



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCC NO 523 OF 2014 (O.S) (E.L.C) FAST TRACK

IN THE MATTER OF CLAIM TO TITLE TO LAND BY ADVERSE POSSESSION OVER

HALF SHARE IN LR NO 13330/192 (ALSO IDENTIFIED AS PLOT NO 391 IN THOME FARMERS NO.5 LIMITED)

BETWEEN

PAUL MACHUKU MURIUKI.....PLAINTIFF

VERSUS

JORETH LIMITED.....1ST DEFENDANT

GEORGE MURIITHI GITHINJI.....2ND DEFENDANT

PURITY WANJIRU MURIITHI.....3RD DEFENDANT

RULING

The application before this court for consideration is the Notice of Motion dated 2nd May 2014 brought under **Order 40 Rule 1,23 and 10 (1) of the Civil Procedure Rules** and **section 1A,1B and 3A of the Civil Procedure Act** seeking for orders that pending the hearing and determination of this suit, this court issues an order of injunction restraining the defendants by themselves, their servants, agents, assignees or any persons claiming title through the defendants or any of them from alienating, transferring, selling, disposing, using, charging, mortgaging, developing on or construction on, trespassing on, entering upon, or in any manner whatsoever dealing with the suit property identified as half share in LR No 13330/192 (also known as half share in plot No 391 in Thome Farmers No 5 Limited)

This application is premised on the grounds stated on the face of the application and the supporting affidavit of the plaintiff herein who states that he is the registered proprietor of half share of plot No 391 in the entity known as Thome Farmers No 5 Limited having been so registered on 23rd August 2001 .That his registration was preceded by the acquisition of the plot from Thome Farmers No 5 Limited in 1974 which he had done jointly with a small group called **Muya Thabai Self Help Group** where he paid half the share price while the other half was paid by the self-help group so that while he owned half the share of the plot the self-help group owned the other half but the property was registered in the joint names. That in 2001 the self-help group sold their half share to one **David Wokabi Muriithi** and his wife **Philomena Wairimu Muiruri** and the share certificate was surrendered in 1974 and a new one was issued in their names as the owners. He further stated that he paid fees for the surveyor who did the surveying and original titles were issued to them in 1975 and they subsequently took possession of the plot in 1975

before the self-help group sold their share. He added that in February 2014, he decided to construct on his half portion by constructing a semi-permanent site house a pit latrine and fenced the portion but these structures were pulled down by the 2nd and 3rd defendants. He avers that he has since learnt that the 1st defendant transferred his half share of the plot to the 2nd and 3rd defendant jointly with existing co-owners by a transfer dated 16th August 2013. He contended that the entity which they purchased the suit property was Thome Farmers No 5 Limited who had occupied it even from before 1074 till it was handed to the applicant. He added that his occupation on the user of the plot since 1974 has been physical open uninterrupted and without interference by the defendants or anybody else. He further added that he purchased the plot while he was still working but now he is a retired man and will suffer irreparably since he put all his savings towards the plot for his security in old age which the defendants now threaten to take away without recourse to legal action. He contends that he was never notified of the sale of the plot so that could contest the defendants' action. He believes he acquired title to the suit property by adverse possession as he had been on the suit property for over 40 years to date and that any claim to any such title over the same by the defendants has been extinguished by the fact of his acquisition of such title by adverse possession.

This application is opposed. The 1st defendant through its special manager *Peter Mungai*, swore and filed his replying affidavit on **16th June 2014**, where he stated that at no point has ownership beneficial or otherwise of the property LR No 13330/192 also referred to as Plot No. **391** in part or wholly thereof ever been vested in the plaintiff/applicant for the main reason that at all material times the subject property was registered and owned by the 1st Defendant and that at no point has the subject property ever vested in Thome Farmers No.5 Limited to enable it pass any interest in the land to the plaintiff. That the 1st defendant is and was at all material times the registered owner of all that piece of land know as Land Reference Number 13330 having been so registered on 19th December 2000..He also added that the suit property was as a result of an amalgamation or consolidation of the 1st Defendant's two titles namely LR No 4920/3 and 4921/3 which titles it held since 1950's. He also added that LR No 13330/192 is a subdivision of LR No 13330 and has not now or ever been registered in the name of Thome Farmers No 5 Limited or any other person other than the 1st defendant. That the 1st defendant had no relation with Thome No 5 Limited and they are not in partnership, joint venture or in any other way .Further Thome Farmers No 5 Limited does not own shares in the 1st defendant's company therefore shares bought by the plaintiff in the said company would not have any bearing whatsoever in the defendant Company and therefore the payments made by the plaintiffs have no effect on the 1st defendant.

