



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 291 OF 2013

SIMON OYARO OGACHIPLAINTIFF

VS

SAMWEL MAIYO.....DEFENDANT

(Application for injunction; principles to be applied; plaintiff alleging that defendant is trespasser on suit land; defendant asserting that he bought a portion of the suit land from an agent of the plaintiff; suit land being agricultural land and subject to the Land Control Act; no application for consent made to the Land Control Board; agreement to purchase therefore nullified; defendant being in possession; whether defendant ought to be allowed to be in possession; Land Control Act prescribing that it is illegal to remain in land if consent has not been issued; prima facie, defendant cannot therefore claim or occupy the suit land; application for injunction succeeds)

RULING

A. INTRODUCTION

1. The application before me is that dated 27 August 2013 filed by the plaintiff. It is an application for injunction filed pursuant to the provisions of Order 40 of the Civil Procedure Rules, 2010, Section 63 of the Civil Procedure Act, CAP 21, and Section 19 of the Environment and Land Court Act, Act No. 19 of 2011. The plaintiff wants the defendant restrained from from trespassing, using, ploughing, or in any way dealing with the land parcel Plateau/Plateau Block 2 (Uasin Gishu) /20 (the suit land), pending hearing and determination of this suit. The application is based on the grounds inter alia that the suit land is registered in the name of the plaintiff; that the defendant is a trespasser; that the defendant has no legally enforceable claim over the land; and that the defendant has prevented the plaintiff from using the land. The application is supported by the affidavit of the plaintiff and is opposed by the defendant who has filed a Replying Affidavit.

B. BACKGROUND AND PLEADINGS

2. A little background will shed light as to the nature of this suit. The plaintiff instituted this suit on 20 May 2013 by way of plaint. It is pleaded in the plaint that the plaintiff is the sole owner of the suit land and that in the year 2012, the defendant made entry into the land on the basis that he had purchased a portion of it from one Thomas Kimeli Kering trading as Betaland Enterprises. The plaintiff has pleaded that he has cancelled the agreement that he had with Kering and that the agreement entered between the defendant and Mr. Kering cannot give the defendant a legal basis to be on the land. He has further pleaded that the suit land is agricultural land which is subject to the provisions of the Land Control Act, CAP 302, Laws of Kenya. In the suit, he wants a declaration that the defendant has no enforceable claim over the suit land and an order for eviction. He also wants mesne profits at the rate of Kshs. 50,000/= per acre per year, effective 1st January 2013. He has also sought a permanent injunction to restrain the

defendant from re-entering the suit land and costs of the suit.

3. The defendant upon being served with summons, filed a Statement of Defence and a Counterclaim on 10 June 2013. He has pleaded that on 6 October 2011 and 4 April 2012, he bought 3 and 2 acres respectively of the suit land from Mr. Kering, who he has described as having been the plaintiff's agent. He has averred that sale agreements for the 5 acres were duly executed. He has pleaded that he has paid Kshs. 1,173,200/= leaving a balance of Kshs. 21,800/=, which was to be paid subject to survey and subdivision by the plaintiff. In the counterclaim, the defendant has sought orders to restrain the plaintiff from interfering with the 5 acres of the suit which he purchased, and an order to compel the plaintiff to transfer the said 5 acres to the defendant. He also wants a declaration that he is the rightful proprietor of 5 acres of the suit land and costs of the suit.

4. In the supporting affidavit to the application, the applicant has averred that the suit land is agricultural land and all transactions are subject to the Land Control Act. He has further deposed that any dealings that he had with Mr. Kering were cancelled and that he refunded all moneys to Mr. Kering.

5. In his replying affidavit, the respondent has annexed an agreement termed a "Commission Agreement" dated 30 May 2011 through which he has averred that the plaintiff authorized Mr. Kering to be his agent for purposes of selling the suit land. He has also annexed two agreements, one dated 6 October 2011 and the other dated 4 April 2012 between himself and Mr. Kering for 2 and 3 acres respectively. He has further averred that if the plaintiff cancelled the dealings that he had with Mr. Kering, this came after he had already purchased 5 acres of the suit land. He has stated that since he purchased the land, he has made huge developments and has been in possession. He has asked that the application be dismissed.

6. In his submissions, Mr. Momanyi, learned counsel for the plaintiff, inter alia submitted that the transaction that the defendant had is void for want of consent of the Land Control Board. He further submitted that the remedy of the defendant is to seek refund from the said Mr. Kering.

7. Mr. Chepkwony, learned counsel for the defendant, inter alia submitted that it is not disputed that the plaintiff appointed Mr. Kering as his agent. He submitted that it is through this agency agreement that the defendant purchased the suit land. He stated that the parties were to appear before the Land Control Board, but did not, as a dispute developed between the agent and the plaintiff. He submitted that the defendant ought not to suffer for the differences between the plaintiff and the agent. He further submitted that the defendant is already in occupation and at least the status quo ought to be maintained pending hearing of the suit.

C. DECISION OF THE COURT

8. It is with the above pleading and rival arguments that I need to determine this application for injunction. The principles for the grant of an injunction were set out in the case of *Giella v Cassman Brown (1973) EA 358* and I do not see the need of re-inventing the wheel. In the said case, it was stated that first, the applicant needs to demonstrate a prima facie case with a probability of success; secondly, that the court ought to be alive to the tenet that an injunction will not normally be granted unless damages are an inadequate remedy; and thirdly, if the court is in doubt, it ought to decide the matter on a balance of convenience.

