



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND CASE NO.48 OF 2014

RUDI MARQUARDT ELECTRONIC CO. LTD.....PLAINTIFF

VERSUS

VALLERY JIMOI KHAZALWA.....1ST DEFENDANT

JOHN ODINDO OGILO.....2ND DEFENDANT

OSCAR OGILO ODINDO.....3RD DEFENDANT

STALINE YUAYA ODINDO.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

R U L I N G

1. This ruling follows interpartes hearing of the Amended Notice of Motion filed here on 29/4/2014 and dated 9th April 2014. The hearing took place on 25/6/2014. The Motion is brought under Sections 26 and 68 of the Land Registration Act, Order 5 rule 17, and order 51 Rule 1 of Civil Procedure Rules, 2010.
2. The application is seeking five prayers but at this stage, and going by the hearing that took place, only prayers 3 and 5 are relevant. The prayers are as follows:

Prayer 3: that upon interpartes hearing an order of inhibition be and is hereby issued inhibiting the registration of any dealing with all those parcels of land known as L.R. NO.KISUMU/KONYA/4794 and L.R. No. KISUMU/KONYA/5087 pending hearing and determination of the suit.

Prayer 5: Costs of the application be provided for.

3. The application is premised on the grounds that the plaintiff is the proprietor of the two parcels of land; that he has never sold the parcels or transferred them to the defendants or to anybody else; that the defendants procured the properties fraudulently and illegally; that there is danger of the properties being wasted or dealt with in a manner detrimental to plaintiff's rights; and that it is in the interests of justice that any further dealings with the properties be stopped.
4. The supporting affidavit of the plaintiff/Applicant states, inter alia, that the plaintiff is the proprietor of the two parcels of land; that it has never sold them to the defendants or to anybody at

- all; that it came to its notice in September 2013 that the 1st defendant illegally transferred the parcels to himself before illegally transferring them to 2nd, 3rd and 4th defendant. That the plaintiff took up the issue with the Land Registrar who issued notices to the defendants; that the plaintiff has suffered and continues to suffer loss and damage; and that all these illegal transactions did not confer any legal rights to the defendants.
5. To substantiate some of the averments made, the plaintiff availed some annexures. There is the Certificate of Incorporation (RG-1), to vouch for plaintiff's legal personality; two copies of original title deeds for the two parcels of land (RG-2) to demonstrate legal ownership; copies of green cards from Land's office (RG -3) showing the illegal transactions; and a copy of Notice (RG-4) sent by land Registrar to the defendants when the plaintiff brought up the issue to that office.
 6. The application was opposed by 2nd, 3rd and 4th defendants vide a replying affidavit filed here on 19/5/2014. The defendants averred they are the legal owners of the parcels of lands, having purchased them from 1st defendant. They acted with due diligence and only purchased the parcels of land after satisfying themselves that the 1st defendant was the registered owner. They were not aware, nor were they notified, that there were irregularities or illegalities surrounding ownership of the two parcels of land and were, for all purposes, innocent purchasers.
 7. The defendants said the plaintiff is a stranger; does not possess the parcels of land; has not suffered loss; and is therefore not entitled to the prayers sought. Instead, the defendants stand to suffer great loss if the prayers are granted since a lot of money has been paid and they are using the properties.
 8. The defendants availed some annexures to buttress some of their assertions. There are copies of their title deeds (JOO-1a and b) to show they are the current registered owners; a copy of sale agreement (JOO-2) to show purchase of the land parcels; copies of search results and green card (JOO-3 a and b) to show they conducted a search and established that the parcels of land were registered in the 1st defendant's name; and there are copies of consent from Land Control Board, Copies of cheques and Land transfer forms (JOO-4(a)(b) and (c)) to show adherence to due process and payment for the parcels of land.
 9. During hearing of the application, Mungla for the plaintiff gave some background to the application and cited some provisions in various statutes to demonstrate the legal anchor of the application. The rest of Mungla's narrative is essentially a restatement and emphasis of what is contained both in the grounds stated in the application and in the supporting affidavit. I have already given the salient aspects elsewhere in this ruling and it is not a rewarding exercise to attempt a repeat.
 10. But it is worth pointing out that Mungla availed various decided authorities to demonstrate judicial rendition of the issues at hand. The decided authorities are:

(i) NYANGW'RA VS STEPHEN MUNGAI NJUGUNA & Anor: ELC NO.609 B/2012, ELDORET (Nyangw'ra's case).

