



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 1234 OF 2014

FRANCISCA WANJIKU MAKENA.....PLAINTIFF

VERSUS

ROSELINE WANJIKU GIKARIAH.....1ST DEFENDANT

FRANCIS NJOMO MURATHE.....2ND DEFENDANT

MARGARET WARIARA KAARA.....3RD DEFENDANT

GACIKU KANGARI.....4TH DEFENDANT

RULING

The subject matter of dispute is a parcel of land known as *Kajiado/Ntashart/840*, measuring 46 acres but which has since been sub-divided into 83 plots numbers *7763 – 7846*. The Plaintiff in her application dated *18th September 2014*, seeks an order for injunction *restraining the Defendants from disposing of, alienating, trespassing onto, transferring and/or dealing in any manner with the said property pending the hearing and determination of the suit.*

The application is based on the grounds outlined in the application and supported by an affidavit sworn by the Plaintiff.

In the affidavit, the Plaintiff deposes that she entered into a sale agreement with the 1st Defendant in *2009* and a further agreement in *2012* for the purchase of the suit property at a consideration of *Kshs. 1,200,000/-*. It is deposed that she paid the requisite deposit of the purchase price upon execution of the agreement and made further part payments, but that she held on to the balance of the purchase price awaiting the actual transfer of the property. It was her deposition that the transfer was subject to the 1st Defendant obtaining letters of administration of the estate of her deceased husband to enable her to effect the transfer. The Plaintiff deposes that she reached out to the 1st Defendant on several occasions with a view to completing the sale, but that the later became evasive. Subsequently, the 1st Defendant transferred the suit property to the *2nd, 3rd and 4th Defendants* in total disregard to their agreement which she maintains is valid and enforceable. Further, that the properties have been sub-divided and that the Defendants have the intention of disposing of the same and therefore her claim will be defeated.

The 1st Defendant swore a Replying Affidavit on *28th October 2014*, wherein she admitted to have entered into a sale agreement with the Plaintiff in *2009* and that the latter paid the *10%* deposit of the purchase price as agreed. The 1st Defendant however denied entering into a second sale agreement in *2012*. She contended that the latter agreement contained forged signatures. She deposes that it is in fact the

Plaintiff who was non-committal in completing the sale and upon her insistence, the Plaintiff paid her **Kshs. 20,000/-** On **30th April 2014**, and **20th May 2014**, despite the outstanding balance being well over **Kshs. 800,000/-**

With no further payments from the Plaintiff, the 1st Defendant deposes that she rescinded the agreement and instructed her advocates to notify the Plaintiff's advocate and return the part payment made of **Kshs. 448,000/-**. The deponent contends that the Plaintiff having failed to meet her obligations, she offered the suit property to the **2nd, 3rd and 4th Defendants**, entered into a sale agreement dated **3rd July 2014**, and upon completion, transferred the property to them. It is her deposition that no proprietary interest had passed to the Plaintiff and therefore having not paid the purchase price in full, the Plaintiff was not entitled to the equitable remedies sought.

The 3rd Defendant swore a Replying Affidavit on **9th October 2014**, on behalf of the 2nd and 4th Defendants. She deposes that they instructed their advocates to undertake due diligence which confirmed that the 1st Defendant was the registered owner of the property. They then entered into an agreement when after they purchased the property and were registered as proprietors. Subsequently, they proceeded to survey and sub-divide the property into 84 plots and obtained title deeds for each plot. The deponent maintained that they are innocent purchasers for value and should not be dragged into any dispute for breach of contract between the Plaintiff and 1st Defendant. Further, that the Plaintiff has no cause of action against them as they cannot be held liable for breach and for any consequential loss or damage.

The Plaintiff swore a Supplementary Affidavit on **18th November 2014**, wherein she deposed that the balance of the purchase price was to be paid upon the successful transfer of the property. The Plaintiff reiterated that she paid the 10% deposit of the purchase price and made additional part payments at the behest of the 1st Defendant. She refuted the claim that she was non-committal to completing the sale deposing that the 1st Defendant was not forthcoming with the progress of the grant of letter of administration to the estate of her deceased husband.

The application was further canvassed by way of written submissions. **Kitheka & Company, Advocates** for the Plaintiff filed submissions dated **27th November 2014** wherein counsel submitted that the parties entered into two sale agreements dated **3rd February 2009** and **14th March 2012**. They mutually added clauses to the agreements that the sale was subject to the Law Society Conditions of Sale and that the Notice period for rescission of the agreement would be 21 days. Counsel referred to the **Clause 4(7) of the LSK Conditions of Sale** submitting that a party in default is to be given a notice of 21 days to complete a sale failing which the other party is at liberty to rescind the agreement. It was submitted that the Completion Notice was never issued to the Plaintiff and therefore the purported attempt to rescind the agreement is contrary to the express terms thereof. Consequently, that their agreement for sale is still alive and binding between the parties.

