



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT**

**AT MAKUENI**

**ELC CASE NO. E017 OF 2020**

STEVE RUKWARO MUTHUI.....PLAINTIFF

VERSUS

JEREMIAH MUTAVI SIMBA.....1<sup>ST</sup> DEFENDANT

ZION MOVERS INVESTMENT SELF HELP GROUP.....2<sup>ND</sup> DEFENDANT

LAND REGISTRAR MAKUENI.....3<sup>RD</sup> DEFENDANT

**RULING**

1. Before this court is a Notice of Motion dated 3<sup>rd</sup> of November 2020, brought under Order 40 and 51 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and all the enabling provisions of Law. The Applicant sought for the following orders;

**1. Spent.**

**2. That pending the hearing and determination of this Application inter partes, the Honourable Court be pleased to issue a temporary injunction restraining the Defendants/Respondents their agents, servants or any other person acting on their behalf from entering, selling, sub-dividing, transferring, developing or in any manner dealing land parcels numbers KONZA SOUTH/KONZA SOUTH BLOCK 5 (KONZA) 1256 and KONZA SOUTH/KONZA SOUTH BLOCK 5 (KONZA) 1922 pending the hearing and determination of this application.**

**3. That this order be registered in the land register as a caution on the two parcels pending the hearing and determination of the suit.**

2. The Application is premised on the grounds on the face of the application and on the Applicant's supporting affidavit sworn on the 19<sup>th</sup> of May 2021. These grounds are:-

**a) That the Applicant is the registered owner of land parcels numbers Konza South/Konza South Block 5 (Konza) 1256 and Konza South/Konza South Block 5 (Konza) 1922**

**b) That the Respondents have illegally and fraudulently registered the parcels of land.**

**c) That the 1<sup>st</sup> Respondent is in the process of finding a willing buyer for land number Konza South/Konza South Block 5 (Konza) 1256.**

**d) That the 2<sup>nd</sup> Defendant is in the process of sub-dividing land parcel number Konza South/Konza South Block 5 (Konza) 1922.**

**e) That the Applicant is likely to suffer irreparable damages.**

**APPLICANT'S CASE**

3. The Applicant avers that he joined Konza Ranching and Farming Co-operative Society Limited in the year 2012 and was given membership number 0776. That in August 2012 the company decided to survey and sub-divide the land and thereafter invited members to

ballot for purposes of allocating each member their respective parcels of land. He stated each member was being allocated two parcels of land one agricultural and the second one a commercial plot.

4. He further averred that he participated in the balloting and that he was allocated plot numbers 606 an agricultural plot and 955 commercial plot. That on the 21<sup>st</sup> of August 2020 he collected a letter of proof of membership from the society's offices to assist him to collect his certificates of titles from the land office. He stated that the letter indicated that he was number 238 and 841, and that he had been allocated the suit properties.

5. That in the company of his lawyer, they proceeded to the lands office where they requested for the certificate of the official search and a copy of the green card but the Land Registrar was hesitant to furnish them with the same and advised them to talk to the current owner of the suit properties one Jeremiah Mutavi Simba and his Advocate Matata and Company Advocates.

6. He further averred that the transfer document indicated that the title deed was first issued in his names and thereafter transferred to the 1<sup>st</sup> Defendant who in turn sold the commercial plot to the 2<sup>nd</sup> Defendant.

7. He further averred that he had never collected the titles from the lands office nor transferred the suit properties to anyone. He stated that the passport photographs, identity card and the KRA pin used in the transaction were not his.

8. He further averred that he had learnt that the 1<sup>st</sup> Respondent was in the process of finding a purchaser for the agricultural plot while the 2<sup>nd</sup> Respondent was in the process of sub-dividing the land parcel No. Konza South/Konza South Block 5 (Konza) 1922 hence the present application.

### **1<sup>ST</sup> RESPONDENT'S RESPONSE**

9. The 1<sup>st</sup> Respondent opposed the application vide his replying affidavit sworn on the 10<sup>th</sup> of January, 2021. He averred that the suit properties were first registered in the names of the Applicant who then sold the properties to him on 12<sup>th</sup> September 2018 as per the sale agreement marked as annexure JM1. That after he paid the purchase price for the two suit properties in the presence of R.M. Matata Advocate, the Applicant handed over to him the copies of the titles for the suit properties and his original identity card.

