



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT KISUMU
LAND CASE NO.41 OF 2015

GEORGE TED OSEWE ODERO.....1ST
PLAINTIFF

NAFTALI ARODI OYUGI2ND
PLAINTIFF

CATHERINE ODERO.....3RD
PLAINTIFF

(Suing as the office bearers of LAKELAND WELFARE CLUB)

VERSUS

PAULINE ADHIAMBO RAGET.....1ST
DEFENDANT

DEBRA OJANY MALLOWA.....2ND
DEFENDANT

ROBERT OCHOLA3RD
DEFENDANT

LAND REGISTRAR KISUMU COUNTY.....4TH
DEFENDANT

THE HON. ATTORNEY GENERAL5TH
DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....6TH
DEFENDANT

RULING

1. George Ted Osewe Odero, Naftali Arodi Oyugi, and Catherine Odero [Suing as office bearers of Lakeland Welfare Club] filed the notice of motion under certificate of urgency dated 3rd February 2015 seeking for injunction order to restrain the Defendants and an inhibition order assistant Kisumu/Fortternan/516 pending the hearing and determination of this application. In the alternative the Plaintiff prays for an order of injunction against Kisumu/Fortternan/1129 and transfer of Kshs4,905,000/= deposited by 1st Defendant into the plaintiff's account to the court pending the hearing and determination of this application. The Plaintiff also prays for costs. The application is stated to be brought under Article 159 (2) (d) of the Constitution, Section 1A, 1B and 3A of the Civil Procedure

Act, Order 40 Rule 1 and 2 of the Civil Procedure Rules, Section 3 and 13 of the Environment and Land Court Act, Section 76 of the Land Registration Act, Practice Directions in |Gazette Notice No.5178 of 25th July 2014. It is based on the six grounds on the Notice of motion and supporting affidavit jointly sworn by the Plaintiffs on 3rd February 2015 in which they deponed to the following among others.

- a) That they entered into a land sale agreement over **Kisumu/Forsternan/516** and **518** with the 1st Defendant and paid the whole purchase price of Kshs.4,950,000/.
 - b) That they obtained the statutory consents and took possession, but before they could register the transfers, they learnt that the 1st Defendant had transferred the two parcels to the 2nd and 3rd Defendants.
 - c) That the 2nd and 3rd Defendants have taken possession of the two parcels, consolidated the titles and are in the process of charging them with the 6th Defendant.
 - d) That the 1st Defendant has secretly deposited Kshs.4,905,000/= which is an amount equal to the purchase price they had paid in their account.
2. That the plaintiff's counsel appeared before the court on 19th February 2015 and the application was certified urgent and temporary injunction in terms of prayer (b) was granted pending interpartes hearing.
3. The application is opposed by the 1st Defendant through her replying affidavit sworn on 14th April 2015, in which she depones to the following, among others;
- a) That after the plaintiffs failed to pay the balance of the purchase price in breach of their sale agreement dated 29th September 2010, she sold the lands to the 2nd and 3rd Defendants and informed the 2nd Plaintiff accordingly in June 2013.
 - b) That she offered to refund the purchase price received but the 2nd Plaintiff asked to be allowed to discuss with the other members first.
 - c) That in January 2014, the 2nd Plaintiff informed her that the matter had been referred to the Criminal Investigation Department and after failing to receive direction on how to refund the purchase price received, she transferred the whole amount of Kshs.4,905,000/ to the Plaintiffs account. The 1st Defendant then served a letter terminating the contract and copy of the Bank transfer (R.TGS) on Professor Oyuko Mbeche.
4. The 6th Defendant also opposed the application through the ground of opposition dated 17th June 2015 summarized as follows:
- a) That plaintiffs have acknowledged refund of the money paid and the 2nd and 3rd Defendant right to use the suit land is protected by the Land Registration Act and the Constitution.
 - b) That the agreement between the plaintiffs and 1st Defendant was rescinded by conduct and the application is incompetent, frivolous, misconceived and ought to be dismissed with costs.
5. The 2nd and 3rd Defendants opposed the application through the replying affidavit sworn by the 3d Defendant on 12th may 2015 in which he among others depones as follows;
- a) That the 2nd Defendant and himself are the registered proprietors of the two suit properties having bought them from the 1st Defendant.
 - b) That they did due diligent and confirmed that the 1st Defendant was indeed the registered proprietor of the two parcels before buying the same.

c) That they obtained the consent of the Land Control board as required and there was no fraud involved in their transaction.

d) That the plaintiffs have not established a case for issuance of injunctive orders.

