



IN THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 91 OF 2019

GEORGE KIMANI KARIUKI.....PLAINTIFF

- VERSUS -

DAVID WAITITU KIMANI1ST DEFENDANT

ANNE MUTHONI NDWATI.....2ND DEFENDANT

LAND REGISTRAR KIAMBU....3RD DEFENDANT

RULING

1. The plaintiff brought this suit through a plaint dated 15/09/2020. He sought the following verbatim orders against the defendants:

1. A declaration that the plaintiff is the bonafide owner of all those land parcels known as Escarpment Jet Scheme/1931/1932/1933/1934 &1937 or any parcels of land exercised therefrom.

2. A declaration that the transfer of the said parcels of land was done illegally, unprocedurally, is rooted in fraud and therefore no other party save for the plaintiff has got legitimate proprietary right over the same.

3. A permanent injunction restraining the 1st and 2nd defendant whether by themselves or their servants or agents from dealing, constructing, disposing, trespassing, interfering, charging and/or whatsoever dealing with all those land parcels known as Escarpment Jet Scheme/1931/1932/1933/1934 & 1937 or any parcels of land exercised therefrom.

4. An order directing the 3rd defendant to cancel any title deed issued to the 1st and 2nd defendant or any party over any portion of land exercised from all those land parcels called Escarpment Jet Scheme/1931 /1932/1933/1934 & 1937 and the plaintiff be registered as the owner.

5. Costs of the suit and interest therefrom from the date of filing the suit

6. Any other relief the court may deem fit to grant.

2. Contemporaneous with the plaint, the plaintiff filed a notice of motion dated 15/9/2020, seeking the following interlocutory reliefs;

1. That pending the hearing of this application, this honorable court be pleased to grant a temporary injunction against the defendants by themselves, their agents, servants, employees and/or other person(s) whomsoever acting on their behalf, be restrained from interfering, dealing, re-allocating or re-allotting the said parcels of land known as Escarpment Jet Scheme/1931/1932/1933/1934 &1937 located in Lari Sub County within Kiambu County, pending the hearing and determination of this application.

2. That pending the hearing of this suit, this honorable court be pleased to grant a temporary injunction against the defendants by themselves, their agents, servants, employees and/or other person(s) whomsoever acting on their behalf, be restrained from interfering, dealing, re-allocating or re-allotting the said parcels of land known as *Escarpment Jet Scheme/1931/1932/1933/1934 &1937 located in Lari Sub County within Kiambu County pending the hearing and determination of the suit filed herein.*

3. The said application is the subject of this ruling. The application was supported by the plaintiff's supporting affidavit sworn on 15/9/2021. His case was that he was the registered owner of Land Parcel Numbers **Escarpment Jet Scheme/1931; /1932; /1933; /1934; and 1937**

located in Lari Sub County within Kiambu County. He discovered that the original titles to the five properties were missing and after conducting a search, he discovered that Parcel Numbers **Escarpment Jet Scheme/1934** and **1937** had been registered in the names of the 1st and 2nd defendants respectively. Further, the other properties, to wit; **Escarpment Jet Scheme/1931; 1932; and 1933** had been used as collaterals for loans advanced to one **Hannah Njeri Kimani** by **M/s Silverstorm Ventures**, based in Limuru.

4. It was his case that he was never involved in transferring the subject parcels of land and the same were transferred in a fraudulent manner. He further contended that he had filed the instant application to stop the defendants from further transferring the suit properties and that it was in the interest of justice that an injunction order be issued because, if denied, he would stand to suffer irreparable damage.

5. The application was opposed by the 1st and 2nd defendants through a replying affidavit sworn on 5/02/2021 by **David Kimani Waititu**. He deposed that between the months of May to November 2018, the plaintiff, in the company of his wife, approached the 2nd defendant with the sole purpose of selling **Escarpment Jet Scheme/1931; 1934; and 1937** to them. He further deposed that he conducted due diligence relating to the properties. The Area Chief confirmed to them that the parcels belonged to the plaintiff. It was his further contention that he approached the law firm of *Ngari & Kaburu Advocates* for advice and they subsequently signed sale agreements and the purchase price was duly paid to the Plaintiff. He added that the Plaintiff successfully applied for consents of the Land Control Board to transfer the parcels into their names and the said consents were duly given.

6. The plaintiff filed a further supporting affidavit dated 21/6/2021 and deposed that he had never approached the 2nd defendant with an intention to sell the parcels of land to them. He contended that the allegations by the 1st defendant were intended to cover up massive fraud for selfish gain. It was his contention that the purported signatures and thumbprints on the sale agreements were pure forgeries. He deposed that **Hannah Njeri Kimani** was embroiled in criminal cases and was remanded at Langata Women Prison in relation to **Milimani CM Criminal Case No 1041 of 2019**. The 3rd defendant did not file any response to the plaintiff's application.

