REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL MISC. NO. 841 OF 2014

EDWARD KINUTHIA MUCHENE..……..... PLAINTIFF

PETER MBUGUA MUCHENE …… 2ND PLAINTIFF

-VERSUS-

SIMON MACHARIA MUCHENE…….....…1ST DEFENDANT

MARGARE WAITHIRA MUKIRI …….. 2ND DEFENDANT

RULING

The plaintiffs by a Notice of Motion application dated 24th June 2014 seek an order of injunction restraining the defendants either by themselves, their agents, servants or anybody else from alienating, transferring, selling or in anyway interfering with land parcel NO. **Dagoretti/Ruthimitu/1282** pending the hearing and determination of this suit.

The plaintiffs application is based on the grounds that appear on the face of the application and on the grounds contained in the supporting affidavit of **Edward Kinuthia Muchene**, the 1st plaintiff herein, sworn on the 25th June 2014. Inter alia the plaintiffs set out the following grounds in support of the application:-

i. That the plaintiffs bought land parcel **L.R.NO.Dagoretti/Rithimitu/1282** on 16th May 2011 from the Defendants.
ii. That the plaintiffs have paid part of the consideration being Kshs.4,130,000/- for the said piece of land and the cheque for the balance of Kshs.320,000/- is ready for collection by the defendants.
iii. The Defendants are in breach of the agreement entered on 16th May 2011 by failing to transfer land parcel **L.R. NO**. **Dagoretti/Ruthimitu/1282** to the plaintiffs.
iv. The acts of the defendants are causing loss and damage on the plaintiff.

By the amended plaint the plaintiffs seek an order of permanent injunction restraining the defendants from in any manner dealing or interfering with the suit property and additionally an order for the specific performance of the contract of sale. In the alternative, the plaintiffs seek a refund of the sum of Kshs.4,180,000/- paid to the Defendants and interest at 15% p.a. from 16th May 2011.

The Defendants filed a replying affidavit sworn by the 1st Defendant in opposition to the plaintiffs application for injunction. Even though the Defendants admit entering into the agreement for sale dated

16th May 2011 the Defendants aver that the agreement was vague and imprecise and was incapable of being performed. For instance the Defendant aver the agreement did not provide for a completion date and yet provided for payment of the balance of the purchase price by installments without providing the amounts and times of payment. The Defendants further aver that the agreement did not annex a sketch plan of the portion of title NO. **Dagoretti/Ruthimitu/1039** which was to be hived off and to illustrate the anomality of the plaintiffs claim the Defendants state that the agreement provided for a portion of 0.0180 of a hectare to be excised while the plaintiffs as per the plaint claim a portion of 0.18 of a hectare.

The Defendants state as a consequence of the highlighted vagueness and anomalies apparent in regard to the agreement for sale they in December 2013 informed the plaintiffs they had cancelled the agreement and offered to refund the deposits paid to them. Additionally the Defendants aver that the transaction within a controlled transaction was the meaning of section 6 of the Land Control Act (Cap 302 of the Laws of Kenya) and to the extent that no consent of the Land Control Board was sought and obtained within the prescribed period the transaction became void and was therefore unenforceable. In the premises the Defendants contend the plaintiffs have not demonstrated a prima facie case with any probability of success to be entitled to an order of injunction. Besides, the Defendants argue the plaintiffs cannot suffer any damage that cannot be compensated for in damages.

The plaintiffs in their supporting affidavit annex a copy of the mutation form in regard to the subdivision of title NO. **Dagoretti/Ruthimitu/1039** alleged to be marked "**EKM4**" (though the annexture is unmarked) which shows the portion marked 'B' now numbered **Dagoretti/Ruthimitu/1282** is approximately 0.16 of a hectare. The agreement of 16th May 2011 indicates the portion the plaintiffs were to purchase was to be 0.0180 of a hectare. The Agreement describes the subject matter of the sale as **"A plot measuring 0.0180 Ha to be excised from L.R.NO. Dagoretti/Ruthimitu/1039 situated in Nairobi County".**

There is significant variance between the size of the plot as per the agreement for sale, the plot claimed as per the plaint and the size of the plot NO.1282 as per the mutation forms. The plaintiffs vide paragraph 9 of the supporting affidavit acknowledge this was a transaction that was a controlled transaction under the provisions of the Land Control Act, Cap 302 of the Laws of Kenya. That under paragraph 9 of the affidavit the plaintiffs state:-

"9. That we indicated to them that the balance would be paid upon them signing the transfer forms and obtaining consent from the relevant Land Control Board to transfer the portion bought into my names".

