



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC NO.482 OF 2012

ERNEST NJAGI MUTHARA.....PLAINTIFF

=VERSUS=

NDERITU WACHIRA

(RECEIVER & MANAGER

BULLEYS TANNARIES LTD).....1ST DEFENDANT/RESPONDENT

EVANSON M.KARANJA.....2ND DEFENDANT/RESPONDENT

RULING:

The matter coming up for consideration before me is a Notice of Motion application dated 19th April, 2013 brought under **Sections 3A & 63 (e) of the Civil Procedure Act, Order 5, Order 40 Rules 1(a) , & (b) , 2(1) & (2), Rule 10(1) (a) of the Civil Procedure Rules** and all other enabling provisions of law.

The application is brought by the Plaintiff/applicant against the Defendants herein seeking for these Orders.

- a. *That pending the hearing and determination of this suit herein, and or further orders, the Honourable Court be pleased to issue an order of permanent injunction prohibiting the Defendants/Respondents either by itself, its authorized agents, servants, officers, employees or otherwise whomsoever from continued dealings, transfer, construction, destruction or and trespass of the suit property, possession and occupation of all that property situate and known as **Thika Municipality Block 5 /460** or otherwise whatsoever .*
- b. *That this Honourable Court issues an order in the nature of specific performance directing the 1st Defendant to prepare and issue allotment letter, lease and all transfer documents of **Thika Municipality Block 5/460** in favour of the Plaintiff.*
- c. *That the officer commanding Thika Police Station be ordered to observe compliance of this Court's Order.*
- d. *That the costs of the application be provided for.*

The Notice of Motion was premised on the grounds set on the face of the application and on the supporting affidavit of **Ernest Njagi Muthara**. These grounds are:-

- a. *That the Applicant is the bonafide purchaser for value of all that property situate in Thika Municipality known as **Thika Municipality Block 5/460** vide a valid sale agreement dated 19th March, 2001 from 1st Defendant estate.*
- b. *That the 1st Defendant continues to unlawfully withhold instruments of title inspite of demand from the Plaintiff.*
- c. *That the 2nd Defendant through the express consent and direction of the 1st Defendant has since obtained the lease document of the said parcel of land from Thika District Lands Office.*
- d. *That the 1st and 2nd Defendants have no legal underpinning and are premised on malice and are tantamount to conversion and unjust enrichment at the behest of the Plaintiff.*
- e. *That gigantic prejudice or loss is being occasioned to Plaintiff/Applicant who has invested a colossal amount of money towards the purchase and development of the suit property.*
- f. *That the Plaintiff is likely to be dispossessed of his property if this Honourable Court does not intervene at the earliest instance.*
- g. *That it is in the interests of justice to have this application allowed.*

In his supporting Affidavit, **Ernest Njagi Muthara**, averred that he is the bonafide owner and/or purchaser for value and occupier of all that parcel of land known as **Thika Municipality Block 5/460** by dint of a sale agreement dated 19th March, 2001 and marked annexure EMN1 . He further averred that upon its purchase, he regularized his interests with the requisite authorities and the same is reflected at the defunct Thika Municipal Council offices, where he has been servicing the rates since the year 2001 as per annexure ENM5. It was his contention that he has always expressed his desire to complete the transaction but the vendor, **Bulleys Tanneries Ltd**, was wound up and it took him time to trace the Receiver Manager. He is now apprehensive that the Defendants may transfer the suit property to any third party if order sought not granted.

The deponent further contended that he is in actual, physical, quiet, and uninterrupted possession of the parcel of land since the year 2001. He therefore contended that the doctrine of adverse possession suffices herein.

The applicant alleged that he has since registered a caveat against the parcel of land on the grounds of purchaser's interest for fear that the Defendants might dispose of the parcel of land. He urged the court to allow his application.

The application is vehemently opposed. One **Evason M. Karanja** , the 2nd Defendant herein swore a Replying Affidavit and stated that he is the Estate Agent of Bulleys Tanneries Ltd

(in receivership) with the full knowledge of the facts and also duly authorized by the 1st Defendant to swear the affidavit on his behalf.

