



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. E 013 OF 2021

MARY WAIRIMU D. KIHARA (Suing on behalf of the Estate of

DAVID KIHARA MWANGI (Deceased).....PLAINTIFF

-VERSUS-

JOE MWANGI MATHAI.....DEFENDANT

RULING

1. By the Notice of Motion dated 21st June, 2021, Mary Wairimu D. Kihara suing on behalf of the Estate of David Kihara Mwangi (*the Plaintiff*) prays for an order of injunction to issue restraining the Defendant from trespassing upon, selling, disposing of, leasing, charging, pledging, transferring or interfering in any manner with the property known as Title No. Konyu/Ichuga/1243 pending the hearing and determination of the suit. In addition, the Plaintiff craves an order directing the Chief Land Registrar to place a caution over the said title pending the hearing and determination of the suit.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds *inter alia*, that:

(i) *The suit property was purchased by the Plaintiff and her deceased husband in 1993 after which they erected their matrimonial home thereon;*

(ii) *In 1994, the family relocated to Naromoru in search of better business opportunities. In 1998 the family further relocated to Nairobi but they would always visit the suit property where they had left behind their 5 bedroomed matrimonial home and some livestock;*

(iii) *The Plaintiff has recently discovered that the suit property has recently been fraudulently registered in the name of the Defendant; and*

(iv) *Neither the Plaintiff nor her late husband had ever at any given time sold or transferred the property to the Defendant.*

3. The Defendant – Joe Mwangi Mathai is opposed to the application. In his Replying Affidavit sworn on 28th July, 2021 but filed herein on 16th August, 2021, the Defendant avers that the Plaintiff and her late husband were his neighbours. Sometime in the year 1993, the Plaintiff's husband was introduced to the Defendant by one James Muriuki Kigio. At the time the Plaintiff's husband was looking for someone to buy the suit property to enable him offset an outstanding loan owed to Barclays Bank to which the property was then charged.

4. The Defendant further avers that in the year 1994, the deceased moved away his family from the suit land and it was then that the Defendant agreed to purchase the same. By a letter dated 19th August, 1994, Barclays Bank confirmed to the Defendant's Advocate that the deceased owed the sum of KShs.600,000/- to the Bank and that they were ready to discharge the title if the said sum was paid.

5. The Defendant avers that on the same 19th day of August 1994, he paid the sum of KShs.600,000/- via Bankers cheque to the Bank and paid a further sum of KShs.200,000/- to the Plaintiff's husband as part of the purchase price for the suit property. The balance of the purchase price being KShs.200,000/- was further paid to the Plaintiff's husband on 29th September, 1994 via a Banker's cheque and the deceased acknowledged receipt by executing an Acknowledgment Form.

6. The Defendant further avers that the Plaintiff's husband thereafter applied for consent to transfer the land from the Land Control Board. That consent was given on 28th September, 1994 after which the land was transferred into the Defendant's name and he was issued with a title therefore on 3rd October, 1994.

7. The Defendant further avers that the Plaintiff was fully aware of the sale of the land by her husband having actively participated therein and she has therefore come to court with unclean hands and should be denied the orders sought.

8. In addition to the Affidavit filed in reply, the Defendant has also taken out a Notice of Preliminary objection dated 5th October 2021 seeking to have the suit herein struck out on the grounds that the same is statute barred under **Section 4(2) of the Limitation of Actions Act** and that the same is fundamentally and incurably defective.

9. I have carefully considered the Plaintiff's application, the response thereto as well as the Preliminary objection by the Defendant. I have similarly considered the written submissions and authorities placed before the court by the Learned Advocates for the parties.

10. By his Preliminary objection dated 5th October, 2021, the Defendant contends that the suit herein is statute-barred by dint of **Section 4(2) of the Limitation of Actions Act** and that hence the same should be struck out. The said Section provides thus:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

11. I have looked at the Plaint dated 21st June, 2021 as filed herein on 25th June, 2021 and it is not clear to me how the Defendant came to the conclusion that this suit is founded on a tort as the cause of action. At paragraph 12 of the Plaintiff, it is evident that the basis of the Plaintiff's claim is fraud which she has particularized thereunder and it goes without saying that **Section 4(2) of the Limitation of Actions Act** is not applicable to the circumstances herein. The Notice of Preliminary Objection is therefore as framed misconceived and without any basis. I dismiss the same.

