



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 167 OF 2015

MURIUKI SAMSON MURIITHI.....1ST PLAINTIFF

SERA NJOKI MURIUKI.....2ND PLAINTIFF

VERSUS

JAMES MWANGI GERALD.....)

PLISCILLA NJOKI KIBUCHI.....)

JUSTUS KIMANDU GERALD MBOGO (Sued on his own behalf

and as Administrator of the Estate of

SOPHIA WAMURANGO GERALD.....) DEFENDANTS

MOFFAT NJIURI GERALD.....)

KENNEDY KIMANI WARIUA.....)

RULING

I have before me the plaintiffs' Notice of Motion dated 17th December 2015 in which they seek the following orders:-

1. Spent

2. Spent

3. That a temporary injunction do issue restraining the defendant, his servants and agents from entering, remaining on, evicting or in any way interfering with the plaintiffs' activities on land parcel No. KIINE/RUKANGA/146 pending the hearing and determination of this suit.

The said application which is premised under **Order 40 Rules 1 and 3 of the Civil Procedure Rules** is based on the grounds set out therein and is further supported by the affidavit of the 1st plaintiff **MURIUKI SAMSON MURIITHI** in which he depones, inter alia, as follows:-

1. That the 1st plaintiff entered into a sale agreement with defendants whereby 1st defendant

received a total payment of Ksh. 65,000 on the following days i.e.:-

- (a) 25th January 2012 - Ksh. 20,000
- (b) 22nd March 2014 - Ksh. 10,000
- (c) 21st September 2013 - Ksh. 5,000
- (d) 26th October 2013 - Ksh. 5,000
- (e) 14th December 2013 - Ksh. 5,000
- (f) 21st September 2013 - Ksh. 5,000
- (g) 26th October 2013 - Ksh. 5,000
- (h) 27th October 2014 - Ksh. 10,000

That sum was in respect of the sale of two (2) acres out of land parcel No. KIINE/RUKANGA/146 which was then registered in the names of the 1st defendant's deceased brother **BENSON MURAGE MBOGO**.

1. That the 1st plaintiff entered into a sale agreement with the defendants whereby the 2nd defendant received 20,000 as follows:-

- (a) 21st August 2012 - Ksh. 10,000
- (b) 30th January 2012 - Ksh. 10,000

The two then made a combined agreement on 22nd May 2015 in which the 2nd defendant agreed to sell two acres from land parcel No. KIINE/RUKANGA/146 which was then registered in the names of her deceased brother **BENSON MURAGE MUGO**.

2. That the 1st plaintiff entered into a sale agreement with the defendants whereby the 3rd defendant received Ksh. 230,000 as follows:-

- (a) 10th August 2013 - Ksh. 50,000
- (b) 21st May 2013 - Ksh. 20,000
- (c) 14th October 2013 - Ksh. 10,000
- (d) 25th January 2012 - Ksh. 20,000
- (e) 10th August 2013 - Ksh. 50,000
- (f) 24th April 2013 - Ksh. 50,000
- (g) 28th January 2011 - Ksh. 30,000

That sum was in respect of the sale of two (2) acres out of land parcel No. KIINE/RUKANGA/146 which was then registered in the names of the 3rd defendant's deceased brother **BENSON MURAGE MBOGO**.

3. That the 2nd plaintiff entered into a sale agreement with the defendants whereby the 3rd defendant as the administrator of the Estate of **SOPHIA WAMURANGO GERALD** received Ksh. 100,000 on 21st March 2011 in respect of the sale of two (2) acres of land from parcel No. KIINE/RUKANGA/146 which

was then registered in the names of the 3rd defendant's deceased son **BENSON MURAGE MBOGO**.

