



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELC CASE NO. 218 OF 2014

JOHNSON GITHAIGA D. MUGO.....PLAINTIFF

VERSUS

JACOB KARIUKI NJOROGE.....1ST DEFENDANT

ISAAC WANJOHI GACHURU.....2ND DEFENDANT

RULING

1. The notice of motion dated **29th October, 2014** brought under **Order 51 Rule 1**, and **Order 40** of the Civil Procedure Rules, **Sections 3A, 63 (c) (e)** of the Civil Procedure Act and **Section 68** of the Land Registration Act No.3 of 2012 seeks an order of inhibition to inhibit further registration of any dealings with the land parcel number **Aguthii/Muruguru/1860** (hereinafter referred to as the suit property) pending the hearing and determination of the current application and the suit. The application also seeks to restrain the defendants from entering and/or interfering with the suit property and an order for maintenance of status quo pending the hearing and determination of the suit.

2. The application is premised on the grounds that the plaintiff/applicant is the beneficial owner of the suit property (having bought it on or about 12th July, 1978 from the 1st defendant); that the plaintiff has been in occupation of the suit property since 1978; that in blatant disregard of the plaintiff's interest in the suit property, the 1st defendant has fraudulently and without any colour of right and/or claim disposed off the suit property to the 2nd defendant. The plaintiff contends that the 1st defendant's decision to sell the suit property to the 2nd defendant was aimed at depriving him of his rights therein unlawfully.

3. It is the plaintiff's case that he received information about the sale of the property after the property had been transferred to the 2nd defendant without his knowledge. Upon obtaining a certificate of search, he discovered that the property was fraudulently transferred to the 2nd defendant (on 15th September, 2014). The plaintiff claims that he has information that the 2nd defendant has plans to sell the suit property to a thirty party. Based on the aforementioned information, the plaintiff is apprehensive that the 2nd defendant may transfer the suit property to a thirty party thus exposing him to more hardship as well as rendering the suit nugatory.

4. The application is supported by the plaintiff's affidavit sworn on **29th October, 2014** in which he has deposed that the suit property resulted from sub-division of **Aguthii/Muruguru/522** (original parcel of land); that the original title was registered in the name of the 1st defendant; that on or about 12th July, 1978 the 1st defendant sold to him two acres of the original parcel of land. After the 1st defendant sold him a portion of the original parcel of land, the land was sub-divided whereof the suit property herein was

created. After executing a sale agreement with the 1st defendant he immediately took possession of the portion he bought and has been in occupation ever since.

5. To prove his interest in the suit property, the plaintiff has annexed to his affidavit the sale agreement executed between himself and the 1st defendant on **12th July, 1978** as “**JGDM1**”

6. The plaintiff contends that the 1st defendant was supposed to execute the necessary transfer documents. However, for reasons best known to the 1st defendant, this did not happen either within the covenanted time or at all.

7. The plaintiff explains that on **22nd August, 2014** the 1st defendant sold the suit property to the 2nd defendant. To prove that fact, the plaintiff has annexed to his affidavit a copy of the sale agreement executed between the 1st defendant and the 2nd defendant and marked it as “**JGDM3.**”

8. Maintaining that he has reliable information that the 2nd defendant intends to dispose of the suit property so as to defeat the cause of justice, the plaintiff has reiterated his contention that unless the orders herein sought are granted, a second transfer in respect of the property is likely to be effected rendering the current application and suit nugatory.

9. In view of the foregoing the court is urged to allow the orders sought.

10. The 1st defendant filed a replying affidavit sworn on **27th November, 2014**. He has deposed that as at **25th September, 2014** he was the registered owner of the suit land having been excised from Aguthii/Muruguru/522. To prove this, he has annexed a certificate of search marked as “**JKN1**” He has further deposed that he lawfully sold the suit property to the 2nd defendant after the plaintiff failed to pay the consideration they had agreed on of Kshs.140, 000/= in 1978.

11. It is his contention that the plaintiff had come to court with unclean hands as he had failed to disclose to the court that he had altered the sale agreement and also forged the 1st defendant's signature; that the plaintiff had never taken possession of the suit property and that it is the 1st defendant who had been in possession of the suit property until he sold the same to the 1st defendant; that the prayers sought are misplaced since the plaintiff has not demonstrated that he is the legal owner of the suit property hence he lacks the capacity to seek orders of inhibition and injunction. He urges the court to dismiss the application.

12. The 2nd defendant also replied vide a replying affidavit sworn on **14th November, 2014** which he has *inter alia*, deposed that he got to hear of the plaintiff when he was served with the current application and suit; that he is an innocent purchaser for value without notice; that in buying the suit property, he followed all the necessary procedures for acquiring land and that the land was sold to him in vacant possession. The 2nd respondent further contends that he is not the proper party to sue.