12. Turning onto the Plaintiff's application for an injunction, the conditions for consideration in granting the same were long set out in the oft-cited case of **Giella -vs- Cassman Brown & Company Limited (1973) EA 358**, where the court expressed itself as follows:

“First an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be 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.”

13. That being the case, this court must therefore first and foremost carry out an inquiry as to whether or not the Plaintiff has established a *prima facie* case with the probability of success at the trial. As to what would amount to a *prima facie* case in a matter such as this one, the Court of Appeal offered guidance in **Mrao Limited -vs- First American Bank of Kenya & 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

14. In the matter before me, the Plaintiff contends that they bought the suit property together with her husband David Kihara Mwangi in the year 1983 and that they then established a five bedroomed matrimonial home thereon. It is the Plaintiff's case that they lived on the land for 11 years before moving away to Naromoru in the year 1994 in pursuit of better business prospects.

15. The Plaintiff told the court that they subsequently re-located to Nairobi in the year 1998 and that all the time they had been away, she had kept an eye on the home by occasionally visiting the same and checking on the livestock that they had left therein. The Plaintiff avers that all this time the land was intact and she was therefore surprised to learn recently that the land had been fraudulently registered in the name of the Defendant herein.

16. The Plaintiff does not indicate the circumstances under which she came to learn of the Defendant's registration as the proprietor of the suit land. From the documents produced by the Defendant herein however, it is apparent that he was so registered way back on 3rd October, 1994.

17. According to the Defendant, his registration came about after he helped the Plaintiff's husband offset a loan of Kshs.600,000/- which was owing to Barclays Bank of Kenya. It is the Defendant's case that the Plaintiff's husband had approached him in the year 1993 to purchase the land by way of private treaty as the bank was demanding payment for a loan he had been issued with. It is the Defendant's case that he was initially reluctant to purchase the land as the Plaintiff's husband still lived there with the family. When the family moved away in 1994, he agreed to purchase the land.

18. In support of his case, the Defendant has produced a number of documents. It is apparent that prior to the year 1994, the suit land which the Plaintiff terms as their matrimonial property was solely registered in the Plaintiff's husband's name. The Plaintiff's husband used the land as collateral to acquire a loan which was running in the sum of Kshs.600,000/- in arrears. That much is clear from a letter dated 19th August, 1994 from the Bank to the Defendant's then Advocates M/S Nyawira Gitonga & Company Advocates.

19. The Defendant has produced a copy of a Banker's cheque in the sum of Kshs.600,000/- indicating that he paid the sum to enable the title to be discharged. He has also produced two acknowledgment notes each for Kshs.200,000/- which he says were executed by the Plaintiffs' husband in acknowledgement of the purchase price. The Defendant has also produced a copy of a Transfer and a Title Deed issued in his name on 3rd October, 1994.

20. It is not clear why the Plaintiff or her husband who was still alive at the time did not immediately challenge the Defendant's registration. From the Plaintiff's own documents, her husband passed away on 18th December, 2001. There was however no evidence that he had any dealings with the land once the loan outstanding with the Bank was cleared.

21. As the Court of Appeal stated in **Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others (2014) eKLR**:

“The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

22. In the matter before me, it is apparent that the Defendant was registered as the proprietor of the suit property some 27 years ago and I am not persuaded that there is any urgent necessity demonstrated by the Plaintiff to require him to be restrained from using the suit property.

23. Unlike the Defendant, the Plaintiff has never been the registered proprietor of the suit property. While she claims that they jointly acquired the same with her late husband, there is no evidence that ever since her husband passed away some 20 years ago, she had taken any steps to occupy or use the land she calls her matrimonial home or to have the title therefore registered in her name.

24. It follows that I am not persuaded that there is merit in the Plaintiff's application dated 21st June, 2021. I dismiss the same with costs to the Defendant.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 20TH DAY OF JANUARY, 2022.

In the presence of:

Ms Maina for the Plaintiff/Applicant

Ms Luchemo for the Defendant/Respondent

Court assistant - Wario

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J. O. Olola

JUDGE