



IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 256 OF 2014

STEPHEN MWAKA MBUVI.....PLAINTIFF

VERSUS

PATRICK MUTUKU MBOVI.....DEFENDANT

RULING

The Application

The Notice of Motion dated 14th February 2014 is brought by the Applicant namely Paul Githinji Mugo, who is seeking to be enjoined in this suit as an Interested Party. He also seeks a temporary prohibitory injunction restraining the Plaintiff from continued dealing, transfer, construction, destruction and/or trespass on all that property known as Ndithini/Manaja Block 5/11 (hereinafter referred to as "the suit property"), and from possession and occupation of the same. Lastly, the Applicant is seeking an order of specific performance from this Court directing the District Land Registrar – Machakos, to transfer and register the suit property in his favour. The application is supported by an affidavit sworn by the Applicant on the same date.

The main ground for the Applicant's application is that he is the *bona fide* purchaser of value and occupier of the suit property, having bought the same for a sum of Kshs.4,000,000/= from the Defendant pursuant to a sale agreement dated 18th May 2013, and having fully paid the entire consideration. Further, that he is thus the *bona fide* owner of the suit property, and it is only fair that he be enjoined in this suit for the Court to arrive at a more reasoned decision and so that his interests are not rendered nugatory. The Applicant in his supporting affidavit gave a detailed account of the processes and due diligence undertaken before he entered into the sale agreement with the Defendant. He attached copies of the certificates of official searches of the suit property showing the Defendant to be registered owner; of the sale agreement entered into with the Defendant; and of the cheques evidencing payment.

The Applicant further stated that he paid all the land rent, rates and stamp duty due and furnished all the original documents to the District Land Registrar, Machakos for transfer. Further, that after inordinate delay in effecting the transfer, he visited the District Land Registry at Machakos, whereupon he was advised that the Plaintiff had lodged a caution against the suit property and as such the transfer was halted. He was further informed that the said caution can only be withdrawn by a court order.

The Applicant also stated that he had since received emissaries sent by the Plaintiff asking him to "amicably" solve this matter by topping up the consideration, which he contended is extortion. He also averred that he faced the risk of being exposed to multiple suits as he had sub-divided the suit property and sold the same to third parties, but cannot process their titles due the existing caution.

The Applicant's counsel file written submissions dated 24th June 2014 in which he argued that he had proved the necessary ingredients for the grant of a temporary injunction.

The Plaintiff's Response

The Plaintiff objected to the Applicant's Notice of Motion in a replying affidavit sworn on 7th March 2014. His position is that he, together with the Defendant, contributed to the purchase of 54 shares within Mananja Farm at Masinga on the agreement that they would be joint owners thereof, which was confirmed in a family meeting on 27/3/1989 and the same was reduced into writing. The Plaintiff annexed a copy of the said agreement and the translation thereof.

Further, that on or about the year 1993, he found out that the Defendant had not included his name in the register of members of Mananja farm, and after his intervention the Defendant duly wrote to the farm confirming that the shares were jointly owned. The Applicant stated that he in addition also wrote a letter to the secretary of Mananja Farm on 10/03/1993 to ensure that his interests were factored in during sub-division of the farm. The Plaintiff annexed copies of the said letters.

However that on or about 2007, the Defendant secretly caused Plot No. 11, being the plot he had balloted, to be registered in his sole name and unlawfully obtained title deed No. Ndithini/Mananja Block 5/11 without noting the Plaintiff's interests thereon. The Plaintiff stated that he was never informed of the balloting and subsequent survey, and hence did not participate.

It is the Plaintiff's contention that although the title deed to the suit property is in the name of the Defendant, the said Defendant holds half the parcel in trust for him and it is in the interest of justice that the same remains in force until the main suit is heard and determined. Therefore, that the caution was lodged in good faith so as to protect his interests. The Plaintiff also alleged that the Applicant had also approached him asking him to settle for less than that what he was entitled to, and that the averments he had been sending him emissaries is unfounded and baseless.

The Plaintiff's counsel filed written submissions dated 9th July 2014 wherein he made argument on the issues of the joinder of the interested party, and on the prayers sought of a temporary injunction and order of specific performance.