10. He further averred that the Applicant swore an affidavit to confirm that the names appearing in the certificate of title and in the identity card referred to one and the same person. He further averred that the Applicant signed the application forms when he sought consent to transfer the properties in his name and upon transfer the titles were issued in his name. He argued that the Applicant's cannot allege that the documents were forged as his signature in the sale agreement and on the documents bear resemblance with signature in the pleadings.

11. He contends that the Applicant is a greedy person who is out to benefit twice from the sale of the same land. The 1<sup>st</sup> Respondent admitted that on 12<sup>th</sup> of March 2020, he sold land parcel number Konza South/Konza South Block 5 (Konza) 1922 to the 2<sup>nd</sup> Respondent. He annexed the sale agreement annexure JM1. He further averred that they have been in possession of the land and using the property.

### **2<sup>ND</sup> RESPONDENT'S CASE**

12. The 2<sup>nd</sup> Respondent opposed the application vide the replying affidavit of Joseph K. Tindi its Chairman sworn on the 31<sup>st</sup> of January 2021. He averred that on the 12/3/2020 the 2<sup>nd</sup> Defendant entered into a sale agreement with the 1<sup>st</sup> Defendant for land parcel number Konza South/Konza South Block 5 (Konza) 1922 for a consideration of Kshs 3,000,000/-. He annexed a copy of the sale agreement annexure JKT1 in his replying affidavit.

13. That before executing the agreement, the 2<sup>nd</sup> Respondent conducted a search and established that the property was registered in the name of the 1<sup>st</sup> Defendant. That after the property was transferred to the group, they were issued with a certificate of title and that they proceeded to apply for sub division of the land and the same was done after consent was granted by the Land Control Board. He argued that their surveyor had sub divided the land as per the mutation form annexure JKT4. He further averred that the 2<sup>nd</sup> Respondent purchased the property after confirming that it was free from encumbrances.

14. The Application was canvassed by way of written submissions. The Plaintiff's written submissions were filed on the 4<sup>th</sup> of October 2021. The Applicant's Counsel submitted that the Applicant was the registered owner of the suit properties and that he never picked his titles from the land office or transferred the suit property to anyone. Counsel argued that the transfer of the suit properties to the 1<sup>st</sup> Defendant was fraudulent as the documents used in the transfer were forged. Counsel contends that the 1<sup>st</sup> Respondent had no valid title and therefore could not purport to transfer the same to the 2<sup>nd</sup> Respondent. To buttress his submissions, he placed reliance on the following cases:-

***a) West End Butchers Ltd v Arthi Highway Developers Ltd & 6 Others (2012) e KLR***

***b) Iqbal Singh Rai vs Mark Lechini and the Registrar of Titles Civil Case No 1054 of 2001***

***c) Dr Joseph Arap Ngok vs Justice Moijo Ole Keiwa & 5 Others Civil Appeal no 60 of 1997***

15. The 1<sup>st</sup> Defendant/Respondent through the written submissions were filed on the 6<sup>th</sup> of December 2021 submitted that he was the registered owner of the suit property having acquired the same through a legal purchase. Counsel for the 1<sup>st</sup> Respondent submitted that the certificate of title could only be challenged under Section 26 of the Land Registration Act upon full hearing of the case. Counsel argued that

the Applicant had not met the requirements for the grant of an injunction as laid out in the case of **Giella v Cassman Brown (1979) EA**.

16. Counsel argued that the Applicant had failed to establish that he has a prima facie case as the Respondents were the registered owners and occupiers of the suit land. On the issue whether the Applicant would suffer irreparable harm, Counsel submitted that the Applicant had nothing to lose as the 1<sup>st</sup> Respondent was in possession of the land.

17. On the issue of balance of convenience, Counsel submitted that the 1<sup>st</sup> Respondent had proprietary rights and was in possession of the suit land unlike the Applicant who had never been in possession.

18. The 2<sup>nd</sup> Respondent through its written submissions filed on 28<sup>th</sup> of December 2021, submitted that the Applicant had not met the conditions for grant of an order of injunction as laid down in the case of **Giella vs Cassman Brown** and reiterated by the Court of Appeal in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) e KLR**.