Thus the issue arise whether or not the plaintiffs have any contract of sale that is capable of being enforced. If the transaction was a controlled transaction under the Land Control Act and no consent was procured then the contract would be unenforceable.

The parties filed written submissions where they reiterate the facts of the case which are largely not in dispute. The plaintiffs assert that they have paid the bulk of the purchase price amounting to Kshs.4,180,000/- although the Defendants only admit receipt of Kshs.4,130,000/- and submit that they have all the time been willing and ready to complete the transaction through payment of the balance but claim the Defendants have been unwilling to perform their part of the agreement.

The Defendants have pointed to what they claim to be the vagueness of the agreement and in particular to the variance in the area of the portion claimed by the plaintiffs and assert that the agreement is incapable of being performed. In the filed defence the Defendants contend that as there was no consent of the Land control Board given to sanction the transaction the agreement for sale is void for all purposes and the same cannot be enforced. The Defendants further submit that the plaintiffs cannot suffer any damages that they cannot be compensated for in damage and argue that the value of the land claimed by the plaintiffs can be easily ascertained through valuation and any deposits paid towards the purchase can be refunded to the plaintiffs.

I have reviewed the pleadings, the application and the affidavits in support and in opposition and the

parties submissions and the issue for determination by the court is whether the plaintiffs have satisfied the conditions for the grant of a temporary injunction. The conditions that an applicant for an interim injunction needs to satisfy are well settled and are as established in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358.** The applicant must firstly, demonstrate he has a prima facie case with a probability of success and secondly, that he stands to suffer irreparable damage that cannot be compensated for by an award of damages. In the event the court has any doubt in regard to either of the first two conditions the court can determine the application on consideration of the balance of convenience.

Having considered all the material placed before the court I am not persuaded that the plaintiffs have demonstrated a prima facie case against the Defendants with a probability of success.

The sale agreement between the parties dated 16th May 2011 quite clearly indicated the portion to be excised out of Title Number **Dagoretti/Ruthimitu/1039** would be 0.0180 of a hectare and unfortunately the parties did not annex a sketch plan to delineate the portion to be excised. The plaintiff in the plaint claims land parcel **L.R.NO. Dagoretti/Ruthimitu/1282** which he claims is 0.0180 of a hectare yet in the mutation annexed to the supporting affidavit this parcel is shown to be 0.16 of a hectare. These variances are unexplained and at any rate the claim of a portion of 0.180 of a hectare as opposed to what was provided in the agreement of sale being 0.018 of a hectare is way out of proportion so as to cast a serious doubt as to whether the portion referred to in the agreement can be the same portion hived out to create **L.R.NO.Dagoretti/Ruthimitu/1282.**

Further there is every indication that this was a controlled transaction within the meaning of section 6 of the Land Control Act Cap 302 of the Laws of Kenya.

Section 6(1) (a) provides:-

6.(1) Each of the following transactions that is to say-

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area,

(b) ----------

is avoid for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

The application for the Land Control Board's consent under section 8(1) of the Act has to be made within six months of the Agreement. Section 8. (1) of the Act provides:-

An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto.

The plaintiffs have not demonstrated that any application for the Land Control Board consent was ever made and no consent for the transaction has been exhibited. If the transaction was a controlled transaction, and indications are that it was, the transaction became void for all purposes in terms of section 6 of the land Control Act after 6 months of the date of the sale agreement. The court cannot enforce a void contract and accordingly specific performance would be unavailable to the plaintiffs for want of consent of the Land Control Board.

In the premises it is my view that the plaintiffs have not demonstrated a prima facie case with a probability of success. As regards whether or not the plaintiffs would suffer any damage that would not be compensatable in damages I hold the view that they would not. In the amended plaint the plaintiffs have pleaded in the alternative for refund of the deposit paid and the interest provided for default in the agreement. This in my view is acknowledgment on the part of the plaintiffs that damages would be

adequate remedy. I hold that damages would infact be an adequate remedy for the plaintiffs in the event they are successful at the trial.

Thus it is my holding that the plaintiffs have not satisfied the conditions for the grant of a temporary injunction and I accordingly dismiss with costs to the defendants the plaintiffs Notice of Motion dated 25th June 2014.

Orders accordingly.

Ruling dated, signed and delivered this……**15th**….day of **May**…2015.

J. M. MUTUNGI

JUDGE

In the presence of:

……. For the Plaintiffs

……. For the Defendants