



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
ELC CIVIL CASE NO. 282 OF 2015

JOEL GITAU MACHARIA & OTHERSPLAINTIFFS/APPLICANTS

-VERSUS-

MARY MWANGO NJUGUNA 1ST DEFENDANT/RESPONDENT

BENSON IRUNGU GICHARU.....2ND DEFENDANT/RESPONDENT

RULING

1. On 16th November, 2015 the plaintiffs brought the instant suit against the defendants seeking a declaration that the transfer of the parcel of land known as No. **Mitubiri/Wempa/Block 1/5790** (hereinafter referred as the suit property) to the 1st defendant by the 2nd defendant is void; a permanent injunction to restrain the defendants by themselves and/or through their authorized agents from developing, alienating, trespassing and/or in any manner interfering with the suit property and the costs of the suit.
2. The plaintiffs who claim to have bought the suit property from the 2nd defendant accuse the 2nd defendants of having caused the suit property to be fraudulently transferred to the 1st defendant.
3. Simultaneously with the plaint, the plaintiffs brought the notice of motion dated **16th November, 2015** seeking the following orders:-
 - a) Spent
 - b) **A temporary injunction to restrain the defendants by themselves and/or through their authorised agents from developing, alienating, trespassing and/or in any other manner interfering with the suit property.**
 - c) **A permanent injunction to restrain the defendants by themselves and/or through their authorized agents from developing, alienating, trespassing and/or in any other manner interfering with the suit property.**
 - d) **A declaration that the transfer of the suit property to the 1st defendant, if any, is void.**

e) Cost of the application be in cause.

4. The application is premised on the grounds that the applicants entered into an agreement to purchase the suit property with the 2nd defendant; that in breach of the agreement, the 2nd defendant fraudulently and unlawfully transferred the suit property to the 1st defendant.

5. Terming the acquisition of the suit property by the 1st defendant fraudulent, irregular and unlawful, the plaintiffs contend that it is in the interest of justice that the prayers sought be granted.

6. The application is supported by the affidavit of Joel Gitau Macharia (one of the plaintiffs/applicants) in which the grounds on the face of the application are reiterated.

7. In support of the averments contained in the supporting affidavit, the deponent has annexed the following documents:-

a) a copy of the sale agreement executed between the plaintiffs and the 2nd defendant, marked **JGM-1**;

b) a copy of certificate of official search showing that as at the time of entering into the sale agreement with the 2nd defendant, the suit property was registered in the name of the 2nd defendant, marked **JGM-2**;

c) a copy of letter of consent and transfer document in favour of the plaintiffs, marked **JGM-3**;

d) a copy of the gazette notice notifying purported loss of the title deed issued to the 2nd defendant, marked **JGM-4**;

e) a copy of a demand letter issued by the 1st defendant to the applicants and title deed issued to the 1st defendant, marked **JGM-5**; and

f) a copy of the caution registered by the plaintiffs restraining dealings with the suit property, marked **JGM-6**.

8. The application is opposed through the replying affidavit of the 1st defendant, Mary Mwangi Njuguna, sworn on 14th December, 2015. In that affidavit, the 1st defendant has, *inter alia*, deposed that she is a bona fide purchaser of the suit property without notice of the plaintiffs' interest therein; that her acquisition of the suit property was legal and devoid of any fraud; that her son, Onesmus Chege Njuguna, has built a permanent house on the suit property and that the orders sought may lead to eviction of her son who is lawfully in occupation of the suit property. The 1st defendant has further deposed that some of the plaintiffs have put up uncompleted structures on the suit property.

9. In support of the averments contained in her affidavit, the 1st respondent has annexed to the affidavit the title deed issued to her on 15th April, 2015; application for consent and the transfer executed between herself and the 2nd defendant.

10. When the matter came up for hearing, **Mr. Kamau**, who was holding brief for Mr. Nyasani for the plaintiffs, relied on the grounds on the face of the application and the affidavit sworn in support of the application and pointed out that the applicants are in occupation of the suit property. He reiterated the contention that the title held by the 1st defendant was obtained fraudulently.

11. Terming the application fatally defective, counsel for the 1st defendant, **Mr. Macharia** submitted that the deponent of the supporting affidavit had no authority to swear the affidavit on behalf of the applicants at the time the application was made. He also faulted the application on the grounds that the

documents annexed to the supporting affidavit were signed by the advocate as opposed to the deponent.

12. Maintaining that the 1st defendant's son is in occupation of the suit property, he submitted that if the orders sought are granted, the 1st defendant and her son will be evicted and denied access to the suit property.

13. With regard to the contention that the plaintiffs are in occupation of the suit property, he submitted that there is no evidence of that fact.

14. In a rejoinder, Mr. Kamau, submitted that the fact that some documents were filed after the suit papers had been filed does not render the suit/application fatally defective. Referring to **Article 159** of the constitution which requires this court to determine disputes preferred before it without undue regard to technicalities, he urged the court to disregard the issues raised concerning the filing of the authority and execution of the documents annexed to the supporting affidavit.

15. Maintaining that the plaintiffs have satisfied the conditions for grant of the orders sought, he urged the court to grant the orders sought.