9. Following the above principles, I need first to be satisfied that the plaintiff has established a prima facie case with a probability of success. This determination has to be made in view of the pleadings and the supporting material presented by both plaintiff and the defendant. Inevitably, a preliminary assessment of the case of the plaintiff has to be made. It should however always be noted that this assessment is preliminary, based on the material before the court, and solely meant for the purposes of establishing how the subject matter of the suit ought to be preserved pending the full hearing of the suit. It is not a final determination of the dispute, which must be left to the full hearing of the suit on merits.

10. I have already set out the case of the plaintiff hereinabove. In a nutshell, it is his view that the defendant has no claim over the 5 acres as he had no agreement with him, and secondly, if there was any

agreement, the same has been voided by lack of consent of the Land Control Board. The defendant on the other hand asserts that his claim for the 5 acres is enforceable and has based his claim on the "Commission Agreement" that the plaintiff had with Mr. Kering and the two sale agreements that he has with Mr. Kering.

11. I have looked at the "Commission Agreement". It is a rather interesting agreement made on 30 May 2011 between the plaintiff and Mr. Kering. Inter alia, it states as follows :-

1. *That the principal (plaintiff) retains agent (sic) as his sole agent.*
2. *That the principal confirms that the agreed consideration for the parcel shall be kshs. 2,100,000/=.*
3. *That the principal acknowledges having been paid Kshs. 100,000/= on 4th February 2011.*
4. *That the agent undertakes to give the principal a sum of ksh. 400,000/= on or before 3rd June 2011.*
5. *That the balance of Kshs. 1,600,000/= shall be paid out to the principal as and when the parcel is sold from the sale proceeds thereof.*
6. *That whatever amount over and above the consideration shall constitute the agent's commission.*
7. *The parties herein mutually agree to have the sale agreement dated 4th February, 2011 cancelled and parties are hereby discharged from their respective obligations.*

There are four other clauses, but which I think are not relevant to my determination.

12. A cursory reading of the above clauses makes one wonder whether the agreement between the plaintiff and Mr. Kering was a sale agreement or a commission agreement. There is a purchase price which Mr. Kering commits himself to pay, but at the same time, it is also stated at clause 6 , that any amount over and above Kshs. 2,100,000/= will constitute the commission of Mr. Kering. Clause 7 alludes to a sale agreement which has been cancelled. I do not know its particulars because the same were not presented by either party. Be as it may, it is on the strength of the above agreement that Mr. Kering entered into the two subsequent agreements with the defendant.

13. Although the status of the commission agreement is not very precise, I think clause 6 thereof, may have mandated Mr. Kering to sell the suit land to potential purchasers. What Mr. Kering did in the subsequent two agreements with the defendant, was to sell portions of the suit land, as if he was an owner of the suit land. In both agreements that Mr. Kering had with the defendant, dated 6 October 2011, and 4 April 2012, Mr. Kering was the vendor and he described himself as having a purchaser's interest over all of the suit land. He never disclosed that he was an agent of the plaintiff or that he was selling the suit land on behalf of the plaintiff. Indeed, there is no mention at all, of the plaintiff, in the two agreements. The registered owner of the suit land however remained the plaintiff and certainly, there is no way that the defendant would have obtained title to the suit land without going through the plaintiff.

14. The parties seem to be in agreement that the suit land is agricultural land. Assuming that the agreements of 6 October 2011 and 4 April 2012, are agreements that are enforceable, consent of the Land Control Board, pursuant to the provisions of the Land Control Act, was required to be obtained within 6 months of the two agreements. The latest is the one dated 4 April 2012 and therefore consent ought to have been obtained latest by 4 October 2012. This is pursuant to the combined provisions of Sections 6 and 8 of the Land Control Act, which provide as follows : -

6. (1) *Each of the following transactions -*

(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;... is void 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.

8. (1) 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...

15. It has not been contended that any application was made to the land control board for consent to the sale transaction. The agreements therefore became void, and if they are null and void, then they cannot be enforced and the plaintiff cannot be bound by them. The only remedy, as provided in Section 7 of the Land Control Act, is refund of the purchase price directed at the person to whom the money was paid.

16. Section 22 of the Land Control Act is in my view critical to this application. It states as follows :-

S. 22 Acts in furtherance of void transaction

Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by [section 6](#) of this Act, and any person—

(a) pays or receives any money; or

(b) enters into or remains in possession of any land,

in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

17. It will be seen from the above, that any person who enters into or remains in possession of the land after the transaction has been voided for lack of consent, commits an offence. From the above provisions, it therefore means that the continuous occupation of the suit land by the defendant is illegal. It has been argued that the defendant is already in occupation, which may be so, but this court cannot sanction an illegality as that occupation is unsupported by law, and indeed it is an occupation for which the law prescribes an offence. I am unable to allow the defendant to continue being in occupation which to me seems to be an illegal occupation.

18. It is clear to me that the plaintiff has laid out a prima facie case with a probability of success. I do not therefore need to determine where the balance of convenience lies, since I am not in doubt as to the success of the plaintiff's case, based on the material presented before me.

19. For the above reasons, I allow this application for injunction. I hereby bar the defendant from entering, being in occupation, utilizing, or in any other way dealing with the suit land or any portion thereof until the final determination of this suit.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET