



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 199 OF 2015

MURAGE MWANGI MANJA.....PLAINTIFF

-VERSUS-

PETER KIMONDO MBUTHIA.....1ST DEFENDANT

TRISERVE LIMITED.....2ND DEFENDANT

RULING

1. On **18th July, 2015**, the plaintiff **Murage Mwangi Manja** filed the suit against the defendants **Peter Kimondo Mbuthia** and **Triserve Limited** seeking a declaration that the transfer of land parcel number **Ruguru/Gachika/1525**, (hereinafter referred to as the suit property) to the 2nd defendant on 25th September, 2014 was null and void, cancellation of the 2nd defendant as the proprietor of Rugutu/Gachika/1525 and subsequent registration of the plaintiff as the proprietor of the same, plus costs with interest.
2. Simultaneously with the plaint instituting the suit, the plaintiff filed the notice of motion dated **15th January, 2015** seeking to inter alia, temporary restrain the defendants, agents and or servants from selling, transferring alienating and/or otherwise interfering with the plaintiffs right in anyway on the suit property and that the County Registrar Nyeri and officer in charge Nyeri Police Station ensure compliance with the court order.
3. The motion is premised on the grounds that the plaintiff bought the suit property from the 1st defendant on 19th June, 2013 which was transferred to him on 16th July, 2013 after performing his obligations under the sale agreement executed between them; that the above notwithstanding, the first defendant fraudulently transferred the suit property to the 2nd defendant on 25th September, 2014 who has threatened to sell, transfer and/or alienate the suit property which action unless restrained through the orders herein sought, will render the main suit nugatory.
4. The application is supported by the affidavit of the applicant sworn on **10th July, 2015**. In that affidavit, the deponent has in addition to reiterating the grounds thereon, annexed the sale agreement executed between him and the 1st defendant marked MMM1, application for consent of the Land Control Board marked MMM2(a), letters of consent MMM2(b), transfer MMM2(c), identification documents of the 1st defendant MMM2(d), the plaintiffs identification card and Pin MMM2(e) and photographs MMM3.

5. The 1st defendant through his advocate C.M. King'ori, entered appearance on 21st September, 2015 and filed his defence, witness statement on 26th October, 2015 but did not respond to the motion.
6. In reply to the issues raised in the motion herein, the 2nd respondent filed the replying affidavit sworn by Gathii Wanjiku Gitonga on 10th September, 2015 and grounds of opposition of even date. In his grounds of opposition, the 2nd respondent states that the 2nd respondent is an innocent purchaser; the application has not met the threshold to be granted an injunction; the applicant can be compensated with damages by being refunded his purchase price by the 1st defendant; there is no cause of action between the plaintiff and the 2nd defendant; that the application is frivolous, vexatious, an abuse of the court process and the applicant is guilty of long and inordinate delay. In the replying affidavit, the grounds of opposition are reiterated. In support of his case, the 2nd respondent has annexed a copy of title deed for Ruguru/Gachika/1525 marked GWG1 and a letter dated 25th September, 2012 marked GWG2.
7. When the matter came up for hearing on 15th March, 2017, **Mr. Kingori** counsel for the 1st defendant, stated that he was not opposing the application.
8. Counsel for the plaintiff **Mr. Mwangi** submitted that the plaintiff is a purchaser for value who purchased the suit property, took possession, commenced construction and his name was entered in the green card on 16th July, 2013 but on 30th September 2014, the 2nd defendant was issued with a title deed.
9. In reply, counsel for the 2nd defendant **Mr. Gathiga Mwangi** denied that the applicant was in possession of the suit property. He submitted that the 2nd respondent was the proprietor of the suit property, having been issued with a title deed on 30th September, 2014.
10. He submitted that there was no privity of contract between the plaintiff and the 2nd defendant and the plaintiff should pursue the 1st defendant for refund of any money he had paid to him for purchase of the suit property and the Land Registrar whom he had failed to join as a party.
11. He urged the court to dismiss the application as the applicant had not met the conditions set out in the case of **Giella vs Cassman Brown and Company Ltd.** (1973)E.A

Analysis and determination

12. It is not in contention that the plaintiff and the 1st defendant entered into a sale agreement for purchase of the suit property which was transferred to the plaintiff on 16th July, 2013. It is also common ground that although the said transfer was effected on 30th September 2014, a title deed was issued to Treserve Limited, the 2nd respondent.
13. Turning to the Law applicable to the application, it is settled law that the guiding principles for granting a temporary injunction are as set out in **Giella –Vs- Cassman Brown and Company Ltd (Supra)**. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages and thirdly, if in doubt, the court must assess the balance of convenience.
14. The conditions outlined in the **Giella** case (supra) are sequential “***so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed***” See **Kenya Commercial Finance Company Ltd Vs Afraha Education Society** [2001] 1 E.A. 86 and **Karen Bypass Estate Ltd v. Print Avenue & Company Ltd; Nairobi HCCC No. 284 of 2013 [2014]eKLR**.
15. Has the applicant established a *prima facie* case? In answering this question, I take note of the 1st respondent's admission in his defence that he sold and transferred the suit property to the plaintiff, that he

handed over the title deed to the 2nd defendant as security for settlement of a debt and that the applicant's name had been entered in the green card but was later cancelled.

16. On whether the applicant will suffer irreparable damage if the orders sought are not granted, since it is not in doubt that the plaintiff fulfilled his obligations in the sale agreement between him and the 1st defendant, and taking into consideration that although there is no privity of contract between the applicant and the 2nd respondent who holds a title deed for the suit property, I am of the view that failing to grant the orders sought may lead to the 2nd respondent dealing with the suit property in a manner prejudicial to the applicants beneficial interest therein. It is also noted that the 1st defendant has not demonstrated that he is willing to refund the applicant's purchase price and any other amount that may be decreed against him.

17. In case I am wrong on the question of adequacy of damages as compensation to the applicant, on the question of balance of convenience, I find that the balance of convenience tilts in favour of the applicant who has fulfilled his contractual obligation under the sale agreement between him and the 1st respondent, has demonstrated through the photographs marked MMM 3 that he is in possession of the suit property and that his interest may be compromised if the suit property is not preserved. consequently, I allow prayer 3 in the application.

18. Costs of the application will be in the cause.

Dated, signed and delivered at Nyeri this 13th day of December, 2017.

L N WAITHAKA

JUDGE

Coram:

Mr. Gathega Mwangi for the 2nd respondents

N/A for the plaintiff/applicant and the 1st defendant

Court assistant - Esther