Issues and Determination

I have carefully read and considered the pleadings and arguments made by the parties herein. The issues for determination are firstly, whether the Applicant should be joined as an interested party to this suit; secondly whether the Applicant should be granted the temporary prohibitory injunction sought; and lastly whether the order of specific performance sought can be granted.

On the first issue of joinder of the Applicant, the Plaintiff's counsel argued that the Civil Procedure Act and Civil Procedure Rules do not have any provisions for the inclusion of an interested party, and it is not possible to identify what interests the Applicant would be addressing which he cannot address as a defendant, that if his interests are against the Defendant, then they are already addressed by Order 24(1) of the Civil Procedure Rules. The Plaintiff relied on the decision in Super Marine Handling Services Ltd vs Commissioner General, Kenya Revenue Authority, (2002) 2 KLR 758 in this regard.

I note that Order 1 Rule 10 of the Civil Procedure Rules gives this court discretion at any stage of court proceedings to add parties whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. Order 1 Rule 10(2) provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or

whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

I find that to the extent that the Applicant alleges to have purchased the suit property herein from the Defendant, and will therefore be affected by any decisions made by this Court with respect to the suit property, he is a necessary party in this suit. The above cited rule allows the court to join a party whose presence is necessary to adjudicate on all questions in a suit, even though not as Plaintiff or Defendant, hence the joinder of parties as interested parties.

On the issue as to whether the Applicant has met the threshold for the grant of the temporary prohibitory injunction sought, the Applicant’s counsel argued that it is not disputed that the Applicant entered into a sale agreement with the Defendant to purchase the suit property. Further, that the Applicant will suffer irreparable damage as he has paid the purchase price of Kshs 4,000,000/= and has subdivided the suit property into plots and sold the same to third party purchasers, and risks being exposed to multiple litigation. Lastly, that the balance of convenience is in the Applicant’s favour as the Plaintiff has never been in occupation of the suit property and stands to lose nothing. The Applicant’s counsel cited various judicial authorities in support of his arguments including Mrao Ltd v First American Bank of Kenya Ltd & 2 Others, [2003] KLR 1215 and Nyanza Fish Processors Ltd vs Barclays Bank of Kenya Ltd, (2009) e KLR.

The Plaintiff’s counsel on the other hand argued in his submissions that the Applicant had not shown a *prima facie* case with a probability of success, as he does not qualify to be joined as a party to this suit, and that he could be adequately compensated by the Defendant who had offered indemnity in the sale agreement he entered into with the Applicant dated 18th May 2013. Lastly, that the Applicant had not provided any evidence of the subdivision of the suit property, and that the Plaintiff on the other hand is likely to be irreparably prejudiced if the land is sold to third parties before his interests are determined.

I am in this respect guided by the requirements stated in Giella vs Cassman Brown & Co Ltd, (1973) EA 358 as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Applicant has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others, [2003] KLR 1215 as follows:

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

In the Applicant’s case, he is seeking, and has been granted orders to be joined herein as an interested party. He has not filed any claim or suit herein that can be the basis of determining of whether he has a *prima facie* case, and is hinging his rights to the suit property on the Defendant’s ownership of the same, which is being contested by the Plaintiff in the suit filed herein. This court cannot therefore in these circumstances find a *prima facie* case in favour of the Applicant.

Likewise, on the issue of the grant of the orders of specific performance, this Court notes that the said prayer is in the nature of a mandatory injunction, and the requirements are that the Applicant has to in addition to showing a *prima facie* case, show special circumstances that make this a clear case where the matter ought to be decided at once. These requirements were stated by the Court of Appeal in Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109.

This Court has already found that the Applicant has not shown a *prima facie* case. In addition, there is an outstanding dispute which is yet to be resolved as between the Plaintiff and Defendant as regards

ownership of the suit property that the Applicant is also claiming an interest in. The Applicant's situation is therefore not a clear case where a mandatory injunction can issue.

Arising from the foregoing reasons I accordingly order as follows:

1. The Applicant herein namely Paul Githinji Mugo, is hereby joined as an Interested Party to this suit.
2. The prayers for a temporary prohibitory injunction and specific performance in the said Applicant's Notice of Motion dated 14th February 2014 are hereby declined.
3. The said Applicant shall meet the costs of the Notice of Motion dated 14th February 2014.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____1st____ day of

____October____, 2014.

P. NYAMWEYA

JUDGE