The Respondent admitted that on or about 19th March, 2001, the Plaintiff entered into an agreement with **Bulleys Tanneries Ltd** (now in receivership) for the purchase of Plot No.51 out of the parcel of land known as **LR No. 4953/598**, situate in Thika Municipality as evidenced by annexure EKI.

Further, he averred that it was an express term of the said sale agreement that the purchase price for the plot was **Ksh.250,000/=** and the Plaintiff was required to pay **Ksh125,000/=** on/or before execution of the sale agreement . The balance of **Ksh.125,000/=** was to be paid within **90 days** from the date of the

agreement that is by 19th June, 2001. It was his contention that, there was an express term of the said agreement that in the event the transaction was not completed on the completion date, the vendor would be at liberty to sell the plot to another buyer and refund the purchase price paid less 20% being penalty for failing to complete.

The Respondent further averred that the Plaintiff paid **Ksh.125,000/=** on execution of the agreement and a further **Kshs. 50,000/=** on **5th October, 2001**, leaving a balance of **Kshs. 75,000/=** as evidence by annexure EK2.

He contended that due to the failure of the Plaintiff to pay the balance of the purchase price, on or before the completion date of **19th June, 2001**, the agreement was terminated and the plot was sold to one **Henry Njuguna Muita**, as evidenced by **annexture EK3**. Respondent averred that the Plaintiff only showed interest in the year 2012, when he averred that he had completed payment of the purchase price vide receipt **No. 6120** dated **25th January, 2001**, **annexture EK4** which receipt is a forgery as it was allegedly issued before the agreement was entered.

He further contended that when the Plaintiff failed to pay the balance of the purchase price within the stipulated period, the vendor was entitled to sell the parcel of land which it did. It was the contention of the Respondent that the Plaintiff has been indolent as he has waited for more than 12 years to offer to complete the agreement. Further, the Respondent averred that the Receiver Manager was appointed in the year 2004 long after the lapse of the completion date and that could not have been the reason why the Plaintiff failed to complete the sale.

The Respondent disputed that Plaintiff is in possession and occupation of the land and he asserted that Plaintiff only fenced off the parcel of land in the year 2012 after he was informed the same had been sold. He deposed that the claim of adverse possession cannot lie in view of the acquisition of proprietary rights over the property by the third party. The Respondent further deposed that payment of rates did not confer ownership rights on the Plaintiff, and in any event this payment was done in December 2012 after Plaintiff was advised the parcel of land had been sold to a third party.

Respondent further averred that the Plaintiff did not disclose any cause of action against the Defendants and it is an abuse of the Court process and he urged the court not to grant any injunction. He further argued that the prayers sought have been overtaken by events as a certificate of lease in respect of the property has already been issued in favour of the new purchaser and applicant has no prima-facie case with probability of success.

Therefore, the Respondents prayed for dismissal of the Plaintiff's application dated 19th April 2013 with costs.

Subsequently, the applicant filed a supporting Affidavit and averred that the alleged bonafide 3rd party, **Henry Njuguna Muita**, bought his parcel of land on **7th March 2001** and the plot was No. 103 and not plot No. 51 (suit land). He further contended that the purchase price for **Plot No. 103** was **Ksh 350,000/=** whereas for **Plot No 51** was **Kshs. 250,000/=**

The 2nd Respondent also filed a further affidavit and averred that the Defendants have always been ready and willing to refund to the Plaintiff the sum of **Ksh.175,000/=** paid towards the purchase of the property less **20% penalty** as provided by clause (a) of the special conditions of the sale agreement. Further, he averred that the said **Henry Njuguna Muita**, purchased two parcels of land from Bulleys Tanneries Ltd, that is plots **No. 51** and **No. 103** as evidenced by annexure EMK1. The said **Henry Njuguna Muita** paid the full purchase price in respect of both plots and was even issued with Certificate of Lease for plot **No. 51**.