4. That the 1st plaintiff entered into a sale agreement with the 4th defendant who received Ksh. 188,000 on the following days:-

(a) 14th October 2013 - Ksh. 8,000

(b) 21st September 2012 - Ksh. 20,000

(c) 15th May 2012 - Ksh. 50,000

(d) 17th March 2013 - Ksh. 60,000

(e) 10th August 2013 - Ksh. 50,000

Whereby the 4th defendant was selling to him two (2) acres from land parcel No. KIINE/RUKANGA/146 which was then registered in the names of the defendant's deceased brother **BENSON MURAGE MUGO**.

That all the defendants agreed that if they breached the agreement, they would refund the purchase price together with 100% interest per year.

That the plaintiffs took possession of the land and have made developments thereon yet the defendants have now breached the agreement and sold the land to the 5th defendant who has demanded that the plaintiffs vacate the land. That the defendants were actuated by malice since the 1st plaintiff was the one pursuing the Succession Cause of the deceased **BENSON MURAGE MBOGO** and after the grant was confirmed, the defendants secretly and hurriedly transferred the land to the 5th defendant without first refunding the purchase price. The plaintiffs therefore stand to lose irreparably.

Annexed to that affidavit are copies of the sale agreement and acknowledgement, copy of the Green Card, copies of the Succession forms and copies of correspondences with the 5th defendant's advocate.

The plaintiffs therefore plead that the defendants have no colour of right to enter the land and ought to be restrained from evicting them and should refund the Ksh. 630,000 with 100% interest per annum for 3 years.

The 1st defendant **JAMES MWANGI GERALD MBOGO** filed a replying affidavit on behalf of the other defendants in which he deponed as follows:-

That the application is incompetent and a gross abuse of the Court process as no injunction can issue against the 5th defendant who is the registered proprietor of the land.

That they filed a Succession Cause in respect of their deceased brother **BENSON MUGO MURAGE** and obtained letters of Administration in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 493 of 2014** after which the land was sold to the 5th defendant.

That before selling the land to the 5th defendant, the defendants had given the 1st plaintiff their intention to revoke their earlier agreement.

That the defendants concede owing the plaintiffs Ksh. 508,000 received between 2011 – 2014.

That the plaintiffs have been in occupation of the land measuring about 10 acres and have derived profits therefrom.

That the agreements are no longer valid in view of the express mandatory provisions of the **Land Control Act** and the **Law of Succession Act** and are willing to refund the Ksh. 508,000. That the plaintiffs have

failed to meet the test laid down in the case of **GIELLA VS CASSMAN BROWN & CO. LTD** and in any case, this Court lacks jurisdiction as this is a civil debt.

That the plaintiffs never assisted the defendants in the Succession Cause and neither did they secretly sell the land.

With the leave of the Court, the 1st plaintiff filed a further affidavit which was responded to by the 1st defendant. The contents thereof are simply to clarify what the parties had deposed to earlier and I need not revisit them.

Submissions have been filed by both **Ms THUNGU** advocate for the plaintiffs and **Mr. CHOMBA** advocate for the defendants.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

In my view, this application hinges on whether in fact there was a valid agreement of sale between the plaintiffs and the 1st to 4th defendants with respect to land parcel No. KIINE/RUKANGA/146 (the suit land).

First, however, I must determine whether I have jurisdiction to determine this dispute which according to the plaint filed herein on 18th December 2015 seeks the main prayer that a permanent injunction do issue restraining the defendants, their servants and agents from entering, remaining or in any way interfering with the plaintiffs' activities on the suit land. The plaint also seeks judgment in respect of the purchase price.

The defendants have on their part filed a defence denying breach of any agreement though admitting receipt of Ksh. 508,000 from the plaintiffs which they are ready to refund. The 5th defendant has also made a counter-claim in which he states that he is the registered proprietor of the suit land and seeking an order for the eviction of the plaintiffs therefrom.

