



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 648 OF 2015

MAURICE INGOI.....PLAINTIFF

VERSUS

JOSIAH MACHARIA.....1STDEFENDANT

LANDAN MBOTE HUTHU.....2ND DEFENDANT

RULING

What I have before me is the Plaintiff's application dated 7th July 2015 in which the Plaintiff has sought a temporary injunction to restrain the Defendants from trespassing on, letting, leasing, encroaching, interfering with or otherwise dealing with all those parcels of land known as Plot No. 63 and Plot No. 68 Komarock pending the hearing and determination of this suit. The Plaintiff has also sought an order of a temporary injunction to restrain Court Star Auctioneers from evicting the tenants on the said parcels of land pending the hearing and determination of this suit.

The application which is supported by the affidavit of the Plaintiff sworn on 7th July 2015 has been brought on the grounds that the Plaintiff is the owner of all those parcels of land known as Plot No. 63 and Plot No. 68, Komarock (hereinafter jointly referred to as "**the suit properties**") where the context so admits). The Plaintiff has contended that sometimes in the year 2012, he entered into an agreement for sale with the Defendants under which he agreed to sell and the defendants agreed to purchase from him the suit properties at a consideration of Kshs.1,200,000/= with each plot being sold at Kshs.600,000/=. The Plaintiff has contended that the defendants only paid a total sum of Kshs.590,000/= of the total purchase price of Kshs.1,200,000/= leaving a balance of Kshs.610,000/= due and payable. The plaintiff has contended that as a result of this development, he considered the contract as having been rescinded and decided to refund to the Defendants the amount which they had paid towards the purchase of the suit properties; a process which is ongoing. The Plaintiff has also contended that despite the fact that he has refunded to the Defendants the purchase price which was paid for the suit properties, the Defendants have been interfering with the said properties.

The Plaintiff has contended that Defendants have issued notices to the Plaintiff's tenants on the suit properties to vacate the same and have also instructed Court Star Auctioneers to evict those tenants who have defied the notices aforesaid.

The Plaintiff's application was opposed by the Defendants through a replying affidavit sworn on 14th September 2015 by the 1st Defendant, Josiah Macharia. In their replying affidavit, the Defendants have contended that Plot No. 63 and Plot No. 68, Komarock were sold to them by the Plaintiff under two separate transactions. The Defendants have averred that Plot No. 68 was sold to them by the Plaintiff at a consideration of Kshs.600,000/= on 26th April 2012 which amount they paid to the Plaintiff in full. The

Defendants have averred that upon the execution of the agreement for sale and the payment of the purchase price in full and aforesaid, the Plaintiff executed an irrevocable special power of attorney in their favour to enable them have the said Plot No. 68 transferred to their names. The Defendants have averred that they ultimately caused the said plot to be transferred to their joint names. With regard to Plot No. 63, the Defendants have contended that the same was offered to them for sale by the Plaintiff at a price of Kshs.600,000/= which amount was to be used by the Plaintiff to set off part of a debt amounting to Kshs,1,062,170/= that was owed by the Plaintiff to the Defendants for goods and services that the Defendants had supplied to the Plaintiff in respect of certain contractual obligations which the Plaintiff owed to Total Kenya Ltd. part of which it sub-contracted to the Defendants.

The Defendants have contended that after the Plaintiff had agreed to transfer of Plot No. 63 to them as aforesaid, a sum of Kshs.462,170/= remained due and payable by the Plaintiff to them. The Defendants have contended that the payments which the Plaintiff has claimed to have been making to them as a refund of the purchase price of Kshs.590,000/= which they had allegedly paid to the Plaintiff was actually being made towards the settlement of the said sum of Kshs.462,170/= that was owed by the Plaintiff to the Defendants. The Defendants have averred that the total amount that has been paid to them by the plaintiff in reduction of that debt amounts to Kshs.372,000/=. The Defendants have averred further that the Plaintiff has since become elusive and has frustrated their effort to transfer Plot No. 63 to their names as had been agreed. The Plaintiff is said to have refused to provide the relevant documents of title in proof of his ownership of the said plot. The Defendants have contended that this suit has been motivated by fraud, malice and blind greed on the part of the Plaintiff.