It was his contention that the Plaintiff was severally requested to complete the agreement by paying the balance of the purchase price as can be confirmed from **EMK2**. He further denied that Plaintiff has been in possession and occupation of the land and also he has never been a shareholder of Bulleys Tanneries

Ltd and the payment rates by the Plaintiff did not confer ownership rights on the Plaintiff. Finally the Respondent deposed that the sale of plot No.51 by the vendor to 3rd party was proper and lawful as the Plaintiff failed to complete the agreement dated 19th March 2001. He further urged the court to dismiss the instant application .

The parties herein filed Written Submissions as a way of canvassing this Notice of Motion. I have now carefully considered the dispositions herein, the annexures thereto, the relevant law and the written submissions. I have also made it clear in my mind that at this stage, I am not required to venture into making definite findings of facts or law as this can only be arrived at after calling of evidence. (**See Francis Jumba Enziano and Others Vs Bishop Philip Okeyo & 2 others , Nairobi High Court, Civil Case No. 1128 of 2001**).

The applicant herein has sought for injunctive relief which is an equitable remedy. The said remedy is granted at the discretion of the court but the said discretion must be exercised judicially. (See **Hasmukh Khetshi ShahVs Tinga Tranders Ltd, Civil Appeal No. 326 of 2002 (2002) KLR 4628**).

For the applicant herein to benefit from the above equitable relief, he needed to establish the settled principles for grant of an injunction as has been held in various judicial pronouncements. In the case of **Dismus Oduor Owour Vs Housing Finance Co.(k)Ltd & another, Nairobi (Milimani) High Court, Civil Case No. 630 of 2001**, the court held that the conditions , for grant of injunctions are:-

- i. *Existence of a prima-facie case with probability of success.*
- ii. *The applicant is likely to suffer an injury which cannot be adequately compensated in damages.*
- iii. *If the court is in doubt about the existence of the above two conditions, it will decide the application on a balance of probabilities.*
- iv. *The conduct of the applicant meets the approval of the court of Equity.*

Has the applicant herein established the above threshold principles to warrant this Court grant him the orders sought?.

Firstly, the applicant needed to establish that he has a prima facie case with probability of success. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125**, The Court of Appeal described prima-facie case as:-

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

From the available documents attached to the pleadings herein, there is no doubt that the Plaintiff/Applicant entered into a sale agreement with **Bulleys Tannaries Ltd** on 19th March, 2001 for purchase of Plot No. 51 from land parcel No. 4953/598 situated in Thika Municipality. The purchase price was **Ksh.250,000/=** and it is evident that the applicant paid **Kshs.125,000/=** at the execution of the agreement.

There is also no doubt the plaintiff, **Ernest Njagi Muthara** was to pay the balance of **Kshs. 125,000/=** within a period of **90 days** from the date of the agreement. The 90 days were to expire on **19th June, 2001**. There is also no doubt that the Plaintiff did pay a further **Kshs.50,000/=** on 5th October 2001 towards settlement of the purchase price and the balance due and owing was **Ksh.75,000/=** .There is also no doubt that the vendor Bulleys Tannaries Ltd went into receivership in the year 2004. By that time the Plaintiff/applicant had not completed payment of the purchase price. The applicant averred that he has been paying rates to the Defunct Thika Municipal Council and he is therefore the owner of the suit land.

On their part, the Defendants admitted that the Plaintiff did paid **Ksh.175,000/=** towards purchase price of the suit land. However, he defaulted in completion of the payment of the full purchase within a period of **90 days**. It was their contention that after the default, the Defendant sold the suit land to a third party and therefore the prayers sought by the applicant have been overtaken by events.

There is no doubt therefore that the Defendants herein did not pay the balance of **Kshs. 75,000/=** within the stipulated time.

The applicant was bound by terms of the sale agreement dated 19th March, 2001. The applicant was supposed to pay the balance of **Ksh.125, 000/=** within 90 days of the date of agreement that is before 19th June, 2001. However, the applicant failed to do so and only paid **Ksh. 50,000/=** on 5th October, 2001.

