



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 491 OF 2014

MARGARET WAITHIRA NJARI.....APPLICANT

VERSUS

JOHN NJARI KAGUNYI.....RESPONDENT

RULING

1. Before me is the Appellant's Notice of Motion dated 5th November, 2014. It is premised to be to be brought under Order 40 of the Civil Procedure Rules Section 1A, 1B and 3A of the Civil Procedure Act. The Appellant seeks the following orders:-
 - a. That a temporary injunction be given to restrain sale, transfer, charge or any other way interference with title number Githunguri/Githunguri/1634 or any of its recent subdivisions namely Githunguri/Githunguri/3576, Githunguri/Githunguri/3577, Githunguri/Githunguri/3578 and Githunguri/Githunguri/3579.
 - b. That a temporary injunction be given to restrain the Respondent or any person claiming through him from selling, transferring, charging alienating or in any other way interfering with land parcel number Githunguri/Githunguri/1634 or any of its recent subdivisions namely Githunguri/Githunguri/3576, Githunguri/Githunguri/3577, Githunguri/Githunguri/3578 and Githunguri/Githunguri/3579 pending the hearing and determination of this appeal.
 - c. That costs of this application be provided for.
2. The application is premised on the grounds on the body of the application and the supporting affidavit of the Appellant sworn on 5th November, 2014. She stated that the subject property is a family property and was subject of Githunguri Tribunal Case No. 17 of 2009. A decree was issued in the Tribunal ordering the joint registration of the subject property in her name and that of the Respondent. The Respondent proceeded to challenge the decree in the High Court vide JR Miscellaneous Application Number 48 of 2010. The Respondent subsequently withdrew the case and went to the District Commissioner Githunguri who wrote a letter to the Kiambu Land Registrar to remove her caution so as to effect the decree. In early November, 2013, she learnt that the Respondent used the removal of the caution to sub-divide the land into 4 parcels namely Githunguri/Githunguri 3576 and 3579. On account of the changed description she applied to court for amendment of the decree so as to have it effected. On hearing of the application, the magistrate, Honourable Mr. Wambo delivered a ruling on 29th October, 2014 and declined her application stating that the decree had been overtaken by events. That the said court also vacated the orders for maintenance of the status quo. She then sought leave of court and filed an appeal. She averred that the Respondent was in the process of disposing of the land by the time she went to Githunguri court and unless restrained he shall dispose of the land.
3. The application was opposed vide the Respondent's replying affidavit sworn on 28th November,

2014. He contended that the Applicant has concealed material facts to this court and misled it to granting orders that are not attainable. He stated that the Applicant failed to disclose that the sub-division was done with her full knowledge and the third parties portions Githunguri/Githunguri/3576 and 3577 currently have title deeds in their names. That the Applicant annexed the certificate of official search of all resultant portions in her lower court application which evidently indicates that some of the resultant portions had been transferred to third party thereof. He contended that he objected to her application to have the decree amended to suit her second thought as they had agreed on the mode of distribution of the remaining portions. He stated that the Applicant was summoned by the area District Commissioner and it is on that point that she consented that due to the fact he remarried, after she deserted the matrimonial home, the remaining portion be sub-divided into his two houses. He averred that the magistrate had no jurisdiction to grant orders cancelling title deeds as the same is the preserve of the High Court. He stated that the lower court and this court have no jurisdiction to order the Land Registrar Kiambu to cancel the new title deed issued because the new title deeds have been issued to third party who are not party to the suit and the Land Registrar Kiambu is also not party to the Tribunal Case No. 17 of 2009 hence the orders sought are not only superfluous but also an abuse of the court process.
4. The Applicant relied in **Giella v. Cassman Brown & Co. Ltd (1937) E.A.** It was submitted the magistrate had jurisdiction to entertain the matter and issue the orders sought since it is the same court that adopted the order of Githunguri Dispute and issued the decree. That the failure to issue an order and vacating the orders for the maintenance of the status quo has exposed the subject property to danger of being wasted and alienated. It was also submitted that by the time the lower court issued the orders, the subject property was still available and the Applicant and the Respondent were in possession. It was submitted that the subject property was held in trust for the issues of the Applicant and Respondent's marriage by the Applicant and the Respondent and that if the Respondent proceeds to sell it, the children stand to suffer irreparable damage. It is submitted that the Applicant and the Respondent are both still in possession of the subject property and the balance of convenience tilts for the court to grant the orders sought.
 5. Referring to Section 3 of Land Disputes Tribunal Act, Cap 303A (Repealed), the Respondent submitted that the Tribunal did not have jurisdiction to grant orders of cancellation of title deeds and could therefore not award land to a litigant. The Respondent on this point cited Owners of the **Motor Vessel "Lilian S" Caltex Oil (Kenya) Ltd (1989) KLR 1** as referred to in **Republic v. Chairman, Uasin Gishu Land Disputes Tribunal & 2 Others, Kaptich Arap Morogo Ex parte (2014) eKLR.** Where it was stated:-

“Jurisdiction is everything. Without it, a court has no power to make one more step.” Any decision, however well reasoned, made out of jurisdiction is a nullity and cannot be given effect. That is fate that must befall the award of the Tribunal in this matter. I do not hesitate to issue an order of certiorari, quashing the entire award of the Tribunal. Having found that the award was outside jurisdiction, it is not necessary for me to go into the merits or remedies of it. It follows that once the award is quashed, every other consequential order must automatically be invalidated.”

The law on temporary injunction is now well settled. As was held in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358** an applicant for a temporary injunction must demonstrate a prima facie case with a probability of success and that he will otherwise suffer irreparable injury unless the injunction is granted. If the court is in doubt on the above, the application would be determined on a balance of convenience. On the other hand Order 40 provides that:-

“Any order for injunction may be discharged, varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

It is clear that the courts do have the power to vary or discharge an injunction. But as much as the court has been donated that power it is essential to consider our scenario in this case. It was the Applicant's contention that the subject property is held in trust for their issues which fact the

Respondent has not controverted. It is worth noting that the essence of temporary injunction is to preserve the subject matter of a suit from being alienated. From the foregoing, the balance of convenience tilts on the Applicant. I am therefore satisfied that the Applicant has established that irreparable loss is likely to be suffered in the event the orders sought are not granted. See **Mula on Code of Civil Procedure 16th Edition** states as follows on dispossession:-

“A person in possession cannot be dispossessed without due process of law. A bona fide possessor should not be dispossessed pending suit unless there is some substantial reason. The matter should be considered judicially in all its aspect.”

The upshot is that this application is allowed. Costs shall be in the cause.

Dated, Signed and Delivered at Nairobi this 20th day of February, 2015

J.K. SERGON

JUDGE

In the presence of:

Khalwale h/b for Mbigi for the Applicant

N/A for the Respondent