When the application came up for hearing on 27th October 2015, Mr. Malinzi appeared for the plaintiff and Mr. Muchoki for the Defendant. In his submissions in support of the application, Mr. Malinzi to a large extent reiterated the contents of the Plaintiffs affidavit in support the application. Contrary to the Plaintiff's contention in the plaint and in his affidavit in support of the application herein, Mr. Malinzi submitted that the plaintiff sold to the Defendants only one parcel of land namely, Plot No. 68. He submitted that Plot No. 63 belongs to the Plaintiff's wife and as such was not sold by the Plaintiff to the Defendant. Counsel submitted that the Defendants failed to pay the purchase price for Plot No. 68 in full and this is when the Plaintiff decided to rescind the agreement and refund the payments that had already been made to him.

Counsel submitted that although the Defendants received the refund unconditionally, they continued to lay a claim over the suit properties and proceeded to instruct auctioneers to evict the Plaintiff's tenants from Plot No. 68. Mr. Malinzi submitted that the Plaintiff did not give the Defendants a power of attorney as alleged and contended that Plot No. 68 risks being wasted by the Defendants unless the orders sought are granted.

Counsel submitted that the Defendants' claim over the suit properties is based on the agreement that the Defendants entered into with an entity known as Mimar Engineering Services Ltd. which entity does not own any of the suit properties.

In reply, Mr. Muchoki submitted that the Plaintiff has not demonstrated his ownership of Plot No. 68. Counsel submitted that the Plaintiff sold to the Defendants Plot No. 68 on a willing buyer, willing seller basis. He conceded that it is only Plot No. 68 that was sold to the Defendants. He submitted that the Plaintiff has admitted to receiving a sum of Kshs.590,000/= as purchase price for Plot No. 68. Counsel submitted that no evidence has been placed before the court showing that the Defendants breached the agreement for sale that they entered into with the Plaintiff in respect of Plot No. 68. He submitted that Plot No. 68 has already been transferred to the Defendants. Counsel submitted that the Plaintiff has not established a prima facie case against the defendants.

I have considered the Plaintiff's application together with the affidavit in support thereof. I have also considered the replying affidavit by the Defendants and submissions by counsels. The principles upon which this court exercises its discretion in applications for interlocutory injunction were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) E. A. 358**. In that celebrated case, it was held that an applicant for interlocutory injunction must establish a prima facie case against the respondent with a

probability of success and must also demonstrate that he stands to suffer irreparable injury which cannot be compensated in damages if the order is not granted. If the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the Court of Appeal case of **Mrao Vs. First American Bank of Kenya Ltd. & 2 others (2003) KLR 125**, a prima facie case was defined as:

“A case which on the material presented to court a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”

The Plaintiff's case as pleaded in the plaint dated 7th July 2015 is that he was at all material times and still is the bona fide proprietor of Plot No. 63 and Plot No. 68 which are situated at Komarock, Nairobi. The Plaintiff contended that he sold the two parcels of land to the Defendants at Kshs.1,200,000/= out of which he received only Kshs.590,000/=. The plaintiff contended that as a result of the Defendants breach of the agreement for sale, he rescinded the contract and decided to refund to the Defendants the said sum of Kshs.590,000/=. The Plaintiff's case is that despite of the Defendants' breach of the said agreement for sale and unconditional receipt of the refund of the purchase price, the Defendants are still laying a claim to the two parcels of land and have sought to evict the Plaintiff's tenants therefrom. In his affidavit in support of the application for injunction, the Plaintiff has not annexed a copy of the agreement for sale that he entered into with the Defendants in respect of Plot No. 63 and Plot No. 68. The Plaintiff has also not placed adequate evidence before the court in proof of the refund of Kshs.590,000/= that he has admitted to have been paid to him on account of the purchase price by the Defendants. Most of the documents annexed to the Plaintiff's affidavit as evidence of payment of the alleged refund are not legible. The Plaintiff has also not placed before the court any evidence of the alleged rescission of the purported agreement for sale that he entered into with the Defendants in respect of Plot No. 63 and Plot No. 68.

