup> November, 2011 to his account which deposit was still less by Kshs. 6, 390,000. He insists the Sale Agreement was rescinded on 14<sup>th</sup> November, 2011 as the Plaintiffs had not paid the full purchase price of Kshs. 12.6 million and he never received any Professional Undertaking nor letter from the Financiers as was the precondition to release the title deed and hence could not do so. He contends that he undertook subdivision to the suit land in late 2003 and that the Plaintiffs' have trespassed on his property KAJIADO/KITENGELA/ 21086 and that is why he sought injunctive reliefs vide ELC 477 of 2014. He reiterates that he will suffer irreparable harm if the orders sought are granted and that the Plaintiffs' have not come to court with clears. He states that the Plaintiffs' will not suffer any prejudice as they can refund for the payments made.

Both parties filed their respective written submissions which were highlighted on 25<sup>th</sup> September, 2017 that I have considered.

### **Analysis and Determination**

Upon perusal of the two Notice of Motion applications dated 19th November, 2014 and 25th November, 2014 respectively, including the supporting affidavits plus the annexures thereon and the replying affidavits as well as the written submissions, I find that the only issue for determination at this juncture is whether the Plaintiffs and Defendant are each entitled to the temporary injunctive reliefs sought pending the outcome of the suit.

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 line with this principle, the Court will proceed to interrogate whether the plaintiffs' and defendants have respectively demonstrated a

prima facie case with a probability of success.

It is not in dispute that the Defendant sold the suit lands KAJIADO/KITENGELA/21086 and KAJIADO/KITENGELA/21232 to the Plaintiffs on 27<sup>th</sup> June, 2011 as per the two Sale Agreement and Plaintiffs paid Kshs. 1,210,000 as 10% deposit. It is further not disputed that the Defendant has failed to complete the transaction and subdivided the suit lands into land parcels number L.R Nos KAJIADO/KITENGELA/63935, 63936, 63937, 63038, 63939, 63940, 63941, 63942, 63943, 63944, 63945 and 63946 respectively. What is in contention is the Defendant's failure to complete the transaction and yet he received the deposit. The Plaintiffs state that they own a school adjacent to the suit lands which they intended to expand. Further that the Defendant had agreed that upon receiving the deposit, he would surrender the two title deeds to the financiers to Charge after which he would receive the balance of the purchase price. I note todate the Defendant has not completed the transaction nor refunded the deposit paid. He claims the Plaintiffs' paid less deposit, he sent them a notice to rescind the contract as he did not receive an undertaking from their advocates nor the financiers and they are free to request for their purchase price. All this point to the fact that there was indeed a contractual obligation between the parties. However, the Defendant contends the Plaintiffs' have encroached on the suit lands with their servants occupying a temporary structure thereon. The Plaintiffs' on the other hand insist that with the 10% deposit paid for the two parcels of land, they have indeed already paid for one parcel.

In further relying on the case of Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125 where the court in determining what a prima facie case entails, held that: '**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 other.**'

In relying on the two authorities and from the facts and materials presented by the Plaintiffs and despite the Defendant's averments, I find that the Plaintiffs' as opposed to the defendant have indeed established a prima facie case with a probability of success.

On the second principle as to whether the plaintiff's and defendant respectively stand to suffer irreparable loss which cannot be compensated by way of damages. I note that the Plaintiffs' entered into a contract to purchase the two suit lands so as to expand their school. Further they even engaged a financier Equity Bank Kenya Limited to support the purchase of the suit lands. These arrangements were accepted by the Defendant who signed the Sale Agreements However, the Defendant later rescinded the contract, has subdivided the suit lands and admitted that he has not refunded the deposit of the purchase price that he was paid. The Defendant further claims that the Plaintiffs have encroached on the land which fact the Plaintiffs have not denied as they claim the 10% deposit of purchase price, paid can cater for the cost of one of the suit lands. The Defendant has not indicated whether the Plaintiffs have undertaken any developments on the suit lands. However, two wrongs do not make a right. From the foregoing, I find that the Plaintiffs as opposed to the Defendant will indeed suffer irreparable loss, which cannot be compensated by way of damages if the temporary injunctive orders sought are not granted.

On the issue of balance of convenience, from the facts and materials presented by the respective parties, I am not in doubt that the balance tilts in favour of the Plaintiffs and if the titles of the resultant subdivisions to the two suit lands is not preserved, the sub stratum of the suit will be lost.

In the circumstances I find the Defendant's Application dated 19<sup>th</sup> November, 2014 unmerited and disallow it, but find the Plaintiffs' application dated 25<sup>th</sup> November, 2014 merited allow but decline to grant the orders as sought and proceed to make the following order:

- 1) An inhibition order be and hereby registered by the Land Registrar Kajiado as against L.R Nos KAJIADO/KITENGELA/63935, 63936, 63937, 63038, 63939, 63940, 63941, 63942, 63943, 63944, 63945 and 63946 respectively which are resultant subdivisions of land parcel number KAJIADO /KITENGELA /21086 and KAJIADO/KITENGELA/21232, of any dealings, lease or charge pending the hearing and determination of the suit.
- 2) The Plaintiffs are further barred from interfering and or trespassing upon the suit lands comprising of L.R Nos KAJIADO/KITENGELA/63935, 63936, 63937, 63038, 63939, 63940, 63941, 63942, 63943, 63944, 63945 and 63946 respectively pending the hearing and determination of the suit.

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

**Dated signed and delivered in open court at Kajiado this 15<sup>th</sup> day of November, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**