19. Counsel for the 2<sup>nd</sup> Respondent submitted that the Applicant had not established that he has a prima facie case as the Applicant had sold the suit properties to the 1<sup>st</sup> Respondent who later sold to the 2<sup>nd</sup> Respondent. Counsel contends that the 1<sup>st</sup> Respondent holds a legal title. Reliance was placed on the case of **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) e KLR** which defined a prima facie case.

20. Counsel argued that the 2<sup>nd</sup> Respondent's title was protected under Article 40(1)(a) & (b) of the Constitution which provides that subject to Article 65 every person has a right either individually or in association with others to acquire and own property of any description and in any part of Kenya. Counsel further argued that by virtue of Section 26 of the Land Registration Act, the 1<sup>st</sup> Respondent held a valid title unless it was impeached. To buttress his submissions he relied on the following decisions:- **Stephen Abu Mukhobi v Daniel Oria Odthiambo & Another (2016) eKLR**

**Mwaura Mithanga & Another v Njoroge Kuria Joseph (201) e KLR.**

21. Counsel further submitted that on the allegation of fraud, the Applicant did not adduce any evidence to demonstrate that the transfer to the 1<sup>st</sup> Respondent was by means of fraud. Counsel argued that the standard of proof in fraud is higher than in balance of probabilities but falls short of proof beyond reasonable doubt. He relied on the decision in **Koinange & 13 Others vs Koinange (1986) KLR 23** where the judge relied on the decision in the case of **Ratilal Patel v Lalji Mukanji (1957) EAR 314-317** in support of his submissions.

22. Counsel further submitted that the Applicant had not demonstrated that he would suffer irreparable injury as the Applicant was not in possession of the suit property. Counsel argued that the 2<sup>nd</sup> Respondent stood to suffer irreparable harm if the orders were granted as he was an innocent purchaser for value who validly acquired the suit property. Reliance was placed the case of **Muikamba Kiranga & Another v Faith Muthoni Maringa & 4 Others (2020) e KLR**.

23. On the issue of balance of convenience, counsel submitted that it tilts in favour of the 2<sup>nd</sup> Respondent as he is an innocent purchaser who holds a title deed for the suit property. To buttress his submissions, Counsel relied in the decision in **Paul Gtonga Wanjau v Gathuthi Tea Factory and 2 Others (2016) e KLR**.

#### **ANALYSIS AND DETERMINATION**

24. Having considered the application, affidavits and the rival submissions, I find that the issue for determination is whether the Applicant has met the threshold for the grant of an order of injunction. The issue for determination is whether the Applicant has met the threshold for grant of an order for injunction.

25. The principles applicable in an application for an injunction were laid down in the celebrated case of **Giella Vs Cassman Brown & Co Ltd 1973 EA 358** where the court held that in order to qualify for an injunction.

ü *First the applicant must show a prima facie case with a probability of success.*

ü *Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.*

ü *Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.*

26. The first issue for determination is whether the Plaintiff has established has a *prima facie* case with a probability of success.

27. A prima facie case was defined by the Court of Appeal in the case of **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** as follows;

*“a prima facie case in a civil application includes but is not confined to a genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

28. In the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another (201) e KLR** the Court of Appeal held that:-

**“With reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid vs Ethicon Limited (1975) AC 396 stated thus:-**

***“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief”.***

29. The Applicant contends that he is the registered owner of the suit properties. The Applicant gave an elaborate background on how he acquired the suit properties and annexed documents marked as annexures 1 to 5 from Konza Ranching and Co-operative Society Limited to demonstrate how he acquired the suit properties. He averred that he had not at any one time collected the certificate of titles from the land office nor sold the suit lands to anyone. The Applicant averred that the suit properties were fraudulently transferred to the 1<sup>st</sup> Respondent and gave an elaborate list of the alleged forged documents used to effect the transfer to the 1<sup>st</sup> Respondent.

30. The 1<sup>st</sup> Respondent argued that he was the registered owner of the suit properties having purchased the same from the Applicant herein. He annexed a copy of the sale agreement JM1, copies of payment vouchers annexure JM1, and a copy Applicant’s identity card annexure JM3 in his replying affidavit to demonstrate the steps he took in purchasing the suit properties. Counsel submitted that upon the transfer of the properties in the 1<sup>st</sup> Respondent’s name, the 1<sup>st</sup> Respondent was issued with certificate of titles marked annexure JM6.