6. The counsel for the parties appeared before the court on the 18th June 2015 and consented to have the application dealt with through written submissions. The plaintiffs counsel submission dated 2nd October 2015 were filed on 5th October 2015. The 1st Defendant counsel's submission dated 6th November 2015 were filed on 9th November 2015 while that of the 6th Defendant's counsel dated 11th November 2015 was filed on 12th November 2015. The submission by counsel for 2nd and 3rd Defendants dated 21st October 2015 were filed on 4th November 2015. The summaries of the submissions are as follows:

a) **PLAINTIFFS' SUBMISSIONS:**

That the plaintiffs have come within the legal principles in **Giella -V- Cassman Brown** [1973] E.A 358 and **Suleiman -V- Amboseli Resort Ltd** 2004 2 KLR 289 and should have the orders sought issued in their favour as they had performed as required of them under the agreement of sale with the 1st Defendant. That the titles acquired by the 2nd and 3rd Defendant did not confer good title to them, as they are impeachable under **Section 26(1) (b) of the Land Registration Act No.3 of 2012**. the counsel referred to the following decided cases:

(i) **Elijah Makori Nyangwira -V- Stephen Mugai Njuguna & another (2003) eKLR**

(ii) **Paskal Ouma Mudaki & 3 others V- Habil Ndisi & 10 others [2014] eKLR**

(iii) **Esther Ndegi Njiru & Another -V- Leonard Gateri (2004) eKLR**

(iv) **Kenya Industrial Estate Ltd -V- Ann Chepsiter & 5 others (2015) eKLR**

The counsel submitted that the above decisions support his submissions that where title has been acquired illegally, unprocedurally or through corrupt scheme, it is impeachable no matter that the holder is an innocent purchase for value. The counsel also referred to the case of **Kenya Anti-Corruption Commission -V- Ahmed Karama said & 2 others** and **Alberta Mao Gachie -V- 4 others** (2006 eKLR) in support of his submissions that a person who has acquired a title to land illegally or in flagrant breach of the statute law cannot pass get title even to an innocent buyer for value and such innocent purchaser cannot claim indefeasible title.

That the Plaintiffs cannot be compensated in damages and would suffer irreparable loss if the orders sought are not granted. The counsel referred to the case of **Mohamed -V- Commissioner of Land & 4 Others KLR** cited in **Purity Wanjiku Nderitu & Another -V- Humphrey Wangombe Kahariri & Another** 2013 and **Jai Super Power Cash & Carry Ltd -V- Nairobi County Council Civil Appeal No.111 of 2002 cited with Approval in Juddy Matetai -V- James Charo [2015] eKLR**.

b) **1ST DEFENDANT'S SUBMISSIONS:**

That the plaintiffs failed to honour the sale agreement dated 29th September 2010 by failing to pay the whole purchase price by 29th December 2010 and after several false promises, she terminated the contract by issuing notice. That on noticing that the title for parcel **Kismu/Forsternan/516** was missing from her documents, she followed the legal processes required and was issued with a provisional title which she then used to sell the same land to 2nd and 3rd Defendants. That upon selling the land to the 2nd and 3rd Defendants she returned the money she had received from the Plaintiffs plus Sh.30,000 for miscellaneous expenses and notified them.

The counsel submitted that the plaintiffs have failed to establish a *prima facie* case and referred to the following cases:

