



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 258 OF 2015

DAVID GIKENGE KIMANI.....1ST PLAINTIFF
PETER KIMANI GIKENGE.....2ND PLAINTIFF
JANE WATIRI GIKENGE.....3RD PLAINTIFF
JAMES NUNGARI GIKENGE.....4TH PLAINTIFF
LUCY MUGURE GIKENGE.....5TH PLAINTIFF
GRACE NDUTA GIKENGE.....6TH PLAINTIFF
TABITHA WAMBUI GIKENGE.....7TH PLAINTIFF
HANNAH MAGIRI GIKENGE.....8TH PLAINTIFF
JOYCE NYAMBURA GIKENGE.....9TH PLAINTIFF
GEOFFREY KAGONA GIKENGE.....10TH PLAINTIFF
FRANCIS MWAURA NYAMBURA.....11TH PLAINTIFF
TERESIA MAGIRI NYAMBURA.....12TH PLAINTIFF
MARY WATIRI NYAMBURA.....13TH PLAINTIFF
JOYCE NYAMBURA KIMANI.....14TH PLAINTIFF

VERSUS

KABURA WAWERU1ST DEFENDANT
STEPHEN GATUMUTA WAWERU.....2ND DEFENDANT

PATRICK KAHORO WAWERU3RD DEFENDANT
JOSEPH WAMUTURI KIGATHI.....4TH DEFENDANT
ESTHER GATHONI NGURE.....5TH DEFENDANT
JOHN MUNYUI GACHUMA.....6TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 26th March 2015 in which the Plaintiffs/Applicants seek for an order of temporary injunction restraining the Defendants from disposing, alienating, charging or evicting the Plaintiffs from the parcels of land known as Kiambaa/Muchatha/T.569, Kiambaa/Thimbigua/7395, 7396, 7509-7519 (hereinafter referred to as the “suit properties”) pending the hearing and determination of this suit and that this court do order the Land Registrar to register an inhibition on the suit properties.

The Application is premised on the grounds set out on its face together with the Supporting Affidavit of the 1st Plaintiff, David Gikenge Kimani, sworn on 26th March 2015 in which he averred that the 1st Defendant’s husband, the late Waweru Kimani (herein the “Deceased”) was registered as proprietor of two family parcels of land known as Kiambaa/Thimbigua/1304 and Kiambaa/Muchatha/T.175 after land consolidation and demarcation. He further averred that the Deceased married the 1st Defendant who after his death now claims both of those parcels of land. He averred that those two parcels of land belong to the family of his late father Kimani Kahora. He added that the 1st Defendant filed a succession cause for the estate of the Deceased and concealed the material fact that the Deceased was holding the suit properties in trust for the family of his late father. He added that as a result, the suit properties were transferred to her name and she immediately started demanding that they should vacate the suit properties. He stated that he together with his siblings who are alive have lived and continue to live on the suit properties since 1958 when their father purchased them. He further averred that in a bid to evict them, the 1st Defendant filed **HCCC No. 568 of 1976** praying inter alia for eviction orders against him, his late father and his sister. He added that during the pendency of that suit, the 1st Defendant cause the parcel known as Kiambaa/Muchatha/T.175 to be subdivided into two parcels namely Kiambaa/Muchatha/T.569 and 570 of which she sold Kiambaa/Muchatha/570 to one Francis Waithaka Gachuma. He further averred that the 1st Defendant subsequently caused the parcel of land known as Kiambaa/Thimbigua/1304 to be subdivided into 3 portions namely Kiambaa/Thimbigua/7395-7397 which she transferred as follows:

- i. Kiambaa/Thimbigua/7395 to Stephen Gatumuta Waweru
- ii. Kiambaa/Thimbigua/7396 to Patrick Kahoro Waweru
- iii. Kiambaa/Thimbigua/7397 to Joseph Wamuturi Kigathi.

He added that Mr. Joseph Wamuturi Kigathi has further subdivided his parcel into 11 portions known as Kiambaa/Thimbigua/7509-7519. He averred further that all those transfers were fraudulent, illegal and contrary to the 1st Defendant’s trustee ship and was calculated to defeat the interest of the Plaintiffs. He added that the 4th, 5th and 6th Defendants were not innocent purchasers for value without notice as they were well aware of the Plaintiff’s occupation, possession and use of the suit properties and further that they reside within the Muchatha area and are well acquainted with the dispute between the Plaintiffs and the 1st Defendant. He added that the titles issued to the 2nd to 6th Defendants should be cancelled and the original title for Kiambaa/Muchatha/T.175 and Kiambaa/Thimbigua/1304 be restored and the two properties be distributed to the Plaintiffs as beneficiaries. He further added that the 1st Defendant having sold her share in the original Kiambaa/Muchatha/T.175 should surrender the remaining half share being Kiambaa/Muchatha/T.569 to the 1st Plaintiff. He added that the Plaintiffs further claim a half share of

Kiambaa/Thimbigua/1304 which is in their possession and upon which they cultivate. He further added that he lives on the suit properties together with his family and he has never known any other place to call home. He expressed the fear that the Defendants will demolish his house and consequently render him and his family homeless. He further stated that he is an old man and cannot afford to start making a home all over again due to financial constraints.