(ii) HARRISON KAMAU NGANGA VS THE HON.A.G & Anor: HCC NO.1241/03, NAIROBI (Harrison's case).

(iii) WILSON WAITHAKA GITAU VS KENYA WINSTON COMPANY LTD: ELC NO:131/07, NAIROBI (Wilson's case)

(iv) ROSEMARY WANJIKU NGIGI VS NANCY MUNJIRU NGIGI: ELC NO.383/2012, NAIROBI (RoseMary's case)

Nyangwira and Harrison's cases illustrate the legal position of innocent purchasers without notice under our new regime of land law while Wilson and Rosemary's cases highlight the considerations necessary before granting an order of inhibition.

11. From the cases, it seems to me that innocent purchasers without notices are no longer protected by law, the applicable law having removed sanctity of title to property from those who acquired it illegally. It also seems to me that to grant an order of inhibition, an applicant needs to show that

- the suit property is at risk of being disposed of or alienated; that refusal to grant the order would render the applicants suit nugatory; and that there is an arguable case.
- 12.P.D Onyango for the defendants advanced arguments that are actually a rehash of what the replying affidavit contains. Onyango espoused the view that the principles applicable to the law relating to injunctions are also applicable to the law relating to the order of inhibition. It is on this basis that he argued that the plaintiff has not established a prima facie case or that it will suffer irreparable harm.
 - 13.I have considered the application and the response made to it by the defendant's side. I have considered too the arguments made by both learned counsel. And in order to have a grasp of the general nature of the case, I have had a look at the suit as filed and the defence on record.
 - 14.Essentially, the application is about granting an order of inhibition. There is a prayer for leave to effect service by means of an advertisement (prayer 4) but this seems to have been abandoned by implication for it was not argued at all. Infact most of the defendants are already on board and I think this is why this prayer was not canvassed.
 - 15.The 1st defendant has not filed defence and/or entered appearance. He has not responded to the application either. It is this defendant who sold the land to the other defendants. He was evidently a minority shareholder in the plaintiff's company.
 - 16.It seems clear that the 1st defendant stole a march on the plaintiff and succeeded in registering himself as owner of the two parcels of land. And having so succeeded, he proceeded to sell the pieces of land to the other defendants. The plaintiff discovered this later and moved to reverse the state of things. This suit is one such move.
 - 17.The defendant's arguments is that they are innocent purchasers. But even as they assert this, the first defendant, who sold the land to them, is nowhere to be seen. Whether or not the plaintiffs are innocent purchasers is a matter of evidence to be adduced at the trial. Whether or not the law offers them protection as innocent purchasers is not for me to decide at this stage.
 - 18.It is apparent that the plaintiff has a formidable argument: The first defendant illegally registered himself as owner of the land parcels. The other defendants came to the scene much later as purchasers. It is plain that they can't vouch for the legality of 1st defendant's registration. But a pointer to the strength of the plaintiff's argument can be seen in that when the matter was reported to the Land Registrar, a notice was issued to all the defendants.
 - 19.The defendant's counsel seemed to equate inhibition with injunction. The counsel was wrong. Injunction is an equitable remedy which, in Kenya, is regulated both by statute and judicial pronouncements. Inhibition, on the other hand, is entirely a statutory remedy applying almost exclusively to registered property. The efficacy of inhibition itself consists in being registered. Injunction on the other hand has wider application; does not require registration; and has a wider gamut of legal principles governing its application. Both remedies are different in their origin, purport, application, and tenor. I therefore reject the counsel's argument.
 - 20.I agree with the plaintiff's counsel concerning the law applicable to granting of inhibitions. It is necessary that the plaintiff or applicant demonstrates a credible claim of right or interests which is violated or threatened with violation. It then becomes necessary to show the need to preserve the suit property and the need to do so becomes more urgent if it is reasonably apprehended that the suit filed might be rendered nugatory. The suit must be an arguable one, not one that collapses like a pack of cards at the commencement of onslaught by the defence.
 - 21.In this matter, the plaintiff's case is not one which anybody can wish away easily. The 1st defendant has not made an appearance yet. He seems to be the brain behind the whole scheme. Until the case is heard, there is an obvious need to preserve the parcels of land an order of inhibition therefore becomes necessary. The order is purely meant to preserve the property, not to declare anybody the owner.
 - 22.On consideration of all what was availed therefore, I deem it necessary to grant an order of inhibition as prayed in Prayer 3. And I hereby do so. Costs of the application however will be in the cause.

29/1/2015