(I) **Giella -V- Cassman Brown & Co. Ltd (1973) E.A 358**

(ii) **Leonard Nzioka Mweke – Edward Mutula & 2 others** {2015} eKLR in which the case of **Mrao Ltd -V- First American Bank of Kenya & 2 others** (2003)KLR 123. That the plaintiffs' have not proved that they paid the full purchase price within 90 days as agreed in the sale agreement pointing out that after the payment of Sh.3,600,000/= on 19th November 2010, the rest was paid from 16th March 2011 to 7th August 2013 and the balance of Sh.45,000/= was still outstanding. That the sale of the lands to 2nd and 3rd Defendants was not fraudulent. The counsel referred to the case of **Mitimitu M'mwitithirwa -V- Diocese of Meru & Another** (2009) eKLR in which the case of **R.G. Patel -V- Lalji Makanji** (1957) E A was cited in his support of his submissions that the allegations of fraud must be strictly proved to a level of more than balance of probabilities and that the plaintiffs has not offered such proof as against the 1st Defendant. That the 2nd and 3rd Defendants could not have known of the Plaintiffs interest over the suit properties as the plaintiffs had not done anything on the land to assert possession. The counsel further submitted that the plaintiffs will not suffer any irreparable loss as the 1st Defendant had refunded to the plaintiffs all the monies they had paid her under the agreement. That the balance of convenience does not tilt to the favour of the Plaintiffs as they were in breach of the contract executed on 29th September 2010.

c) 2ND AND 3RD DEFENDANTS SUBMISSIONS;

That the 2nd and 3rd Defendants carried out due diligence before entering into the sale agreement with the 1st Defendant and confirmed she was indeed the owner of the suit properties and that

there was o other party who had registered any interest on the two parcels. That they did not know that the Plaintiffs had entered into an agreement with the 1st Defendant over the same properties at the time of the transactions. That as the Plaintiffs have not established a case of specific performance against the 1st, 2nd and 3rd Defendants, then they have failed to establish a *prima facie* case with a probability of success and injunction orders cannot issue. That the 1st Defendant's title to the suit land was good title which she passed to the 2nd and 3rd Defendants upon sale and transfer and hence their title was procedurally obtained and not impeachable under **Section 26 1 (b) of the Land Registration Act**. That the cases Plaintiffs' counsel relied on had dealt with factual circumstances of forged title which then enabled the court to impeach the titles transferred to third parties, which is not the case in these proceedings. That the Plaintiffs have not shown that

monetary compensation would not be sufficient to redress their grievances. The counsel further submitted that the balance of convenience favours the 2nd and 3rd Dependants as they have obtained legal rights over the suit properties that are protected under **Article 40 of the Constitution**. That equity aids the vigilant and not the indolent and that the Plaintiffs took inordinately long to pursue their right under their sale agreement of 2010. That should the court be inclined to grant injunction, then the Plaintiffs should offer an undertaking for damages. The counsel referred to the case of **Lucy Wangari Njogu -V- Peter Leonard Mwangi & Another** [2012] eKLR in which the case of **Chatur Radio Services – V- Phonogram Ltd** [1994] KLR 114 was cited on the considerations to be taken when setting terms for an undertaking for damages.

d) 6TH DEFENDANT'S SUBMISSIONS;

That the Plaintiffs have not provided any documentary evidence to prove their allegation that the 2nd and 3rd Defendants are in the process of obtaining a loan from the 6th Defendant with the suit properties as collateral. That the fact that the 1st Defendant has rescinded the sale agreement she had with the Plaintiffs means that

the Plaintiffs have not established a *prima facie* case with a probability of success. That the injury suffered by the plaintiffs, if any, would adequately be compensated by damages.

7. The court has careful considered the grounds on the notice of motion, the affidavit evidence filed by the parties, the submissions by counsel and come to the following determinations:

a) That from the evidence, including documentary, tendered by the parties herein, the 1st Defendant was the registered proprietor of land parcels **Kisumu/Forttarnan/516 and 518** having been soregistered on 30th October 1997. That none of the parties herein has questioned the 1st Defendant's proprietorship of the two properties and the court therefore finds the 1st Defendant could transfer good title. The only person who had questioned the 1st Defendant's title was Hon. Peter Oloo Aringo, who is her husband through a letter dated 2nd April 2013 to the Land Registrar. The said Peter Aringo is not a party in these proceedings, and his claim is not for determination in this ruling.