The Application is contested. The 1st Defendant/Respondent, Kabura Waweru, filed her Replying Affidavit sworn on 13th May 2015 in which she averred that the 2nd to 10th Plaintiffs are children of the 1st Plaintiff and the 11th to 13th Plaintiffs are children of the 14th Plaintiff. She further averred that in 1972, she filed **Succession Cause No. 36 of 1972** in the District Magistrate's Court at Kiambu whereby on appeal, Hon E. Okubasu Resident Magistrate ordered that she was solely entitled to inherit the parcels of land known as Kiambaa/Thimbigua/1304 and Kiambaa/Muchatha/T.175. She further averred that the issues raised in this Application are similar in nature and form to those raised in **HCCC No. 568 of 1976** in which she was the plaintiff and the 1st and 14th Plaintiffs were the 1st and 3rd Defendants. She averred that in **HCCC No. 568 of 1976**, the 1st and 14th Plaintiffs/Applicants filed a defence and counterclaim where they prayed for the following orders:

- a) A declaration that the plaintiff holds the said parcels of land as trustee for the defendants.
- b) Alternatively, a declaration that the defendants are entitled to the said parcels of land under the scatters title.
- c) An order that the plaintiffs do transfer Kiambaa/Muchatha/T.175 to Kimani Kahora the 2nd defendant.
- d) An order that the plaintiff do transfer half acre of land parcel Kiambaa/Thimbigua/1304 to the 1st defendant David Gikenge
- e) Costs of the suit
- f) Such further or other relief that the Honourable court may deem fit to grant.

She further averred that **HCCC No. 568 of 1976** was heard and determined on merit by Justice J.L.A. Osiemo on 22nd September 2005. She added that the said Judge did not mention anything to do with the 1st and 3rd defendant's counterclaim and as a result, section 7 explanation 5 of the Civil Procedure Act states that "any relief claimed in a suit which is not expressly granted by the decree shall be deemed to have been refused. She added that the 1st and 3rd defendants' counterclaim in **HCCC No. 568 of 1976** was not expressly granted and therefore it is deemed to have been refused and the only recourse available was to file an appeal against the said judgment which was not done. She added that the Plaintiffs/Applicants have no right whatsoever over the suit properties and the only leeway and opportunity they had was to file an appeal against the judgment of Justice Osiemo in **HCCC No. 568 of 1976** and also against the judgment of Hon. E. O. Kubasu in **Succession Appeal No. 8 of 1974** delivered and dated 2nd July 1974 which declared her as the sole inheritor of the two land parcels Kiambaa/Muchatha/T.175 and Kiambaa/Thimbigua/1304. She added that the Plaintiffs/Applicants having squandered the opportunity of filing appeals in those suits ought to be stopped from filing several and endless suits by dismissing this Application. She concluded that for justice and fairness to prevail litigation must come to an end.

The 4th Defendant/Respondent, Joseph Wamuturi Kigathi, filed his Replying Affidavit sworn on 13th May 2015 in which he averred that on 20th May 2014, he entered into a sale agreement with the 1st Defendant/Respondent for the purchase of land measuring approximately 1 acre to be excised from Kiambaa/Thimbigua/1304. He further averred that upon receiving Kiambaa/Thimbigua/7397, he subdivided it into 11 parcels of land being Kiambaa/Thimbigua/7509-7519 of which titles were issued. He further averred that he conducted a search on the parcel of land before the purchase and did not find

any restriction or caution on record so he knew he was purchasing a clean title. He further averred that he is an innocent purchaser for value without notice so he should not be dragged into issues of which he was unaware. He further added that the Plaintiffs/Applicant were not and are not in occupation of the disputed parcel of land so it was not possible to known of their interest in the land. He therefore sought for this Application to be dismissed with costs.

The Application is further contested by the 5th Defendant/Respondent, Esther Gathoni Ngure who filed her Replying Affidavit sworn on 13th May 2015 in which she averred that her late husband Francis Waithaka Gachuma was the registered proprietor of Kiambaa/Muchatha/T.570 which he purchased from the 1st Defendant/Respondent. She further averred that she owns that parcel of land by virtue of the Certificate of Confirmation of Grant dated 25th June 1999 to the exclusion of the Plaintiffs/Applicants. She added that her late husband was a bona fide purchaser of that parcel for value without notice. On those grounds, she sought for this Application to be dismissed with costs.

I am required to determine whether the Plaintiffs/Applicants are entitled to an order of temporary injunction pending the hearing and determination of this suit which they seek. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

Have the Plaintiffs/Applicants demonstrated that they have a genuine and arguable case and hence a prima facie case with high chances of success at the main trial? From the information supplied to this court, it appears that the issue of the Plaintiff’s entitlement to a portion of the suit properties has been litigated over and over again. At no point did the Defendants obtain an order granting them any ownership rights over the suit property. That issue has to be laid to rest once and for all. At this interlocutory stage of these proceedings, the Plaintiffs/Applicant have not succeeded in demonstrating any legal right over the suit properties. On the other hand, the Defendants have exhibited to this court their title documents over the suit properties. The law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1) of the Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

**(a) On the ground of fraud or misrepresentation to 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.”

In light of the foregoing, this court is bound by the law to take the produced certificates of title as prima facie evidence of ownership of the suit properties. The Plaintiffs/Applicants have not been able to demonstrate that those title documents were acquired through fraud or misrepresentation to which the Defendants were party or that those title documents were acquired illegally, unprocedurally or through a corrupt scheme. In light of that, I find that the Plaintiffs/Applicants have not demonstrated that they have a prima facie case with high chances of success at the main trial.

Since the Plaintiffs have failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants.

DELIVERED AND SIGNED IN NAIROBI THIS 11TH DAY OF MARCH 2016.

MARY M. GITUMBI

JUDGE