13. In a rejoinder, the applicant argues that the fact that the 2nd defendant did not know the plaintiff does not render the application mischievous, scandalous and/or an abuse of the court process and/or render the alleged illegal activities lawful. Further, that the averments in the 2nd defendant's affidavit (replying affidavit) demonstrate how fraudulent the transaction between the defendants was.

14. Pointing out that the suit property was charged to Barclays Bank International Ltd and alleging that he is the one who redeemed it, the plaintiff explains that in consultation and participation of the 1st defendant, he obtained the necessary land control board consent to sub-divide and to transfer the suit property to himself. In support of those facts, the plaintiff has annexed a bundle of documents to his reply to the replying affidavit (further affidavit). Those documents include:-a copy of land control board application for consent, a copy of consent to transfer, a copy of the old title, a copy of discharge of charge and mutation form all marked “**JGDM-2**”.

15. Maintaining that he has been and still is the one in occupation of the suit property, the plaintiff has deposed that he has cultivated a maize crop on the suit property which he is about to harvest. The plaintiff has reiterated the contention that he is the beneficial owner of the suit property and that the process of transfer of the suit property to the 2nd defendant was fraudulent.

The Law applicable to the application

16. The application herein being one for issuance of a temporary injunction, to succeed in his quest to restrain the defendants, in particular the 2nd defendant from dealing with the suit property, the plaintiff must satisfy the conditions enunciated in the celebrated case of **Giella v. Cassman Brown** (1973) E.A 358 that is to say, the plaintiff must:-

- (I) Demonstrate that he has a *prima facie* case with a probability of success;
- (ii) Prove that damages are not adequate to compensate him for the loss that he may suffer if the prayer for temporary injunction is denied;
- (iii) If the court is in doubt, it will determine the case on a balance of probabilities.

17. The conditions outlined in the *Giella* Case (Supra) are sequential **“So that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed”** See **Kenya Commercial Finance Company Ltd Vs Afraha Education Society** [2001] 1 E.A. 86 and **Karen Bypass Estate Ltd V. Print Avenue & Company Ltd**, Nairobi Hccc No. 284 Of 2013 [2014]Eklr.

18. Turning to the current case, the first question to be determined is whether the plaintiff has established a *prima facie* case with a probability of success.

With regard to this question, it is important to start by pointing out that the 2nd defendant is a holder of a title issued to him under the Land Registration Act, No. 3 of 2012. By dint of the provisions of Section 26 of that Act, this court is enjoined to treat a title issued by the Registrar as *prima facie* evidence that the person thereon is the absolute owner of the property.

19. In applying the foregoing provisions of the law to the circumstances of this case, the law is tilted in favour of the 2nd defendant who has a title to the suit property. see **Section 26** of the Land Registration Act, No.3 of 2012 which provides:-

“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the 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, easements, 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.”

20. The 1st defendant has cast doubt on the issue of occupation of the suit property by the plaintiff. He deposed that he had always been in possession of the suit property until he sold the land to the 2nd defendant. Besides, despite the applicant having deposed that he has been and is still in occupation of the suit property, he has not adduced any evidence capable of proving that fact. To establish that fact, the applicant should at least have produced evidence of his alleged activities on the suit property by, say,

production of photographs. Without any evidence of his alleged activities on the suit property his allegations remains merely as such.

21. I also note some of the documents attached to the applicant's further affidavit, namely receipts, suggest that the agreement executed between him and the defendant aborted and the purchase price was refunded. In view of the foregoing, I find and hold that the plaintiff has not demonstrated a *prima facie* case with a probability of success.

22. In case I am wrong on this first condition, from the plaint filed herein I note that one of the prayers which the applicant seeks is refund of the purchase price based on the current market value of the suit property. My understanding of that prayer is that the plaintiff has no problem losing the suit property if he is paid its current market value. Although the plaintiff has not stated what the current value of the suit property is, I find that to be an issue which can easily be determined by conducting a valuation of the suit property.

23. The balance of convenience in this matter also tilts in favour of the 2nd defendant who has a title to the suit property, and in respect of whom no evidence has been tendered to show that he was aware of the applicant's interest in it when he decided to buy the land from the 1st defendant (the former registered owner). There is also no proof that he knowingly partook in the alleged fraudulent dealings concerning the suit property.

24. The upshot of the foregoing is that the application has no merit and it is dismissed with costs to the 1st and 2nd defendants.

Dated, signed and delivered at Nyeri this 20th day of February, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kariuki Attorney General for the plaintiff

Mr. Warutere for the 1st defendant

No appearance for the 2nd defendant

Lydiah – Court Assistant