Counsel also referred to the 1st Defendant's annexures submitting that the contents of the letter dated **24th July 2014** is an admission that there were two agreements entered into by both parties. Further, that it was also noteworthy that the sale to the 2nd, 3rd and 4th Defendants was effected on **3rd July 2014** before the purported notice to complete that was issued **on 24th July 2014**. It was also submitted that the completion period as expressed in the 2nd agreement was to be within 3 months from the date of confirmation of the grant of letters of administration. Counsel submitted the 1st Defendant never notified the Plaintiff of the confirmation of grant which demonstrates that the 1st Defendant had the intention to unfairly renege from her contractual obligation.

Muriuki Ngunjiri Advocates for the 1st Defendant filed submissions dated **9th December 2014**, wherein counsel referred to the agreement entered into on **3rd February 2009**, which provided for a **90 days** completion period of vacant possession upon completion of purchase price. It was submitted that the Plaintiff was not granted vacant possession for failing to complete on her part and therefore non-performance on the part of the purchaser was sufficient for the agreement to be repudiated. In support of

this submission counsel relied on the cases of **Wambugu v Njuguna (1983) KLR 172** and **Openda v Ahn (1984) KLR 208**.

It was submitted that the 1st Defendant did not enter into a second agreement as alleged but that even if she did, both agreements were entered into before the 1st Defendant obtained letters of administration on **3rd June 2013** and they were therefore void for want of legal capacity to contract. Counsel further submitted that the property having passed to the 2nd, 3rd and 4th Defendants, an injunction cannot issue as the said Defendants were not privy to the dealings between the 1st Defendant and the Plaintiff.

Muriungi & Company Advocates for the 2nd, 3rd and 4th Defendants filed submissions dated **9th December 2014** wherein counsel submitted that the Defendants were innocent purchasers for value without notice. It was also submitted that the agreements, subject matter of this suit, were a nullity having been made prior to the grant of letters of administration. Additionally, that in any event, the said agreement provided for damages in case of breach by either party Further that there was no **Land Board Control** consent obtained contrary to the **Land Control Act** which requires consent to be obtained within 6 months of the date of entering into the agreement.

The Court had considered the pleadings and the written submissions and the Court finds that:-the facts of this case are not entirely in dispute. The Plaintiff and the 1st Defendant entered into agreement for the purchase of the suit property when after the Plaintiff paid the 10% deposit of the purchase price and over time made further part payments. It is also common that the property would be transferred to the Plaintiff upon the 1st Defendant obtaining a confirmation of grant of letters of administration. It is the Plaintiff's claim that she was not afforded an opportunity to complete the sale since the 1st Defendant entered into another agreement, transferring the property to the 2nd – 4th Defendants in disregard to their agreement. On the other hand, the 2nd – 4th Defendants claim to be bona fide purchasers for value and assert that they ought not to be dragged into the dispute between the Plaintiff and 1st Defendant as they were not privy to the agreement between them.

It is undisputed that the 2nd – 4th Defendants are presently the registered proprietors of suit property. **Under Section 26(1) of the Land Registration Act, 2012**, issuance of certificate of title after registration of a transfer upon purchase is regarded as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and cannot be challenged except:

- a. ***On the ground of fraud, or misrepresentation which the person is proved to be a party; or***
- b. ***Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

The Plaintiff does not allege that the 2nd, 3rd and 4th Defendants acquired the property through fraud, misrepresentation or through a corrupt scheme. There is therefore no basis upon which the Plaintiff can challenge the titles issued to the said Defendants.

Indeed the dispute is between the Plaintiff and 1st Defendant in regards to the completion date, particularly as to the date and the events leading to the completion. The other issue is whether a completion notice was actually issued to the Plaintiff. It is also contested whether the parties entered into a second agreement with the 1st Defendant remaining categorical that there was no such agreement entered into between the parties. A further issue is on the capacity of the 1st Defendant as at the date of entering into the sale agreements with the Plaintiff in view of **Sections 45 and 82 (b) (ii) of the Law of Succession Act**, noting that the property was registered in the name of her deceased husband. These issues are in respect to the construal of the terms of agreements entered into between the Plaintiff and the 1st Defendant.

On the foregoing, it is my considered view that the Plaintiff has not met the threshold set out in **Giella v**

Cassman Brown (1973) E.A 358 to warrant the grant of injunction orders. It is noteworthy that the Plaintiff has prayed for an order of specific performance. Whilst I should refrain from delving into the merits of the suit at this juncture, it is evident that the Plaintiff had not completed payment of the purchase price neither has she demonstrated that she can comply and be ready and able.

Having now carefully considered the Plaintiffs/Applicants Notice of Motion dated **18th September 2014**, the Court finds it not merited and the same is dismissed entirely.

Costs in the cause

It is so ordered

Dated, Signed and Delivered this 17th day of June 2015

L.GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff/Applicant

Mr Kimathi holding brief **Mr Ngunjiri** for the 1st Defendant/Respondent

None attendance for the 2nd, 3rd and 4th Defendants/Respondents

Hilda: Court Clerk

L.GACHERU

JUDGE