Jurisdiction is everything and as was held in the case of **OWNERS OF THE MOTOR VESSEL 'LILLIAN S' VS CALTEX OIL (KENYA) LTD 1989 K.L.R 1**, the moment a Court determines that it has no jurisdiction, it downs its tools and proceeds no further. The issue of my jurisdiction to handle this suit and therefore the application has been raised both in the 1st defendant's replying affidavit and the submissions by their counsel **Mr. CHOMBA** that this is a civil debt and therefore this Court lacks the jurisdiction to determine it.

From the pleadings herein, it is clear to me that the challenge to this Court's jurisdiction to determine this dispute is completely devoid of merit. The plaintiffs seek a permanent injunction with respect to land known as KIINE/RUKANGA/146 or a refund of the purchase price. The 5th defendant seeks the eviction of the plaintiffs from that land. The remedies sought by both parties fall within the jurisdiction of this Court as spelt out in **Section 13 of the Environment and Land Court Act**. Nothing stops this Court from ordering a refund of the purchase price where a land transaction has gone sour. The objection to this Court's jurisdiction over this dispute was obviously not made with any serious conviction. It is dismissed.

An application for a temporary injunction such as this must be considered in light of the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358**. These are:-

(a) The applicant must show that he has a prima facie case with a probability of success at the trial.

(b) The applicant must demonstrate that unless the order for injunction is granted, he might suffer irreparable injury that cannot be compensated by an award of damages, and

(c) If in doubt, the Court will determine the application on the balance of convenience.

A prima facie case on the other hand was defined in the case of **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002** 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”.

A Court considering an application for temporary injunction should, as was held in the case of **FILMS ROVER INTERNATION LTD VS CANNON FILM SALE LTD 1986 3 ALL E.R 772** take the course that appears to carry the lower risk of injustice.

Finally, the remedy of temporary injunction is an equitable remedy and the party seeking it must approach the Court with clean hands. Equity, it should be remembered, follows the law.

I shall therefore be guided by the above broad principles in determining the application before me. As indicated above, the starting point is whether in fact there is a valid agreement between the plaintiffs and the 1st to 4th defendants with respect to the suit land. The case between the plaintiffs and the 5th defendant will be considered in isolation.

With regard to the agreements entered into between the plaintiffs and the 1st to 4th defendants, it is not in dispute that the suit land was all along registered in the names of **BENSON MURAGE MBOGO** (the deceased). Those agreements which are annexed to the 1st plaintiff's supporting affidavit and marked as annexures **MSM 1, MSM 2, MSM 4 and MSM 5** were entered into between the plaintiffs and the 1st to 4th defendants between 2011 and 2013. All that time, the suit land was registered in the names of the deceased. While there is evidence that Succession proceedings had been taken out in respect of the deceased's Estate in **KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S SUCCESSION CAUSE No. 310 of 2012**, no confirmation of grant in respect of the deceased's Estate was issued until 4th November 2015 in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 493 of 2014** when the suit land was distributed between the 1st to 4th defendants with the 1st defendant getting 4 acres and the others 2 acres each. It is clear therefore that all the agreements entered into between the plaintiffs and the 1st to 4th defendants between 2011 and 2013 with respect to the suit land were illegal because no confirmation of grant had been issued to any of the defendants. The relevant provisions of **Section 82 of the Law of Succession Act** provides as follows:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:-

(a) –

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best, provided that –

(i) –

(j) no immovable property shall be sold before confirmation of the grant”. Emphasis added.

On the other hand, **Section 45 (1) of the Law of Succession Act** provides that:-

“Except as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person”.

