



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 39 OF 2016**

**REUBEN KIPKURUI KOECH.....PLAINTIFF**

**VERSUS**

**WINNY CHEPKURUI SIME.....1<sup>ST</sup> DEFENDANT**

**RICHARD KIPNGENO.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is coming up for determination is the application dated 20th June 2016 in which the plaintiff/applicant seeks the following main prayers:

- a) That the subordinate court suit to wit Kericho CMCC No. 340 of 2015 be stayed pending the hearing and determination of this suit.**
- b) That pending the hearing and determination of the main suit an order do issue directing the plaintiff and the second defendant to use their respective portions of land parcel number KERICHO/KABIANGA/4676 which portions are distinct and clearly demarcated.**
- c) That pending the hearing and determination of the suit herein, an order of injunction do issue restraining the 2nd defendant by himself, his agents and or servants or otherwise from selling, alienating, transferring, disposing charging mortgaging or dealing with land parcel number KERICHO KABIANGA/ 4676 in any other manner that is prejudicial to the plaintiff.**

The application is premised on the supporting affidavit of the applicant sworn on the 20<sup>th</sup> June 2016 in which he sets out the chronology of events. In essence he depones that the respondents' conduct is unconscionable, fraudulent, unfair and inequitable as the 1<sup>st</sup> defendant had a binding contract with the applicant at the time he purported to sell the suit land to the 2<sup>nd</sup> defendant while the 2<sup>nd</sup> defendant had both express and constructive knowledge of the plaintiff's interest in, occupation and development of the suit land. He avers that the respondents conduct is aimed at defeating the applicant's interest in the suit property.

The application is opposed by the respondents. The 1<sup>st</sup> respondent states that the application is an abuse of the process of the court and a ploy by the applicant to sanctify his illegal occupation of the suit land. He further depones that the applicant has not met the threshold for the grant of an injunction and urges that that the application be dismissed.

A brief background of the case is necessary in order to put things into perspective. On 10<sup>th</sup> May 2014 the plaintiff entered into an agreement with the 1<sup>st</sup> defendant for the sale of a portion of land parcel number KERICHO/ KABIANGA/26 measuring 0.45 of an acre which was registered in the name of the 1<sup>st</sup> defendant's father Kipruto Sanganyi-deceased at a consideration of Kshs. 900,000. After paying the purchase price the plaintiff took vacant possession of the suit land, fenced it and constructed some permanent structures.

Since the land in question was agricultural land, it was a requirement that the parties obtain the consent of the Land Control Board within six months in order to complete the transaction. This did not happen thus frustrating the contract. In January 2015 the 1<sup>st</sup> defendant decided to rescind the sale and sent a cheque for the purchase price together with a penalty of 30 % to the plaintiff's advocate. It is the plaintiff's case that her advocate returned the said cheque to the 1<sup>st</sup> defendant's advocate. She later obtained a Grant of Letters of Administration in respect of her late father's estate, had the suit land transferred to her through transmission subsequently transferred it to the 2<sup>nd</sup> defendant in August 2015. This is what prompted the plaintiff to file the instant suit alleging fraud against the 1<sup>st</sup> defendant and praying for a cancellation of the 2<sup>nd</sup> defendant's title and injunction to restrain the defendants from interfering with the plaintiff's quiet possession of his portion measuring 0.45 acres. In the alternative the plaintiff seeks a refund of the purchase price together with interest and special damages for the developments on the suit land.

The 1<sup>st</sup> defendant filed a defence admitting that she sold the suit land to the plaintiff but since she was unable to obtain consent of the Land Control Board within the stipulated period of six months, the sale was rendered null and void. She then took the initiative to refund the plaintiff the purchase price together with 30% interest. She further states that she took back possession of the suit land in January 2015 prompting the plaintiff to institute Kericho CMCC NO. 13 of 2015 seeking to evict the 1<sup>st</sup> defendant. The suit was however dismissed for want of jurisdiction. She further alleges that the plaintiff subsequently re-entered the suit land prompting her to institute criminal charges for forcible entry and detainer against him vide criminal case no.727 of 2015. The 1<sup>st</sup> defendant admits selling the suit land to the 2<sup>nd</sup> defendant after obtaining the consent of the Land Control Board but denies that the said sale was fraudulent as alleged by the plaintiff.

