



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 123 OF 2015

BONIFACE BAJABAJA BEJA.....PLAINTIFF/APPLICANT

=VERSUS=

1. KITSAO YAA BAYA

2. FLORENCE TABU BIRAY.....DEFENDANTS/RESPONDENTS

R U L I N G

1. The Application before me is the one dated 17th July, 2015 in which the Plaintiff is seeking for the following orders:

(a) THAT this Honourable Court be pleased to issue an injunction restraining the Defendants by themselves, their servants or agents or otherwise howsoever from wrongfully and illegally trespassing and or selling and or alienating and or dealing in any manner howsoever with an un-adjudicated and un-surveyed piece or parcel of land measuring approximately 0.7 acres or thereabouts situated within Kijipwa Settlement Scheme at Mferejini (hereinafter referred to as “the suit premises”) pending the hearing and final determination of the Plaintiff's suit herein.

(b) THAT the costs of this application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that by a written agreement dated 16th June, 2013, he purchased the suit premises from the Defendant for Kshs.237,714; that he made a down payment of Kshs.160,000 and that the balance of Kshs.77,714 was to be collected by the Defendant from him.

3. The Plaintiff has deponed that at the behest of the Defendant, some unknown people destroyed his perimeter fence whereupon the 1st Defendant illegally entered the suit property and took possession; that the 1st Defendant has sold the suit property to the 2nd Defendant and that the Defendants are now in the process of putting up a perimeter fence.

4. In response, the 1st Defendant deponed that the consideration for the suit property was Kshs.320,000; that the Plaintiff paid him Kshs.160,000 leaving a balance of Kshs.160,000 and that when the Plaintiff failed to pay the balance of the purchase price, he repossessed the suit property on 15th March, 2014.

5. It is the 1st Defendant's case that he re-sold the suit property to the 2nd Defendant and that the Plaintiff

refused to take the Kshs.160,000 that he was ready and willing to refund him.

6. The 2nd Defendant deponed that the Plaintiff is entitled to liquidated damages of Kshs.172,210 being the down payment that he made; that the agreement that was entered into between the Plaintiff and the 1st Defendant is ambiguous and that the Applicant has not demonstrated that he has a prima facie case with chance of success.

Submissions:

7. The Plaintiff's counsel submitted that the agreement between the Plaintiff and the 1st Defendant was duly executed and attested; that the said agreement meets the conditions of Section 3(3) of the Law of Contract Act and that the 1st Defendant has conceded that he sold the suit property.

8. Counsel submitted that there is no evidence to show that the 1st Defendant called for the balance of the purchase price and that an injunction should issue in the circumstances.

9. The 1st Defendant's counsel submitted that there is no evidence to show that the Plaintiff completed his part of the bargain; that the Plaintiff was in breach of the agreement and that the 1st Defendant has sold the suit property to the 2nd Defendant.

Analysis and findings:

10. The Plaintiff is claiming for an order of injunction on the ground that he purchased the suit property from the 1st Defendant.

11. To support his case, the Plaintiff has annexed an agreement of sale dated 16th June, 2013 that he entered into with the 1st Defendant.

12. The agreement was duly signed and attested pursuant to the provisions of Section 3(3) of the Law of Contract.

13. In the agreement, the 1st Defendant acknowledged receipt of Kshs.160,000 from the Plaintiff with a balance of Kshs.160,000 that was to be paid later.

14. It would appear that the land that was to be sold by the 1st Defendant was supposed to be 1 acre for Kshs.320,000.

15. However, according to the drawings behind the agreement, it turned out that the land that the 1st Defendant actually sold to the Plaintiff measured 3,640 M², culminating into a price of Kshs.237,714.

16. The reverse side of the agreement shows that the 1st Defendant agreed on 7th July, 2013 that the purchase price of the suit property was to be Kshs.237,714, and having received Kshs.160,000, he was to be paid the balance of Kshs.77,714. There is no indication as to when the said balance was to be paid.

17. It is trite that courts cannot re-write contracts for parties.

18. Considering that the 1st Defendant acknowledged in writing that the Plaintiff owed him Kshs.77,714, he cannot turn around and state that the actual balance for the suit land is Kshs.160,000.

19. In any event, the 1st Defendant has not produced any letter addressed to the Plaintiff informing him to pay up the balance of the purchase price.

20. Having not included the completion period in the agreement, the 1st Defendant, prima facie, cannot

legally sell the suit property to the third party without, firstly, making time to be of essence and secondly, repudiating the agreement in writing.

21. In the circumstances, I find that the Plaintiff has established a prima facie case with chances of success.

22. For those reasons, I allow the Plaintiff's Application dated 17th July, 2015 as prayed.

Dated, signed and delivered in Malindi this 6th day of **May**, 2016.

O. A. Angote

Judge