In reply to the application, the Defendants contended that the plaintiff only sold to them Plot No. 68 for Kshs.600,000/= which amount was paid to the plaintiff in full. The Defendants contended that the Plaintiff has acknowledged receipt of a sum of Kshs.590,000/= out of the said sum of Ksh.600,000/= that was paid by the Defendants to the Plaintiff on account of the purchase price of the said parcel of land. The Defendants have contended that following the said agreement for sale, Plot No. 68 has been transferred to their names and the same no longer belongs to the Plaintiff. As concerns Plot No. 63, the Defendants have contended that the same was to be transferred to them by the Plaintiff in part settlement of a debt of Kshs.1,062,170/= which was owed to them by the Plaintiff from a separate business transaction.

The Defendants have contended that the payments that were made by the Plaintiff to them in the total sum of Kshs.372,000/= which the Plaintiff claims to be part of the refund of the purchase price of Kshs.590,000/= were actually payments made on account of the said debt of Kshs.1,062,170/=. The Defendants placed before the court a copy of the agreement for sale in respect of Plot No. 68 which they entered into with the Plaintiff, a copy of an irrevocable power of attorney which the Plaintiff executed in their favour in respect of Plot No. 68, copies of L.P.O's and correspondence showing that they had another business transaction with the Plaintiff in respect to which the Plaintiff admitted being indebted to them to the tune of Kshs.614,257 and copies of statements showing that the Plaintiff had paid to them Kshs.372,000/= on account of the debt that he owed.

Faced with these materials, the Plaintiff who did not file a supplementary affidavit to controvert the contents of the replying affidavit by the Defendants admitted in his submissions that it is only Plot No. 68 that he had sold to the Defendants. He claimed that Plot No. 63 belongs to his wife and that the business transaction on account of which the Defendants have claimed Kshs.1,062,170/= from him concerned a limited liability Company. The Plaintiff's advocate also denied from the bar that the Plaintiff did execute a power of attorney in favour of the Defendants.

From the material before me, I am not satisfied that the Plaintiff has established a prima facie case against the defendants with a probability of success. I have found the Plaintiff's case as presented vague and inconsistent. The Plaintiff had a duty to demonstrate that he is the owner of the suit properties and that

the Defendants have without any lawful justification entered or intruded upon the same. There is no material before me showing that the plaintiff is the current owner of the suit properties.

The documents before the court do not show the owner of Plot No. 63 which the Plaintiff has claimed on one hand to belong to him and on the other to his wife. As for Plot No. 68, the evidence before the court shows that the same was sold by the Plaintiff to the Defendants and that the same has been transferred to the names of the Defendant by the Nairobi City County Government. The Defendants cannot therefore be said to be trespassing on a property which was sold to them and in respect of which they have paid the full purchase price and the property transferred to them. I have no evidence before me that the agreement for sale in respect of Plot No. 68 was rescinded and that the Plaintiff has refunded the purchase price to the Defendants.

The Plaintiff having failed to establish a prima facie case, it is not necessary for me to consider whether or not the Plaintiff stands to suffer irreparable injury if the orders sought are not granted. In conclusion, I

find no merit in the application dated 7th July, 2015. The same is accordingly dismissed with costs to the defendants. For the avoidance of doubt the dismissal of the application shall not entitle the Defendants to enter Plot No. 63 which belongs neither to the Plaintiff nor the Defendants.

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

S. OKONG'O

JUDGE

In presence of

Mr. Kimathi holding brief for Malinzi for the Plaintiff

Mr. Ombete holding brief for Gichuki for the Defendants