On his part the 2<sup>nd</sup> defendant maintains that he is not privy to the events leading to the repudiation of the transaction between the plaintiff and the 1<sup>st</sup> defendant. He states that he purchased the suit land from the 1<sup>st</sup> defendant in August 2015 and he was subsequently registered as the proprietor thereof. He states that when he bought the suit land it is the 1<sup>st</sup> defendant who was in occupation but the plaintiff later forcefully entered the land and constructed structures thereon. The 2<sup>nd</sup> defendant was then forced to file a case against the plaintiff vide Kericho CMCC No. 340 of 2015 alleging trespass and seeking a permanent injunction to restrain him for interfering with the plaintiff's proprietary interest in the suit land. The said suit is still pending in court and had been held in abeyance following the Petition challenging the jurisdiction of magistrates courts to handle land cases.

The application was canvassed by way of written submissions and each of the parties filed their submissions.

The following issues emerge for determination:

- 1) **Whether Kericho CMCC No. 340 of 2015 should be stayed pending the hearing and determination of this suit.**
- 2) **Whether an order should issue directing the plaintiff and the second defendant to use their respective portions of land parcel number KERICHO/KABIANGA/4676 which portions are distinct and clearly demarcated.**
- 3) **Whether an order for injunction should issue restraining the 2nd defendant by himself, his agents and or servants or otherwise from selling, alienating, transferring, disposing charging mortgaging or dealing with land parcel number KERICHO KABIANGA/ 4676 in any manner that is prejudicial to the plaintiff.**

On the first issue regarding the stay of the suit filed in the Magistrate's court –Kericho CMCC No 340 of 2015, no justification has been given by the applicant for staying the suit especially given the fact that the said suit was filed before the instant one. The recent decision of the Court of Appeal in **The Law Society of Kenya Nairobi Branch V Malindi Law Society and Others Civil Appeal No 287 of 2016** which held that that Magistrates courts have the jurisdiction to handle land matters removes any doubt that may have existed regarding the court's jurisdiction.

The second and third issues require the court to make a determination as to whether the applicant has made out a case for the grant of an injunction. In order for the court to exercise its discretion in granting injunctive relief the applicant must meet the conditions set out in the case of **Giella V Cassman Brown 1973 EA 358** which were restated in the case of **David I. Githuku V George Munyua Mbira & 2 Others (2013) eKLR** as follows:

First, the applicant must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.

It is common ground that the applicant does not have title to the suit land as it is registered in the name of the 2<sup>nd</sup> defendant. Under section 26 of the Land Registration Act the certificate of title issued by the registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in that certificate.

Even though it is not in dispute that the applicant was the first one to buy a portion of the suit land from the 1<sup>st</sup> defendant, this sale was rendered null and void by operation of the law since no consent of the Land Control Board was obtained as required by section 6 of the Land Control Act. I rely on the case of **Kiplagat Kotut V Rose Chebor Kipngok Civil Appeal No 31 of 2015** where the Court of Appeal stated that where consent of the Land Control Board had not been obtained within six months of the sale, the court's hands were tied and they declared the sale null and void. In the circumstances, the applicant has failed to demonstrate that he has a prima facie case with a probability of success. As regards the question of irreparable injury or damage, this has not been established. Indeed, in his Pleint the plaintiff prays for a refund and special damages for the developments he made on the property which means that the damage is quantifiable. I need not consider the balance of convenience as I am not in any doubt.

I have carefully considered the application, affidavits of the parties, pleadings and the rival submissions filed herein as well as that law and I have come to the conclusion that the application lacks merit and it is therefore dismissed with costs.

**Dated, signed and delivered this 3rd day of November 2017.**

**J.M ONYANGO**

**JUDGE**

In the presence of:

Miss Ngetich for Mutai J.K for the Plaintiff/Applicant

Mr. Oboso for Orina for the 1<sup>st</sup> Defendant

No appearance for the 1<sup>st</sup> Defendant