



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 2318 OF 2007

BERNARD KARITA MUIRU..... PLAINTIFF

VERSUS

KIMANI LABAN MAINA..... DEFENDANTS

BENSON N. KARANJA

CECILIA WANJIKU NJUHO(Sued as trustees of UHURU WELFARE ASSOCIATION)

(By original Action)

KIMANI LABAN MAINA..... PLAINTIFFS

BENSON N. KARANJA

CECILIA WANJIKU NJUO (Sued as trustees of UHURU WELFARE ASSOCIATION)

VERSUS

BERNARD KARITA MUIRU 1ST DEFENDANT

TIMOTHY KIMANI MUIGAI 2ND DEFENDANT

(By counter-claim)

RULING

The Defendant/Applicants by Notice of Motion application dated 5th November 2013 prays for an order of temporary injunction restraining the plaintiff whether by himself servant, agent and/or employees from trespassing into and/or building structures on **L.R. NO.4148/134 Ruiru** or otherwise construction on open space within the 5 acres which the plaintiff herein and the 2nd defendant in the counter claim respectively sold to the defendants/Applicants.

The Defendants application is supported by the affidavit of **Kimani Laban Maina** sworn on 5th November 2013 and on the grounds set out on the face of the application. The Defendants/Applicants aver that they purchased the 5 acres comprised in **L.R.NO.4148/31/134 Ruiru** on diverse dates of 31/5/1999 and 16/10/2002 from the plaintiff and the 2nd defendant to the counterclaim respectively. The

Defendants/Applicants allege that its members took possession of the plot save for an open space measuring approximately 3 acres falling within the 5 acre plot. The Applicants contend that the plaintiff and the 2nd Defendant to the counter-claim have failed and/or refused to transfer the land to the applicants inspite of receiving **Kshs.800,000/-** and **Kshs.900,000/-** as the purchase price respectively.

The applicants aver that the plaintiff/Respondent and/or his servants or agents on 23rd October 2013 entered the open space of the plot and commenced construction of a foundation for a structure and state that unless an order of restraint is issued by the Honourable court the applicants members would be prejudiced and a breach of peace could ensue. The Applicants states that the maintenance of status quo where no one undertakes any development on the open space of the plot until the suit is heard and determined would suffice and no party would be prejudiced since that was the status quo that was obtaining since the filing of the suit.

The plaintiff respondent opposes the Defendant's application and has sworn a replying affidavit dated 14th November 2013. The plaintiff avers that he purchased the land **L.R. NO.4148/134** in **1996** from **Muigai Holdings Ltd** who duly executed a transfer in the plaintiff's favour on 13/12/1996. The plaintiff has annexed to the replying affidavit a copy of the Land Board consent to the transaction marked "**KMI**" and "**KM2**" respectively. The plaintiff denies that he ever owned the suit property **L.R.NO.4148/134** jointly with **Timothy Kimani Muigai** the 2nd Defendant to the counter claim or with anybody else. The plaintiff states that he took possession of the entire parcel of land measuring 5 acres upon purchase but states the transfer of the parcel of land has not been effected owing to the unavailability of the mother file at the Lands Office. The plaintiff admits selling to the Defendants a portion of 2 acres out of his 5 acre parcel of land and avers that he has been using the remaining portion of 3 acres and has completed the construction of a chicken rearing shed as per photographs exhibited as "**KM6**" in his replying affidavit. The plaintiff further states that the defendants have caused the 2 acres that he sold to them to be subdivided into small plots which they have sold to their members who have constructed homesteads on the portions.

The Plaintiff contend that the Defendants are seeking to have him restrained from trespassing into or utilizing land which he has always had possession of and has been utilizing. The plaintiff further avers that the Defendants dealt with **Timothy Kimani Muigai** who had no interest in the suit property and could thus not legally deal with the plaintiff's property. The plaintiff in the premises contends that the Defendants application for injunction is incompetent and is defective in substance and the same ought to be dismissed.