7. The application was canvassed through written submissions dated 9/7/2021, filed through the firm of *Kiratu Kamunya & Co. Advocates*. Counsel for the plaintiff identified the following as the two issues that fell for determination in the application: (a) *Whether the plaintiff was entitled to the interlocutory orders sought?* (b) *Who should pay the costs of the application.* On the first issue, counsel cited **Giella v Cassman Brown & Co. Ltd (1975) EA 358** and submitted that the acts of fraud, forgery and impersonation may not be fully compensated by way of damages. He added that the Plaintiff had met the requisite criteria and should be granted the orders sought.

8. The 1st and 2nd Defendants filed joint written submissions dated 12/10/2021 through the firm of *Komo & Kamenju Advocates*. Counsel for the 1st and 2nd defendants identified the following as the three issues falling for determination in the application: (i) *Whether a prima facie case existed;* (ii) *Whether the plaintiff will suffer irreparable damages;* and (iii) *Where does the balance of convenience tilt.*

9. On the 1st issue, counsel submitted that the plaintiff had not reported the alleged fraud to the authorities concerned and no criminal action had ever been taken. On the 2nd issue, counsel submitted that the Plaintiff had failed to demonstrate the irreparable injury he was likely to suffer as a result of the respondents' actions. On the last issue, counsel submitted that the balance of convenience tilted in favour of the 1st and 2nd respondents because they had demonstrated how they acquired the suit properties.

10. I have considered the application; the response to the application; and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The key issue falling for determination in this application is whether the applicant has satisfied the criteria upon which an interlocutory injunction is granted by a trial court. The criteria was outlined in the case of **Giella v Cassman Brown & Co. Ltd (1975) EA 358**. First, the applicant must demonstrate a prima facie case with a probability of success. Second, an interlocutory injunction will not be granted unless the applicant demonstrates that if the injunction is not granted, he would stand to suffer irreparable injury for which he may not be adequately compensated through an award of damages. Thirdly, if the court is in doubt of either or both of the above two requirements, the application should be decided on the balance of convenience. Lastly, the trial court does not make definitive or conclusive pronouncements on the key issues in the suit at this stage. Definitive pronouncements are reserved for judgment or final disposal determination of the suit.

11. The plaintiff contends that he was at all material times the registered proprietor of the suit properties and he has never sold them nor transferred them. He contends that he was shocked to learn that **Escarpment Jet Scheme/1934** and **1937** had been transferred into the names of the 1st and 2nd defendants respectively while **Escarpment Jet/1931; 1932** and **1933** had been used as securities for loans allegedly advanced to one **Hannah Njeri Kimani** by a company by the name **Silverstorm Ventures**, based in Limuru.

12. On their part, the 1st and 2nd defendants contend that the plaintiff sold and transferred **Escarpment Jet Scheme/1931; 1934** and **1937** to them. The plaintiff denies that allegation and contends that the alleged sale and transfer of the properties is a fraud perpetuated by the 1st and 2nd defendants. He denies signing any of the alleged sale agreements and transfers or obtaining any consent from the Land Control Board. He further denies receiving any purchase price from the two defendants.

13. It is not clear why, if indeed the alleged fraud was committed, the plaintiff has not involved the Criminal Investigation Directorate in this matter. This court has been consistent in stating that any one who commits land fraud should promptly be dealt with by the law enforcement agencies. This is possible only when those making allegations of fraud report to the relevant authorities and provide relevant information to the authorities. Nothing in a suit of this nature prevents the police against discharging their mandate.

14. In the circumstances, the court takes the view that this is an application to be disposed based on the balance of convenience. The balance of convenience would require that the suit properties be preserved pending the hearing and determination of this suit.

15. In the end, the plaintiff's application dated 15/9/2020 is disposed in the following terms:

a. Pending the hearing and final determination of this suit, no dealings shall be registered in the parcel registers relating to Escarpment Jet Scheme/1931; 1932; 1933; 1934 and 1937.

b. The plaintiff shall within 14 days amend the plaint and join Hannah Njeri Kimani together with Silverstorm Ventures [or the proprietors of Silverstorm Ventures, as the law may require) as defendants in this suit.

c. The Criminal Investigation Directorate shall be at liberty to independently investigate any report made to them regarding the alleged fraud relating to the five titles and take appropriate steps thereon as they may deem necessary.

d. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF JANUARY, 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Kiratu Kamunya for the Plaintiff

Mr Kaburu for the Defendants

Court Assistant: Phyllis Mwangi