Analysis and determination

16. The issue I am required to determine, at this stage of the proceedings, is whether the plaintiffs (applicants) have made up a case for being granted the orders sought.

17. Before I consider that issue, I need to address the issue of the pleadings filed by the applicants, which are said to be improperly in record. With regard to that issue I note that counsel for the applicants has admitted that there were technical flaws in filing and attesting the documents filed in support of the applicants' case. I have considered the issue raised concerning those flaws and the submissions in respect thereof by advocates for the parties.

18. My view of that issue is that the flaws do not go to the root of the matter. I say this because no evidence was produced to show that the respondents suffered any prejudice owing to those flaws. For those reasons, I decline to strike out the impugned documents and instead deem them to be properly on record.

19. With regard to the prayer for temporary injunction, for this court to grant that prayer, the applicants must satisfy the conditions set in the celebrated case of **Giella versus Cassman Brown (1973) EA 358**. In that case it was held:-

“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.”

20. In the case of **Kenya Commercial Finance Co. Ltd** versus **Afraha Education Society (2001) 1 EA 86** the Court of Appeal held:-

“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...”

21. As pointed out above, the first condition that an applicant must satisfy is that they have a *prima facie* case with a probability of success.

22. The term *prima facie* case was described in the case of **Mrao v. First American Bank of Kenya**

Limited & 2 others(2003) KLR 125, 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.”

23. In the instant case, have the applicants demonstrated that they have a genuine and arguable case against the defendants/respondents?

Concerning this question, whereas there is evidence of breach of the sale agreement executed between the 1st defendant (respondent) and the plaintiffs/applicants (hence an arguable case against the 1st defendant/respondent), there is no evidence that the 2nd defendant (respondent) colluded with the 1st respondent to defeat the applicants interest in the suit property.

24. Although the 2nd respondent has not provided any evidence capable of showing that he bought the suit property, there being no evidence capable of proving that he was party to the fraud allegedly perpetrated by the 1st respondent and himself, I am unable, at this stage of the proceedings to find that the acquisition of the title held by the 2nd respondent was fraudulent, irregular and unlawful. If anything, the legal threshold of proving fraud is very high. In this regard see the case of **Njuwangu Holdings Ltd v. Langata Kpa Nairobi & 5 others (2014) eKLR** where it was held:-

“The standard of proving fraud in Civil cases, the courts have consistently held, is higher than on a balance of probability. An allegation of fraud is a serious indictment against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in criminal cases it is no doubt near there but is certainly higher than on a balance of probability and thus when a party in a civil matter makes an allegation of fraud against a party he should be prepared to tender and adduce evidence to prove the allegation to the required standard. In the present case, I am afraid the fraud allegations against the plaintiff have been generalized and lack specificity and are generally unproved...”

25. In the circumstances of this case, the 2nd respondent being the registered proprietor of the suit property enjoys the protection of the law. In this regard see **Section 26** of the Land Registration Act, 2012 which provides as follows:-

“26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by a proprietor 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, subject to the encumbrances easement, restrictions and conditions contained or endorsed in the certificate 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.”

26. To successfully challenge the title held by the 2nd respondent the applicants will require to, by way of evidence; prove the existence of any of the circumstances contemplated in **Section 26(1) (a) (b)** of the Land Registration Act, 2012, which they have at this juncture failed to do.

27. In view of the foregoing, despite there being evidence of breach of the agreement executed between the applicants and the 1st respondent, since the title held by the 1st respondent has already being transferred to the 2nd respondent and there being no evidence capable of proving the alleged fraud or

collusion on the part of the 2nd respondent, I find and hold that the applicants' have not established a *prima facie* case with a probability of success as against the 2nd respondent.

28. By dint of the provisions of **Section 26** of the Land Registration Act (*supra*) the 2nd respondent is *prima facie* the absolute and indefeasible owner of the suit property.

Final determination

29. Although the above determination suffices to determine the issues raised in this application, from the pleadings filed in this suit and the evidence adduced in support thereof, I note that some of the applicants are in occupation of the suit property. In this regard see paragraph 14 of the replying affidavit sworn by the 2nd respondent on 14th December, 2014 where she has deposed:-

“14....the said non disclosure is fatal to the applicants case as they risk to evict him/bar him from accessing the land with his family. Further they have not disclosed that some of them have put have half completed structures on the parcel of land”.

30. As the 2nd defendant's/respondent's ownership of the suit property is under challenge, and there being evidence that the suit property had been sold to the plaintiffs before it was transferred to the 2nd respondent, I hold the view that for purposes of protecting the suit property pending the hearing and determination of the suit, an order of maintenance of status quo is the most appropriate. Therefore, in exercise of the powers granted to this court under **Section 3A** of the Civil Procedure Act and **Order 40(1)** of the Civil Procedure Rules, I order that the *status quo* obtaining in respect of the suit property be maintained pending the hearing and determination of the suit.

31. The costs of this application shall abide the outcome of the main suit.

Dated, signed and delivered at Nyeri this 26th day of April, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Kamau h/b for Mr. Nyasani for the plaintiffs/applicants

No appearance for the defendants

Court assistant - Lydia