



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 28 OF 2016

GIDEON WAWERU KIRIMO APPLICANT

VERSUS

JOSEPH SAWENJA WANINGILO RESPONDENT

RULING

1. The Applicant **Gideon Waweru Kirimo** filed a notice of motion in which he seeks a temporary injunction against the defendant/respondent in the following terms:-

“That pending the hearing and determination of the suit herein this honourable court be pleased to issue a temporary injunction to restrain the defendant his agents, employees or any other persons acting for or on his behalf whatsoever from ingressing, trespassing, leasing, wasting, ploughing, cultivating, remaining on or continuing in occupation of or carrying out any operations and/or activities of any nature or doing any such nature of things whatsoever on the plaintiff's land known as LR. No. Kwanza/Maridadi/67 registered in the names of the plaintiff”.

2. The applicant avers that on **29/5/2004** he entered into an agreement with the respondent in which he sold **5.3 acres** comprised in his plot which was then known as **Plot No. 67** at **Maridadi Settlement Scheme**. The plot has since been registered as **LR. No. Kwanza/Maridadi/67** (Suitland). The purchase price was **Kshs.85,000/= per acre** making a total of **Kshs.450,500/=**. The respondent paid **Kshs.380,000/=** and the balance was **Kshs.70,500/=** which the respondent has declined and or refused to pay.

3. The applicant contends that he has since written to the respondent communicating his intention to rescind the agreement and has called upon the respondent to collect his refund but which the respondent has refused to do. It is on this basis that he prays for an injunction against the respondent.

4. The respondent has opposed the application through replying affidavit sworn on **22/2/2016** and grounds of opposition filed in court on **25/2/2016**. The respondent contends that the applicant's application is misconceived and does not meet the threshold for grant of injunction. The respondent contends that he is the one in possession of the suitland and that he is not in breach of the agreement. That it is the applicant who has refused to take the balance of **Kshs.70,500/=**. That the best order to be granted in the circumstances is an order for status quo pending the hearing and determination of the suit.

5. I have considered the applicant's application as well as the opposition thereto by the respondent. For an injunction to be granted, the applicant has to show that he has a prima facie case with probability of success. An injunction will not normally be granted unless it is shown that the applicant will suffer loss which will not be compensated in damages. If the court is in doubt, it will decide the application on

a balance of convenience. *See Giella -vs- Cassman Brown Co. Ltd [1973] E.A 358.*

6. In the instant case, there is no contention that there was an agreement for sale made in **2004**. It is the respondent who is in possession. The applicant sold his entire interest in the land and went and settled elsewhere. The respondent was put in possession in **2004**. The applicant obtained title in his name in **2014**. As at **2014**, he was still willing to have the balance of the purchase price. Though he says that the respondent has refused to clear the balance, the respondent on the other hand contends that it is the applicant who has refused to take the balance.

7. The purchase price was not inclusive of the developments on the land. The developments were to be valued and paid for separately. There is no evidence that such valuation was done and the respondent asked to pay and that he refused. Without such evidence, I do not find that the applicant has demonstrated that he has a prima facie case with probability of success.

8. I now move to consider whether the applicant will suffer loss which will not be compensated in damages. There is no loss which the applicant will suffer which will not be compensated in damages. The applicant has already had the suitland registered in his name. The property is not in any danger of being sold. If it turns out that the respondent is in breach of the agreement, and that it had been validly revoked, then any loss resulting from that breach is quantifiable and can be paid.

9. What about the balance of convenience? There is evidence that it is the respondent who is in possession. If the injunction was to be granted, it will amount to granting a mandatory order whose effect is to remove the respondent from the suitland. This is not the purpose of a temporary injunction. The balance of convenience tilts in favour of the respondent who is in possession. The upshot of this is that I find that the applicant's application for injunction is not merited. The application is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this **26th** day of **April, 2016**.

E. OBAGA

JUDGE

In the presence of Mr. Yano for Mr. Teti for Applicant.

Court Assistant – Winnie.

E. OBAGA

JUDGE

26/4/2016