The parties filed written submissions as directed by the court and on behalf of the Defendant/Applicants it was argued that on the basis of the grounds set out in support of the application and the affidavit in support disclose substantial issues for trial and meet the threshold for grant of temporary injunction. The Defendant applicant argues the building of new structures on the suit property would interfere with the status quo and submits that the status quo ought to be maintained and the plaintiff should be restrained from putting up any structures on the property until the suit is heard and determined. The plaintiff referred the court to a ruling by **Hon. Justice Kihara Kariuki** as he then was in the case of **Benson Ngeru & Ano. -vs- Karugu Guandai & 2 others** to illustrate the application of the Principles for the grant of injunctions as enunciated in the case of **Giella -vs- Cassman Brown & Co. Ltd (1973) EA 358**.

The plaintiff/respondent in his submissions took issue with the competency of the Defendants pleadings and the application arguing the same did not comply with order 1 Rule 13 of the Civil Procedure Rules. On the facts the plaintiff contended that the Defendant did not show or establish they have a prima facie case on the counterclaim to warrant the grant of an interlocutory injunction. The plaintiff argues the suit property is owned by him and while he admits he sold 2 acres out of the suit land to the Defendants he denies he had anything to do with the alleged sale of the remaining 3 acres of his land which he states he has been using. The plaintiff further submits that damages would be an adequate remedy to the Defendants since even under the counterclaim the defendants in the alternative pray for refund of the purchase price but at the current values of the suit property. Thus the defendants acknowledge damages would be adequate remedy.

On the facts adduced there is no dispute that the plaintiff purchased **L.R.NO.4148/134** from **Muigai Holdings Ltd** measuring about 5 acres and that the appropriate Land Control Board consent was given for that transaction. A transfer of the suit property from **Muigai Holdings Ltd** to the plaintiff was executed on 31st December 1996 and therefore although the transfer has not been duly registered it is clear that the plaintiff is the beneficial owner of the suit property. In my view therefore the 2nd Defendant to the counterclaim could have had no basis to deal with the suit property as the owner thereof. The purported sale of 16.10.2002 of 3 acres of the suit land could not therefore be entered into except by the plaintiff and/or by the plaintiff's express authority which it is not shown was obtained. Though the plaintiff admits the sale of a portion of 2 acres there is no evidence that the Land Control Board gave its consent to that transaction and equally alleged the sale of the 3 acres to the Defendants does not appear to have had the sanction of the appropriate Land Control Board.

The Land Control Board Act Cap 302 of the Laws of Kenya requires that all transactions that are subject to the Act be accorded consent within 6 months of the agreement in case of transactions relating to sale of land and if no consent is sought and obtained within the period of 6 months such transactions are rendered null and void for all purposes.

On the basis of the facts and evidence tendered in support and in opposition to the defendants application for injunction I am not satisfied the Defendants have established they have a prima facie case with any probability of success. The Defendants have not shown on what basis they dealt with the 2nd Defendant to the counterclaim when from their earlier transaction they knew or are taken to have known the plaintiff was the owner of the suit property. The plaintiff has in my view demonstrated that he is the beneficial owner of the suit property and would therefore be the only person entitled to deal with the suit property.

On the basis of the Defendants pleadings as per the counter claim the defendants have pleaded themselves outside the ambit of an interlocutory injunction as they acknowledge an award of damages would be an adequate remedy and therefore damages would be sufficient to compensate the defendants in case they succeed and the injunction is not granted.

As I have come to the conclusion that the defendants have not established they have a prima facie case with a probability of success and I am equally of the view that damages would be an adequate remedy, I need not consider where the balance of convenience would fall as I have no doubt in regard to first two conditions that a court needs to consider in an application for injunction. In short the Defendants have failed to satisfy the conditions for the grant of an interlocutory injunction as established in the **Giella –vs- Cassman Brown case (Supra)** and thus I disallow the defendants application in the circumstances.

I accordingly order the Defendants application dated 5th March 2013 dismissed with costs to the plaintiff.

Ruling dated signed and delivered at Nairobi this...29thday of.....May.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

.....For the Plaintiff

..... For the Defendants