



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1081 OF 2013

JEREMIAH MWAURA MITHANGA..... 1ST PLAINTIFF

JOHN GITHENYA MUCICU 2ND PLAINTIFF

VERSUS

NJOROGE KURIA JOSEPHDEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 10th September 2013 in which the Plaintiffs/Applicants are seeking for an order of temporary injunction restraining the Defendant/Respondent from transferring the parcel of land known as Muguga/Jet Scheme/3211 (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Plaintiff, Jeremiah Mwaura Mithanga, sworn on 10th September 2013 in which he averred that on 10th March 2009, the Defendant and he entered into a written sale agreement with the 2nd Plaintiff for the sale of the suit property. He further stated that the suit property was registered in the name of Esther Nyambura Mucicu who is the mother of the 2nd Plaintiff. He further stated that the suit property was vested solely in the 2nd Plaintiff. He stated further that the agreed consideration was Kshs. 1,430,000/- of which they jointly paid Kshs. 370,000/- leaving a balance of Kshs. 1,060,000/-. He further averred that they continued paying the balance and by 25th July 2013 were remaining with a balance of only Kshs. 45,000/-. He stated that he and the Defendant bought the suit property jointly and in equal shares and he has been in occupation since 2009. He stated that it has now come to his knowledge that the Defendant has fraudulently transferred the suit property into his name to his exclusion. He annexed a Certificate of Official Search to support that assertion. He further stated that he immediately lodged a caution on the suit property. He also stated that his advocates wrote to the Defendant on 17th July 2013 requesting him to allocate him with his half share thereof, which letter the Defendant has not responded to till now. He further added that he has come to learn that the Defendant in connivance with others duped the 2nd Plaintiff’s mother to sign the transfer form in his favour which he substituted with the one signed in favour of both of them. He further stated that it is now highly likely that the Defendant would transfer ownership of the suit property to third parties and if the order is not made he stands to suffer irreparable loss and damage.

The Application is contested. The Defendant, Njoroge Kuria Joseph filed his Replying Affidavit sworn on 23rd September 2013 in which he averred that indeed, he is the registered proprietor of the suit property which he acquired for valuable consideration. He annexed a copy of his title deed in support of this assertion. He stated further that he does not hold the suit property either as a trustee for anybody or in partnership with the 1st Plaintiff. He stated further that prior to purchasing the suit property, he conducted a search at the lands office in Kiambu and confirmed that the same was duly registered in the name of Esther Nyambura Mucicu as an absolute proprietor and not as a trustee. He confirmed that the said Esther Nyambura Mucicu was the mother of the 2nd Plaintiff but was not registered as a trustee for the 2nd Plaintiff nor was she in partnership with the 2nd Plaintiff. He further conceded that on or about 10th March of 2009, he and the 1st Plaintiff entered into an agreement for sale with the 2nd Plaintiff whereby it was agreed that they would purchase the suit property from the 2nd Plaintiff at an agreed price of Kshs. 1,430,000/-. He stated further that on execution of the said agreement for sale, he paid to the 2nd Plaintiff a sum of Kshs. 190,000/- and thereafter Kshs. 200,000/- while the 1st Plaintiff did not pay any money whatsoever. He stated further that it was a term of the said agreement for sale that the balance in the sum of Kshs. 1,060,000/- would be paid within 120 days which was the completion period. He further stated that unknown to them there was a reference filed at the Land Disputes Tribunal at Kikuyu being Tribunal Reference Number KW/LND/9/6/3/2008 by one Hannah Muthoni Wangengi against her mother in law Esther Nyambura Mucicu over the original title Muguga/Jet Scheme/506. He further stated that after the Tribunal's award was delivered, the Claimant, Hannah Muthoni Wangengi filed an appeal at the Provincial Appeals Tribunal at Nyeri. He stated that upon learning of the said appeal, the 1st Plaintiff withdrew from the said purchase and refused to pay any money which was being requested for by Esther Nyambura Mucicu to enable her defend herself at Nyeri before the Provincial Land Disputes Appeals Tribunal. He stated that on his part, he gave all the money required until the completion of the matter. He added that the 1st Plaintiff found it was risky to pay any purchase price then when there was a case pending whose outcome was unknown. Regarding the said Sale Agreement dated 10th March 2009, he stated that the vendor who is the 2nd Plaintiff had no legal capacity to sell to them the suit property, that 2nd Plaintiff has no capacity to sign the application forms for the Land Control Board and that the 2nd Plaintiff had no capacity to sign the transfer documents to vest the ownership of the suit property to them. He said that consequently, that agreement for sale is of no value whatsoever. He further stated that the 1st Plaintiff did not contribute anything towards the purchase due to the pending case before the Tribunal at Nyeri. He stated further that the 1st Plaintiff subsequently purported to pay money to the 2nd Plaintiff according to his Exhibit "JMM2" long after the title was issued to him as the purported payment was made on 25th July 2013, 3 days after he carried out a search on the suit property and must therefore have known that the suit property is in his name. He further added that when he and Esther Nyambura Mucicu were signing the application forms for the Land Control Board, all the family members of the 2nd Plaintiff were present and the 1st Plaintiff was also present but he did not raise any objection as he had no interest in the suit property. He further stated that when they attended the Land Control Board, the 1st Plaintiff was present and did not raise any objection to the suit property being transferred to him. He confirmed having paid the 2nd Plaintiff a sum of Kshs. 1,119,700/- leaving a balance of Kshs. 310,300/- which he tried to pay but was informed that the 2nd Plaintiff's bank account was dormant and needed to be reactivated first. He further confirmed that the 1st Plaintiff has never been in possession of the suit property. He further added that he was not aware of any payments of the purchase price by the 1st Plaintiff to the 2nd Plaintiff.

