



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 709 OF 2011

ANTOLUC MERCHANTS LIMITEDPLAINTIFF

VERSUS

STEPHEN MBURU KAMAU.....1ST DEFENDANT

The Administrator of the estate of the late

MICHAEL KAMAU MUIGAI.....2ND DEFENDANT

MARY WAMBUI KAMAU.....3RD DEFENDANT

HANNAH WANGUI KAMAU.....4TH DEFENDANT

VIRGINIA NJERI KAMAU.....5TH DEFENDANT

LUCY WANGARI KAMAU.....6TH DEFENDANT

MONICAH MUKAMI KAMAU.....7TH DEFENDANT

VERONICA WANJA NJUGUNA.....8TH DEFENDANT

JOSEPH MUIGAI KAMAU.....9TH DEFENDANT

BONIFACE NJUNGE KAMAU.....10TH DEFENDANT

FRANCIS NJOROGE KAMAU.....11TH DEFENDANT

NICHOLAS MUYA KAMAU.....12TH DEFENDANT

JOSEPH MUIGAI KAMAU.....13TH DEFENDANT

MESHACK MWANGI MBAYU.....14TH DEFENDANT

RULING

At all material times, all that parcel of land then known as **LR No. Limuru/Rironi/4487/4** (hereinafter referred to as **“Plot No. 4487/4”**) was registered in the name of Michael Kamau Muigai, deceased

(hereinafter referred to only as “**the deceased**”). The grant of letters of administration in respect of the estate of the deceased was issued to Veronica Wanja Njuguna, Joseph Muigai Kamau, Boniface Njuguna Kamau, Francis Njoroge Kamau and Nicholas Muya Kamau, the 8th, 9th, 10th, 11th and 12th defendants herein in Thika CMC Succession Cause No. 364 of 1997. The said grant of letters of administration was confirmed on 4th June, 2008. According to the certificate of confirmation of the said grant dated 4th June 2008, Plot 4487/4 was to be shared amongst the defendants herein in various portions. The 1st defendant was entitled to a portion of the said parcel of land measuring 9.765 acres. The other defendants were assigned portions of that parcel of land measuring between 0.5 acres and 3.90 acres. Before Plot No.4487/4 was subdivided so that each of the defendants could get a separate title for his/her portion of the said parcel of land, the defendants held the said parcel of land in undivided shares of various sizes as indicated above.

On 13th March 2009, the plaintiff herein and the 1st defendant entered into an agreement for sale pursuant to which the 1st defendant agreed to sell to the plaintiff a portion of Plot No. 4487/4 measuring one (1) acre at a consideration of Kshs.6,600,000/=. The said agreement was to be completed within 90 days and it was subject to the land control board consent. On the material before me, the Plaintiff performed its part of the agreement while the 1st Defendant failed to do so within the prescribed time.

On 14th December 2011, the Plaintiff filed this suit against the 1st Defendant and “the administrators of the estate of Michael Kamau Muigai” seeking among other reliefs; a declaration that the Plaintiff is the owner of a portion of Plot No. 4487/4 measuring 1 acre which after sub-division became known as **LR No. Limuru/Rironi/4885/1/4** (hereinafter referred to as “**the suit property**”), an order for specific performance of the agreement for sale dated 13th March 2009 by the transfer of the suit property to the Plaintiff and, a permanent injunction restraining the the defendants from selling, pledging, offering for sale, mortgaging, charging or in any other manner disposing of or alienating the suit property.

Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 14th December 2011 seeking among others a temporary injunction to restrain the then Defendants from trespassing onto, occupying, erecting any structures on, selling, disposing or alternating the suit property pending the hearing and determination of this suit. The application was heard ex parte on 14th December 2011 by Koome J. (as she then was) who granted interim exparte order of injunction pending the hearing of the application interparties on condition that the Plaintiff deposits in court as security a sum of Kshs.300,000/= within 14 days. The Plaintiff’s application was opposed by the 1st defendant. On 26th November 2012, the parties agreed to have the application withdrawn and the status quo prevailing then maintained.

What is now before me is a Notice of Motion application by the plaintiff dated 16th February 2015 in which the plaintiff is seeking leave to amend the plaint to add the 3rd to 14th Defendants as parties to the suit and a temporary injunction to restrain the Defendants from trespassing onto, occupying, erecting any structures, selling, pledging or offering for sale mortgaging or in any other manner disposing or alienating the suit property pending the hearing and determination of this suit. The application was brought on the grounds that while this suit was pending hearing and determination, the 1st to 13th Defendants fraudulently sold and transferred the suit property to the 14th Defendant and that it is necessary to preserve the suit property pending the hearing and determination of the suit.

