



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO.1354 OF 2013

JOSEPH MUTISYA KITHUKA.....PLAINTIFF

VERSUS

CHAL DEVELOPERS LIMITEDDEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 29th October 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from evicting, leasing, charging, transferring, threatening or otherwise interfering with the Plaintiff's possession of Plot Numbers 9, 10, 11 and 15 excised from LR. No. 18046 (hereinafter referred to as the "suit properties") pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for the costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Joseph Mutisya Kithuka, sworn on 29th October 2013 in which he averred that at all material times, the Defendant was and is the registered owner of all that property known as L.R. No. 18046 measuring approximately 6 hectares. He further averred that the Defendant subdivided that land into several plots and offered them for sale to members of the general public. He then averred that under three separate sale agreements dated 12th May 1999, 24th May 1999 and 9th May 2000, the Defendant sold to him the suit properties at a purchase price of Kshs. 400,000/- per plot. He confirmed having paid the Defendant the entire purchase price of the suit properties. He then stated that he proceeded to take possession of the suit properties after paying an additional Kshs. 458,000/- being charges demanded by the Defendant for processing the title deeds to the suit properties. He then stated that all this notwithstanding, the Defendant refused or failed to transfer the suit properties to him without any legal justification. He concluded by stating that this is why he has filed this suit to compel the Defendant to transfer the suit properties to him.

The Application is contested. The Defendant filed the Replying Affidavit of its Director, Newton Kamau, sworn on 4th December 2013, in which he confirmed that the Defendant subdivided its land known as L.R. No. 18046 into 49 plots. He further confirmed that the Defendant sold the suit properties to the Plaintiff but that any delays in finalization of the title documents has been solely due to the government bureaucracy countrywide in the lands office. He averred that the Defendant had done its part towards the finalization of those sales and had even given the Plaintiff vacant possession of the suit properties unconditionally. He further pointed out that any party who thinks there has been a delay on the

Defendant's part may pursue the remedy provided in clause 8 of the Special Conditions in the Sale agreement. He stated further that pursuant to that clause, the Defendant is ready and willing to refund any monies received by it from the Plaintiff.

In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

Has the Plaintiff/Applicant made out a prima facie case? In determining whether the Plaintiff/Applicant has established a prima facie case, I must consider whether he has shown that he has a right to specific performance. It is conceded by both the Plaintiff and the Defendant that the larger parcel of land being L.R. No. 18046 out of which the suit properties are excised is registered in the name of the Defendant. The Defendant admits to having subdivided that large parcel of land into 49 plots, some of which are the suit properties. The Defendant has admitted that it has not managed to finalize the subdivision process and issuance of separate titles for each plot. Looking at the facts of this case, the Plaintiff has sought to rely on three sale agreements dated 12th May 1999, 24th May 1999 and 9th May 2000 between him and the Defendant as the basis of his claim to the suit properties. A sale agreement is a contract. **Section 4(1)** of the **Limitation of Actions Act Cap 22** provides as follows:

Actions of contract and tort and certain other actions

- 1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued-**
 - a. Actions founded on contract;**
 - b. -**

This legal provision is very clear and cannot be ignored. It is quite categorical that actions founded on contract must be brought to court before the end of 6 years from the date the cause of action arose. In this particular case, the cause of action arose in the year 1999/2000. Having filed this suit in the year 2013, it is clear that a time period of over 8 years had lapsed from the date the cause of action arose to the date of filing this action to claim the suit properties. This is well over the time period allowed by the law cited above. This suit is therefore essentially time barred and the Plaintiff does not have a high chance of success at the main trial. I therefore find that he has not made a prima facie case with high chances of success.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory

injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 27TH

DAY OF FEBRUARY 2015.

MARY M. GITUMBI

JUDGE