He further stated that the 1st defendant filed a suit in 1992 against the defendants who had trespassed onto what is now LR No 13330 which was determined in the year 2002 by a consent order where the defendants in the **HCC 6206 OF 1992** would pay an all-inclusive sum of Ksh 200,000/= to Joreth Ltd (1st Defendant) wherein the transfer of land would be done to the individual defendants. He added that the plaintiff ignored the court order and continued trespassing on the 1st defendant's land. He concluded that the 2nd and 3rd defendants were the registered owners of the suit property LR No 13330/192 having paid the requisite purchase price and registration fees.

On the allegation of adverse possession he stated that the plaintiff could not have been in open physical and uninterrupted occupation of the suit premises without interference as the 1st defendant has been in continuous occupation of the suit property as part of the more than six hundred subdivisions of the 1st defendant's parcel of land. The 1st defendant stated that the allegation by the plaintiff that he will suffer irreparable loss are denied as the plaintiff had not shown how he will suffer loss and that the balance of convenience tilts in favour of the 1st defendant who has proved its ownership rights and interest in the land which have subsequently been transferred to other bonafide purchasers and that the plaintiff has been guilty of laches and is not entitled to the orders sought. He concluded that since the plaintiff contracted with Thome Farmers No 5 Limited then its recourse lies as against the said company and not the 1st defendant.

The 2nd Defendant *George Muriithi Githinji*, swore a replying affidavit stating that the 1st Defendant was

the registered owner of LR No 13330/192 and its title had never been extinguished by either transfer, sale or otherwise. That based on the confirmation that the 1st defendant was the registered owner of the suit property he together with his wife offered to buy half the portion of the said land which was undeveloped and subsequently entered into a sale agreement of Ksh 7 Million and a transfer was effected after the payment of the requisite fees. He added that they took possession of the vacant property with the confirmation of the 1st Defendant. He set out plans to construct a residential house in the suit, property but received information in **March 2014**, that someone had deposited building materials on the site. He reported the matter to Kasarani Police Station and after seeking documentation of the suit property from both sides, the Police concluded that he was the owner of the property and the plaintiff was ordered to vacate the grounds. He removed his building materials and never returned only for him to be served with court pleadings. He believes that the plaintiffs claim of adverse possession is an afterthought and false. That the orders sought cannot be granted since they will interfere with the rights of a duly registered owner whose title is indefeasible since the plaintiff has not challenged the title of the 1st defendant to warrant the orders sought.

By an order of this court, parties filed written submissions. The plaintiff filed his submissions on 18th July 2014. He reiterated the contents of the affidavit and argued that he had shown a prima facie case as he had established that he lawfully and legally entered into the suit premises through the joint purchase with Muya Thabai Self Help Group in Thome Farmers No. 5 Limited and was issued with a share certificate. Further, he produced evidence of the purchase of the suit property from Thome Famers No. 5 Limited. He added that the 1st defendant was the registered owners of **LR No 4920/3 and 4921/3** which were later amalgamated into one parcel to form **LR NO. 13330**. This parcel was sold to Thome Farmers No 5 Limited by the 1st defendant. This land was subdivided and the suit property was one of the plots 13330/192 arising out of the subdivision. The Plaintiff further submitted that the 2nd and 3rd Defendants were not bona fide purchasers as the nature of the developments undertaken by the plaintiff is so open and clear that anyone purchasing the suit property cannot claim not to have seen the developments. He added that the plot was owned jointly with other people named at paragraph 8 of the plaintiff's supporting affidavit but the 2nd and 3rd defendants did not make any enquiry as to the ownership of the plaintiff's half portion of the plot which is the subject matter of this suit. The failure was deliberate omission by the 2nd and 3rd defendants and cannot elevate them to innocent purchasers.

The 2nd and 3rd Defendants filed submissions dated 22nd September 2014. They argued that the 1st Defendant was registered owner of the suit property and subsequently transferred it to them, and that it is trite law that a party who holds a certificate of title issued by the Registrar shall be taken to be the indefeasible owner of a parcel of land under section 23 of the repealed Registration of Titles Act. Further, that the Plaintiff had thereby failed to show a prima facie case as he is not the registered owner of the suit property and cannot enjoy more rights than the registered owner.