The application was opposed by the 1st and 3rd to 13th Defendants through separate replying affidavits. In his replying affidavit sworn on 6th March 2015, the 1st defendant termed the Plaintiff’s application as an abuse of the process of the court. The 1st Defendant contended that the agreement for sale dated 13th March 2009 which is the basis of the Plaintiff’s claim herein is null and void in that the same was not executed by all the administrators of the estate of the deceased. The 1st defendant contended further that there was no indication in the said agreement for sale that the property that was being sold to the Plaintiff was the suit property. The 1st Defendant contended that he was entitled to rescind the said agreement for sale on account of his inability to perform his part of the bargain. On their part, the 3rd to 13th Defendants

contended through a replying affidavit that was sworn on their behalf by the 9th Defendant that they were not aware of and were not parties to the agreement for sale that was entered into between the Plaintiff and the 1st Defendant. The 3rd to 13th Defendants contended that they are not bound by the said agreement.

When the application came up for hearing before me on 16th September 2015, the parties agreed to argue the same by way of written submissions. All the parties filed their submissions and the same are on record. I have considered the Plaintiff's application and the affidavits that were filed by the defendants in opposition thereto. I have also considered the submissions by the advocates for the parties. Prayer 1 of the application is spent while prayer 2 was granted on 19th March 2015. The prayer that is left for my consideration is the one seeking interlocutory injunction. As submitted by both parties, the principles upon which this court exercises its discretion on applications for interlocutory injunction were laid down in the case of **Giella vs. Cassman Brown Ltd (1973) E.A 358**. In that case, it was held that an applicant for interlocutory injunction must establish a prima facie case with a probability of success against the respondent and demonstrate that unless the application is granted, he stands to suffer irreparable injury which cannot be compensated in damages. If the court is in doubt as to the above, the application would be determined on a balance of convenience.

The Plaintiff's case as set out in its amended plaint, affidavit in support of the application herein and submissions is that, the Plaintiff entered into an agreement for sale with the Defendants in respect of the suit property and that the Defendants have refused to perform their part of the contract although the Plaintiff had taken possession of the suit property and commenced developments thereon. The Plaintiff has contended that the failure by the Defendants to transfer the suit property to it necessitated the filing of this suit. The Plaintiff has contended that during the pendency of this suit, it discovered that the Defendants had transferred the suit property to the 14th Defendant. This is what prompted the present application whose aim is to preserve the suit property. The Plaintiff has contended that the agreement for sale that it entered into with the Defendants is valid and entitles it to the injunction sought. The Plaintiff has submitted that since the ownership of the suit property is in dispute, it is necessary for the suit property to be preserved pending the hearing of the suit. The Plaintiff has submitted that it has established a prima facie case against the Defendants and has also demonstrated that it stands to suffer huge losses which cannot be compensated in damages if the orders sought are not granted. The Plaintiff has submitted further that since the ownership of the suit property is in contention, the doctrine of *lis pendens* bars the Defendants from transferring the suit property during the pendency of the suit. In support of this submission the Plaintiff cited the case of **Komarock View Ltd Vs. Another vs. Bank of Baroda (K) Ltd. & Another [2008]eKLR**.

In their submissions in reply, the 1st and the 3rd to 13th Defendants reiterated the contents of their affidavits that were filed in opposition to the application. The onus was upon the Plaintiff to show that it has a prima facie case with a probability of success against the Defendants. It is not in dispute that Plot No. 4487/4 was at all material times registered in the name of the deceased. It is also not in dispute that as at the time the Plaintiff purported to purchase a portion of Plot No. 4487/4 measuring 1 acre from the 1st Defendant, the duly appointed legal representatives of the deceased to whom a confirmed grant of letters of administration had been issued were the 8th, 10th, 11th, 12th and 13th Defendants. There is also no dispute that the said legal representatives of the deceased were not parties to the agreement for sale that the Plaintiff had entered into with the 1st Defendant.