The grant in respect of the Estate of the deceased was issued on 3rd February 2015 and confirmed on 4th

November 2015. Before 2015, therefore, the defendants were not administrators of the Estate of the deceased and therefore had no capacity to sell the suit land. What they did between 2011 and 2013 was simply to intermeddle with the property of the deceased which is a criminal offence punishable with a fine not exceeding Ksh. 10,000 or to a term of imprisonment not exceeding one year or to both fine and imprisonment. Therefore, the agreements entered into between the plaintiffs and the 1st to 4th defendants with respect to the suit land between 2011 and 2013 were all illegal and cannot be enforced by this Court – see **MISTRY AMAR SINGH VS SERWANO WOFUNIRA KULUBYA 1963 E.A 408**. Similarly, in the case of **HEPATULLA VS NOORMOHAMED (1084) K.L.R 580**, the following passage is quoted from the case of **MISTRY AMAR SINGH** supra:-

“Ex-Turpi causa non aritor actio. This old well-known legal maxim is founded in good sense and expresses clear and well recognized principle which is not confided to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of Court and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him”

The plaintiffs, as per their own admission in paragraph 10 of the supporting affidavit of the 1st plaintiff and also paragraph 7 of the further affidavit knew that the defendants had not obtained any confirmed grant of representation in respect to the Estate of the deceased when they were entering into the agreements for the sale of the suit land. That is why they were assisting the defendants in the Succession Cause as they claim which the defendants have denied. That is clear evidence that at the time the agreements with respect to the sale of the suit land was being entered into, the plaintiffs knew or ought to have known that the contracts they were signing were illegal. Since the contracts were illegal and cannot be enforced by this Court, it follows that the plaintiffs have not surmounted the first hurdle in the **GIELLA** case (supra) which is the establishment of a prima facie case with a probability of success. Such a case cannot be founded on an illegal contract. It follows also that the plaintiffs having failed to establish a prima facie case with a probability of success, there would be no need to consider the other conditions in the **GIELLA** case (supra) because those three conditions have to be considered sequentially – **KENYA COMMERCIAL FINANCE CO. LTD VS AFRAHA EDUCATION SOCIETY 2001 E.A 86**. Consequently therefore, the orders sought in the Notice of Motion as against the 1st to 4th defendants cannot be granted and must be dismissed.

Similar orders are sought against the 5th defendant who is now the registered proprietor of the suit land as per the title deed issued in his names on 27th November 2015. That title is issued under the **Land Registration Act 2012** and under **Section 26 (1)** of the said Act, such registration is evidence that the 5th defendant is the absolute and indefeasible owner of the suit land. His title cannot therefore be challenged except on the ground of fraud or misrepresentation to which he was a party or where it is shown that the title was obtained illegally, un-procedurally or through a corrupt scheme. **Section 24** of the same Act also confers on the 5th defendant the absolute ownership of the suit land together with all rights and privileges belonging or appurtenant thereto. However, such registration shall not relieve the 5th defendant of any duty or obligation to which he is subject as a trustee. From the pleadings herein, it cannot be said that any prima facie evidence of fraud has been established against the 5th defendant in the manner in which he acquired the suit land. Indeed no allegations of fraud on his part are pleaded in the plaint. It is therefore difficult to see how the 5th defendant’s title to the suit land can be impugned. Neither is it suggested that he holds the same in trust for the plaintiffs or any other party. In short, I do not, on the material before me, discern any of the plaintiffs’ right that the 5th defendant has infringed with respect to the suit land. It would be a rare case indeed to injunct the registered proprietor of land unless in clear and obvious cases where there is prima facie evidence that his title may have been acquired illegally or through corrupt means or that he is infact a trustee. There is no such evidence disclosed in this case. The plaintiffs Notice of Motion seeking orders against the 5th defendant must also be dismissed.

In the circumstances therefore and having considered the evidence placed before me, I find no merit in the plaintiffs Notice of Motion dated 17th December 2015 and the same is dismissed herewith. The

plaintiffs shall however not be entitled to costs because of their conduct which was not above board.

It is so ordered.

B.N. OLAO

JUDGE

14TH OCTOBER, 2016

Ruling dated, delivered and signed in open Court this 14th day of October 2016

Mr. Kanampiu for Miss Thungu for the Plaintiffs present

Mr. Chomba for the Defendants present

Mr. Gichia Court Clerk present

B.N. OLAO

JUDGE

14TH OCTOBER, 2016