The 1st defendant filed its submissions on 2nd September 2014. It reiterated the contents of its affidavit and added that it transferred its rights to the 2nd and 3rd defendants for valuable consideration. Further he submitted that the plaintiff cannot seek for orders for injunction as against the defendants who have always been the former and present registered owner of the suit property. It further submitted that the doctrine of privity of contract precluded the plaintiff from filing this suit for the reason that the 1st defendant did not enter into a contract nor receive any consideration to sell the whole or part of its interest in parcel LR No 13330/192 to the plaintiff herein. Any sale would have been in writing, signed by all parties and attested as is required by the provision of section 3 of the Law of Contract Act and section 38 of the Land Act No 6 of 2012. Therefore the 1st defendant cannot be bound by the agreement sought to be relied upon by the plaintiff nor did the 1st defendant issue any certificate of allotment to the plaintiff.

I have read and carefully considered the pleadings, annexed evidence and submissions made by the Plaintiff and Defendants. The issues arising herein are whether the Plaintiff has met the requirements stated in **Giella Vs Cassman Brown & Co Ltd, (1973) EA 358** to be granted a temporary injunction, and if so whether the Plaintiff has also met the requirements for the mandatory injunction sought. The requirement for the grant of a temporary injunction are that the applicant must establish a prima facie

case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The Plaintiff relies on the share certificate issued to him by Thome Farmers No.5 Limited dated 23rd August 2001 and affidavit sworn by Joseph Wambaa the director of Thome Farmers No.5 Limited sworn on 2nd April 2007 stating that there was an agreement by the Directors of Joreth Ltd to sell to Thome Famers Ltd L.R No. 4920/3/1/ and LR 4920/3/2 which were later amalgamated to be L.R. No. 13330 and ballot receipts. However, he did not bring any evidence of title to the suit property and/or LR 33330 by Thome Farmers No 5 Ltd.

The 1st defendant on the other hand has brought in as evidence the consent order entered into on 22nd June 2002 in **HCCC 6206 of 1992, Joreth Ltd vs Lewis Kibue and Others** which consent provided that the defendants would pay an all-inclusive sum of Ksh 200,000/= to the 1st defendant wherein all the transfer of the land would be done to the individual defendant. The 2nd and 3rd Defendants have shown legal ownership by bringing evidence of their title to LR 33330 and to the suit property respectively. They have also shown a sale agreement and transfer between the 1st defendant and the 2nd & 3rd defendants.

Having considered the above position, I find that in these circumstances, the Plaintiff has not established a prima facie case for the grant of the prayers sought since he has not conveyed any evidence of title to the suit property acquired by Thome Farmers No 5 Ltd from whom he asserts to derive his interest in the suit property, or of any agreement entered into with the 1st Defendant who was the registered owner of the suit property at the time he took possession of the same.

The court notes that the suit property is now registered in the name of the 2nd and 3rd Defendants. The provisions of **sections 24, 25 and 26 of Land Registration Act No. 3 of 2012**, clearly state that the 2nd and 3rd Defendants by virtue of registration as owners of the suit property are vested with absolute ownership and their rights of proprietorship are not liable to be defeated except as provided under the Act. **Section 26(1)** of the Act which provides that the certificate of title held by a proprietor is conclusive evidence of proprietorship and can only be challenged on the ground of fraud or misrepresentation to which the person is proved to be a party and/or that it is shown the title has been acquired illegally un procedurally or through a corrupt scheme.

However, the issue of whether the title issued to the 2nd and 3rd Defendants with respect to the suit property is good title will have to be determined after full trial and not at this stage. The court will also have to make a determination as to whether the agreement entered into between the 1st Defendant and Thome Farmers No. 5 Limited for the purchase of the suit property was valid and the import of that agreement to the plaintiff but this will be determined after the full hearing.

Having now carefully considered the Notice of Motion dated **2nd May 2014**, the pleadings generally and the written submissions, the Court finds it not merited and the same is dismissed with costs in the cause.

It is so ordered.

Dated, Signed and delivered this **13th day of February, 2015**

L. GACHERU

JUDGE

In the Presence of:-

Mr Ochieng holding brief King'ara for the Plaintiff/Applicant

Mr Mbichire for 2nd & 3rd Defendants/Respondents

Mr Kiogera holding brief for Wangui Koech for 1st Defendant.

Kamau: Court Clerk

L. GACHERU

JUDGE

13/2/2015