Both the Plaintiffs and the Defendant filed their written submissions.

I am required to determine whether the Plaintiffs/Applicants are entitled to an order of temporary injunction pending the hearing and determination of this suit which they seek. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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 latter.”

It is conceded by both the Plaintiffs and the Defendant that the suit property was registered in the name of Esther Nyambura Mucicu, who is the mother of the 2nd Plaintiff. At no time whatsoever was the suit property registered in the name of the 2nd Plaintiff. Accordingly, the agreement for sale dated 10th March 2009 exhibited by the 1st Plaintiff and marked “JMM1” between the Plaintiffs and the Defendant would appear to be of no legal effect. The 2nd Plaintiff was not the legal owner of the suit property and could therefore not purport to transfer the same to the 1st Plaintiff and the Defendant as purported therein. Further, no written agreement has been exhibited in which Esther Nyambura Mucicu, the registered owner of the suit property, agreed to sell the suit property to the 1st Plaintiff. The law on the issue of disposition of an interest in land is very clear. The **Law of Contract Act** at **section 3(3)** clearly indicates as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- a. **The contract upon which the suit is founded**
 - a. **Is in writing**
 - b. **Is signed by all the parties thereto: and**
- b. **The signature of each party signing has been attested by a witness who is present when the contract was signed by such party...”**

Going by these legal provisions, the 1st Plaintiff cannot claim any interest in the suit property as he did not enter into a contract for the sale thereof with Esther Nyambura Mucicu.

It is also conceded by the 1st Plaintiff that the suit property is now registered in the name of the Defendant but the 1st Plaintiff contends that the transfer to the Defendant was fraudulent. The Defendant has exhibited a copy of his title deed to the suit property which was issued on 15th April 2011. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

The 1st Plaintiff alleges that the transfer of the suit property to the Defendant was effect by way of fraud. The standard of proof in fraud is a higher balance of probability but falls short of proof beyond reasonable

doubt. In the case of **Koinange & 13 others –vs- Koinange (1986) KLR 23** the Judge relied on the decision in the **Ratilal Patel v Lalji Makanji [1957] EAR 314-317** and held as follows,

“There is one observation which we must make- burden of proof – standard of proof required – allegations of fraud must be strictly proved, although that standard of proof may not be so heavy as to require proof beyond reasonable doubt. Something more than a balance of probability is required”

Even at this interlocutory stage of the proceedings, I have not seen any evidence produced by the Plaintiffs that goes to establish that the transfer of the suit property to the Defendant was effected by way of fraud other than the bland statement in his Supporting Affidavit. On the other hand, the Defendant has gone to great length to demonstrate how he came to be the registered proprietor of the suit property. He has conceded that he entered into the agreement for sale with the Plaintiffs where the intention was for he and the 1st Plaintiff to acquire the suit property jointly. He has explained that the 1st Plaintiff pulled out of the transaction due to the uncertainty arising from the disputes before the Land Disputes Tribunal and the Provincial Land Disputes Appeal Tribunal. The Defendant has explained, quite credibly, that when these disputes were resolved, Esther Nyambura Mucicu transferred the suit property to him as he had supported her financially during this period. I do not see any fraud there. To the contrary, I consider that the Plaintiffs have failed to convince this court that the Defendant is guilty of any fraud. The Plaintiffs have not discharged the burden of proof for their allegation of fraud. Arising from this, I find that the Plaintiffs have not established that they have a prima facie case with high chances of success at the main trial.

Since the Plaintiffs have failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application with costs to the Defendant.

DELIVERED AND SIGNED IN NAIROBI THIS 4TH DAY OF MARCH 2016.

MARY M. GITUMBI

JUDGE