b) That the 1st Defendant and the Plaintiffs entered into a land sale agreement over the two parcels on the 29th September 2010. That the 1st Defendant acknowledged receipt of Kshs.2,400,000 from the Plaintiffs as part payment. The agreement further indicated that the balance of Kshs.2,550,000/= was to be paid in three equal installments of Kshs.850,000/=. The position taken by the Plaintiffs is that they paid the purchase price totalling Shs.4,950,000/= but the 1st Defendant transferred the two parcels to the 2nd and 3rd Defendants and that she later deposited Shs.4,905,000/= into their (Plaintiffs') account on 8th December 2014. The 1st Defendant's position is that the sale agreement with the Plaintiffs was subject to the Law Society conditions of sale and that it was to be completed in 90 days; which the Plaintiff failed to honour by failing to pay the balance of the purchase price by 29th December 2010. That from the facts presented by the plaintiffs in table A, B and C in the supporting affidavit, a total of Kshs.3,671,000/= had been paid to the 1st defendant between 29th September 2010 to 22nd November 2010. The other payments totalling 1,315,000/= was paid in installments between 16th March 2011 and 7th August, 2013. This brings the total payment to Kshs.4,986,000/= apparently, surpassing the purchase price by Kshs.36,000/=. The 1st Defendant's tabulation differs with that of the Plaintiffs insisting that only a total of Kshs.4,915,000/= had been by 7th August 2013 leaving a balance of 35,000/= unpaid to date. According to the 1st Defendant, the Plaintiffs opted to pay the balance of purchase price in installments of Kshs.900,000/= on 16th March 2011, Kshs.300,000/= on 7th December 2011, Kshs.750,000/= on 11th July 2012 and Kshs.40,000/= on 7th August 2013. That all those installments were paid after the 90 days period provided for in their contract. The court is not expected to pronounce itself with finality on any question of law or fact at this interlocutory stage. It would however appear that the 1st Defendant communicated her decision to rescind the contract she had with plaintiffs through her alleged discussions with the Plaintiff's officials and the act of tendering Kshs.4,905,000/= to Plaintiff account. That fact that she rescinded the contract did not affect her right as the registered proprietor of the two parcels, and she remained with the capacity to transfer good title in accordance with the law.

c) That the 1st Defendant entered into a sale agreement with the 2nd and 3rd Defendants on 1st March 2013 over the same properties for Kshs.8,450,000/- and the properties were transferred to their names on 17th May 2013. The Plaintiffs have attacked that transaction and submitted that their title is impeachable under **Section 26(1) b) of the Land Registration Act**. The court has addressed itself to the decisions cited by counsel and found that, in this case, there is no evidence tendered by either of the parties to lead to the conclusion that the 1st Defendant had procured registration with the suit properties unprocedurally, illegally or through a corrupt scheme. The 1st Defendant has explained how she applied and obtained a re-issue of a provisional title for parcel 516 to enable her effect the transfer to the 2nd and 3rd Defendants. There is nothing that can amount to fraud or forgery in the process that she explained and the Plaintiffs have not offered evidence to the contrary.

d) That flowing from (c) above, the court takes note of the provision of **Section 26 (1) of Land Registration Act** that obligates this court to take the person named in the certificate of title issued by the Land Registrar as the absolute and indefeasible owner of such land until and unless successfully challenged under **subsection (1) (a) and (b)** of the said section. The court therefore finds that the Plaintiffs have not established a prima facie case with a probability of success on their entitlement to the two suits lands based on the rescinded contract to enable the court exercise its discretion in their favour. The court is of the view that from the available facts, the Plaintiff's claim, if successful, can adequately be addressed through an award of damages. The balance of convenience tilts to allowing the status quo obtaining before the filing of the suit to continue until the suit is heard and determined.

8. That the plaintiffs' notice of motion dated 3rd February 2015 is therefore without merit and is dismissed with costs. The interim orders are hereby vacated.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this **13th day of April 2016**

In presence of;

Plaintiffs Absent

Defendants Absent

Counsel Mr Oriel for Mbeche for Plaintiff

Mr Dome for Musumba 1st Defendant

Onyango for Ichasa for 2nd and 3rd Defendants and

M/S Alinative for 6th Defendant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/4/2016

13/4/2016

S.M. Kibuja J.

Oyugi court Assistant

Dome for Musumba for 1st Defendant

Mr Alinative for 6th Defendant

Mr Oriel for Mbeche for Plaintiff

Court: Ruling delivered in open court in presence of Mr Oriel for Mbeche for Plaintiff, Mr Dome for Musumba for 1st Defendant, Mr Onyango for Ichasa for 2nd and 3rd Defendants.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/4/2016