It is also not in dispute that upon confirmation of grant of letters of administration dated 4th June 2008 that was issued to the 8th, 10th, 11th, 12th and 13th Defendants, Plot No. 4487/4 was to be shared amongst all the Defendants in various undefined portions which varied in measurement from 0.5 acres to 9.765 acres. It is also not in dispute that in addition to the 8th, 10th, 11th, 12th and 13th Defendants, the 3rd to 7th Defendants were also not parties to the agreement for sale that the Plaintiff had entered into with the 1st Defendant.

It is clear from the foregoing that the administrators of the estate of the deceased were not bound by the agreement for sale dated 13th March 2009 that the Plaintiff had entered into with the 1st Defendant. The said administrators were therefore free to decide the manner in which they were to sub-divide or share Plot No. 4487/4 amongst the beneficiaries of the estate of the deceased. I have noted from the record that the administrators of the estate of the deceased caused Plot No. 4487/4 to be sub-divided and one of the portions or subdivisions thereof was given land reference No. 4885/114 (“**the suit property**”) and registered in the names of the 1st and the 3rd to 13th Defendants on 25th July 2011. Although the suit property was registered in the names of the 1st and the 3rd to 13th Defendants on 25th July 2011 before this suit was filed on 14th December 2011, the Plaintiff did not join the 3rd to 13th Defendants in this suit as parties. The Plaintiff sued the 1st defendant and an amorphous entity it referred to as “the administrators of the estate of the late Michael Kamau Muigai.”

On 1st December 2014, the 1st and 3rd to 13th Defendants as the registered owners of the suit property transferred the same to the 14th Defendant. The suit property is only a small portion measuring 0.3999 ha. of the original Plot No. 4487/4. It is in fact less than the 1 acre portion of Plot No. 4487/4 that was sold to the Plaintiff by the 1st defendant. I am unable to see anything unlawful or irregular in the transfer of the suit property to the 1st and 3rd to 13th Defendants that was effected by the administrators of the estate of the deceased. The 1st and 3rd to 13th Defendants were entitled to the said parcel of land pursuant to the grant of letters of administration that was issued in succession cause No. 364 of 1997 aforesaid. As I have stated above, the administrators of the estate of the deceased were not parties to the agreement that was entered into between the Plaintiff and the 1st Defendant and were not bound by the terms hereof. Once the suit property was transferred to them as part of their inheritance from the estate of the deceased, the 1st and 3rd to 13th Defendants were at liberty to deal with the same in whatever manner they deemed fit including selling the same.

The 1st Defendant in my view could not compel his co-proprietors of the suit property, the 3rd to 13th Defendants to transfer the same to the Plaintiff. The 3rd to 13th Defendants were not bound by the agreement for sale between the Plaintiff and the 1st Defendant. The 3rd to 13th Defendants cannot therefore be faulted for having sold the suit property to the 14th Defendant. There is no evidence before this court that the sale of the suit property to the 14th Defendant was carried out fraudulently. Fraud requires strict proof. Apart from pleading fraud, no evidence has been placed before the court in proof thereof. It is settled law that allegations of fraud must be specifically pleaded and strictly proved on a standard which is higher than on a mere balance of probabilities. See **Koinange & 13 others vs. Koinange (1986) KLR 23** and **Urmila w/o Mahendra Shah vs. Barclays Bank International Ltd & Another (1979) KLR 76**. I have also noted that the agreement for sale between the Plaintiff and the 1st defendant was subject to the land control board consent. There is no evidence that such consent was obtained within the prescribed period of 6 months. In the absence of such consent, the agreement became null and void for all intents and purposes.

I am of the view that I have said enough to show that the Plaintiff has not established a prima facie case with a probability of success against the Defendants. That being my view of the matter, it is not necessary for me to consider whether the Plaintiff would suffer irreparable injury if the orders sought are not granted. For the foregoing reasons, I find no merit in the application dated 16th February 2015. The application is accordingly dismissed save for prayer 2 thereof which had already been granted. The costs of the application shall be in the cause.

For the interest of justice and with a view to preserve the suit property, there shall be an order of inhibition inhibiting the registration of any other or further dealings with the suit property namely, LIMURU/RIRONI/4885/114 until the hearing and determination of this suit or further orders by the court.

Delivered, Dated and Signed at Nairobi this 29th day of January, 2016

S. OKONG'O

JUDGE

In presence of

N/A for the Plaintiff

N/A for the 1st Defendant

Ms. Maina h/b for Kanyi for the 3rd to 13th Defendants

N/A for the 14th Defendant