I have considered clause (a) of the special conditions of the agreement which reads as follows:-

“If for any cause whatsoever other than non- completion caused by an act or default of the vendor the transaction shall not be completed on the completion date then the vendor shall be at liberty to sell the said parcel of land to another interested buyer and refund the purchase price already paid as at the time of the breach of this agreement, less 20% of the same being penalty for failing to comply on the part of the purchaser with condition of this agreement”.

It is evident that indeed the Plaintiff herein failed to remit the balance of the purchase price within a period of **90 days** or within reasonable time. The Defendant then sold the suit land as per the provisions of clause (a) of the special conditions. The suit land is now in the name of a 3rd party and the fact that Plaintiff paid rates due to Thika Municipal Council did not confer any title to him. The Plaintiff herein was in breach of the said sale agreement executed by himself on 19th March, 2001. As I arrive at the above findings, I will be guided by the case of **William Kazungu Karisa Vs Cosmus Angore Chanjera, (2006) eKLR** where it was held that:-

“ The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them.....However, when a specific date is mentioned, then time becomes of essence and completion must be within that date as it becomes a condition which goes to the root of the contract”.

I will also concur with the Defendants’ submissions that even where time is not of essence, the contract must be performed with a reasonable period of time. In the instant case, the delay was over 10 years and that is not a reasonable time. There is no doubt that the vendor herein has already sold the suit land to a 3rd party as evidenced from the Certificate of Lease **annexture EK3**. The court cannot therefore injunct what has already happened or overtaken by events. See the case of **Esso Kenya Ltd Vs Mark Makwata Okiya Civil Appeal No. 69 of 1991** where it was held:-

“ An injunction cannot issue to restrain an event that has taken place “.

The applicant herein defaulted in payment of the balance of the purchase. Though he alleged the fact that the vendor went into receivership delayed his payment, it is evident that the vendor went into receivership in the year 2004. The applicant was in breach for more than 3 years by the time the vendors went into that receivership. The applicant therefore has not come to court with clean hands. In the case of **Kenya Projects and Investments Ltd Vs Kenya Post Office Savings, Bank Ltd, Nairobi High Court, Civil Case No. 2811 of 1995** , the court held that:-

“ The remedy of injunction being an equitable in origin the court must decline to exercise its discretion in favour of an applicant whose conduct is shown not to merit approval of a court of Equity; delay and unclean hands would disqualify an applicant from equitable relief”.

The applicant herein breached the contract and by his conduct, he demonstrated that he is underserving of

the equitable relief that he has sought.

Having analyzed the available documentary evidence and the submissions herein, I find that the applicant has not established that he has a prima-facie case with probability of success.

There is also no evidence that applicant is in possession of the suit land and that he has developed or improved the same. Applicant has also failed to demonstrate that he will suffer irreparable harm or injury which cannot be compensated by an award of damages. The value of the property herein can be valued or ascertained and applicant can adequately be compensated by an award of damages. (See the case of **Wilfred Oanda Kirochi Vs David Pius Mugamba, Civil Appeal No.76 of 1995** where the court held :-

“ If damages can suffice, injunction cannot be granted”.

Having now considered the pleadings in totality, I find that the applicant has failed to demonstrate that he deserves the orders sought.

The upshot of the foregoing is that the applicant’s Notice of Motion dated **19th April, 2013** is not merited. The same is dismissed entirely with costs to the Defendants/Respondents.

It is so ordered.

Dated, signed and delivered this **23rd day of May , 2014**

L.GACHERU

JUDGE

In the Presence of:-

Mr Mugambi holding brief T M Kuria for the Plaintiff/Applicant

Mr Muhindi for the Defendants/Respondents

Lukas: Court Clerk

L.GACHERU

JUDGE

23/5/2014

Mr Mugambi:

I apply for certified copy of the Ruling.

Court:

To be supplied upon payment of requisite fees .

L.GACHERU

JUDGE

23/5/2014

