



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.334 OF 2015

JAMES OKECH OTIENO.....PLAINTIFF

VERSUS

JULIANA OLANG'O NDONGA.....DEFENDANT

RULING

1. **Joseph Okech Otieno**, the Applicant, filed the notice of motion dated 30th November 2015 seeking for injunctive orders restraining **Juliana Olang'o Ndonga**, the Respondent, from selling, disposing, charging, transferring, pledging, leasing or by other means whatsoever dealing adversely with the suit property namely, plot **No.067/189/Koru**, pending the hearing and determination of this suit. The Applicant listed four grounds as the basis of the application which is also supported by his affidavits sworn on 30th November 2015 and 1st April 2016.
2. The Respondent opposed the application through her replying affidavit sworn on 1st day of March 2016 deponing that it is the Applicant who had failed to honour their agreement.
3. The application was heard on 26th April 2016 when Mr. Sala, learned counsel for the Applicant, and the Respondent in person, made their submissions.
4. The issues for determination are as follows:
 - a) Whether the Applicant has established a prima facie case with a probability of success for temporary injunction to issue.
 - b) Who pays the costs of the application.
5. The court has considered the four grounds on the face of the application, the affidavit evidence by both parties, submissions made during the hearing of the application and come to the following conclusions:
 - a) That indeed, both the Applicant and Respondent are in agreement that they entered into a land sale agreement for two acres of **plot 067/189/Koru** whose purchase price was Kshs.700,000/=. That the Respondent has received Kshs.450,000/= leaving a balance of Sh.250,000/=.
 - b) That both the Applicant and Respondent have confirmed that under their sale agreement, the Applicant had paid the Respondent Ksh.400,000/= deposit and had agreed to pay the balance of Sh,300,000/= after the Respondent subdivides the land and gives the Applicant his portion. That the Applicant main basis for this application is that the Respondent has failed and or declined to

subdivide the land and give him his portion and has instead commenced transactions to sell the land to a third party. The Respondent has denied the Applicant's claim and in her deposition, stated that she had subdivided the land and the Applicant has already fenced off his portion. She goes on to blame the Applicant for breach of the contract stating that it was indeed the Applicant would indicated that he has lost interest with the land. The Respondent did not specifically dispute the Applicant's deposition that he had fenced off the portion he was buying after subdivision which fact if true would mean that the Respondent has not been in breach of the contract. The different position taken by the Applicant and Respondent points to a possible breach of contract between the parties. It is only after evidence is taken that the court will be in a position to pronounce itself with finality on the party or parties in breach of the contract and not at this interlocutory stage.

c) That under the provisions of **Section 7 of the Land Control Act Chapter 302 of Laws of Kenya**, monies paid in pursuant of land transaction that becomes void for failure to receive the consent of the land Control board is recoverable as a debt. The court notes that both parties have not disclosed to this court whether their sale agreement had received the relevant land control board consent within, the time required. In the absence of the land control board consent, then their contract is void and specific performance orders would not be available to the Applicant. This is especially so when it is apparent that he has not paid the whole purchase price.

d) That in view of the finding in (c) above, the court is of the view that the Applicant has failed to establish a prima facie case with a probability of success for temporary injunctive orders to be issued against the Respondent over the land. The Applicant has also not shown that he would suffer irreparable loss if the order is not issued. That were the Applicant to be successful, his entitlement would be a refund of the money paid under the sale agreement which is already agreed to be Ksh.450,000/=. That the balance of convenience consideration in the absence of the land control board consent tilts against issuing any temporary injunctive orders at this stage.

6. That having found as above, the notice of motion dated 30.11.2015 is without merit and is dismissed with costs. The interim orders issued on 2nd December 2015 are consequently vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 8TH DAY OF JUNE 2016

In presence of;

Plaintiff/Applicant Absent

Defendant /Respondent Present

Counsel M/S Kagoya for Plaintiff/Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/6/2016

8/6/2016

S.M. Kibunja J

Oyugi court Assistant

M/S Kagoya for Plaintiff

the Defendant is present in person.

Court: Ruling delivered in open court in presence of M/S Kagoya for Plaintiff/Applicant and the Defendant/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

8/6/2016