31. Counsel argued that restraining orders could not issue against a person who was in possession of the property unless it is proved that the certificate was acquired fraudulently, illegally or through a corrupt scheme. The 1<sup>st</sup> Respondent further stated that he sold the commercial plot to the 2<sup>nd</sup> Respondent.

32. The 2<sup>nd</sup> Respondent contends that it purchased the suit property after conducting a search and establishing that the same was registered in the name of the 1st Defendant. It is evident from the sale agreement dated 12<sup>th</sup> of March 2020 annexed to the 2<sup>nd</sup> Respondent’s affidavit that the 1<sup>st</sup> Respondent sold land parcel number Konza South/Konza South Block 5 (Konza) 1922 for a consideration of Kshs. 3,000,000/-. It is equally evident from the copy of the certificate of title annexure JKT 2 in the 2<sup>nd</sup> Respondent’s replying affidavit that land parcel number Konza South/Konza South/Block 5 (Konza) 1922 is registered in the name of the 2<sup>nd</sup> Defendant/Respondent, while land parcel Konza South/Konza/South Block 5 (Konza) 1256 is registered in the name of the 1<sup>st</sup> Defendant/Respondent.

33. The Applicant submits that he is the owner of the suit properties and that the registration and transfer was done illegally as the identity card, KRA pin and photograph used in the transaction is not his. In a nutshell he submits that the transfer was fraudulent. On the other hand, the 1<sup>st</sup> Respondent argued that he is the registered owner of the suit parcels having purchased the same from the Applicant. The 1<sup>st</sup> Respondent contends that the Applicant is a greedy person who wants to benefit twice from the sale of the same parcels of properties. The 1<sup>st</sup> Respondent stated that he thereafter sold the commercial plot to the 2<sup>nd</sup> Respondent.

34. It is evident from the pleadings and annexures that both the Plaintiff and the Respondents are claiming ownership over the same parcels of land. It is also evident from the certificates of title and green card that the suit properties Konza South/Konza South Block 5 (Konza) 1256 and Konza South/Konza South Block 5 (Konza) 1922 are registered in the names of the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents respectively. The Applicant has alleged that the suit properties were transferred to the 1<sup>st</sup> Defendant fraudulently and that the 1<sup>st</sup> Respondent did not have a good title to pass to the 2<sup>nd</sup> Respondent.

35. The issues for determination is who is the legitimate owner of the suit properties and whether the transfer and registration of the suit properties to the 1<sup>st</sup> Respondent was done fraudulently. A party who alleges fraud must be given an opportunity to prove the allegations. These are issues that need to be canvassed in a full trial by calling evidence and interrogating it through cross examination. As rightly submitted by the Respondents the issue of fraud can only be established upon hearing the parties in the main suit. At this stage the court is not required to determine the issues which will be canvased at the trial. In so finding I am guided by the holding in the case of **Edwin Kamau Muniu v Barclays Bank of Kenya** where the court held that:-

***“the court cannot at this juncture hold with certainty who between the plaintiff and the respondent is the owner of the land.”***

36. The court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy. Looking at the documents annexed to the respective affidavits, it is evident that the Plaintiff’s claim is not baseless. Since both the Plaintiff and the Defendants are claiming ownership over the same parcels of land, with the sanctity of the title being in dispute, I find that these will best be determined in a full trial.

37. On the basis of the material that is on record, I find that the Plaintiff/Applicant has established a prima facie case.

38. On whether the Applicant will suffer irreparable harm which cannot be adequately compensated by damages, the Applicant must establish that he will suffer irreparable loss if an order for injunction is not granted.

39. The Court of Appeal in **Nguruman Limited Vs Bonde Nielsen & 2 Others (2014) eKLR** held that: -

***“On the second factor, the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be***

*compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”*

40. Irreparable loss was described in the case of **Gitonga Wanjau Vs Gathuthi Tea Factory CO. Ltd & 2 Others Nyeri HCC NO. 28 of 2015** as simply injury or harm that cannot be compensated by damages and would be continuous.

41. Similarly in the case of **Pius Kipchichir Kogo v Frank Kimeli Tenai (2018) e KLR** Paul the court held that:-

*“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”.*

42. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured

43. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by damages, it is evident from the pleadings and annexures on record that, the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents are the registered owners of the suit properties and are in occupation of the same. The 2<sup>nd</sup> Respondent confirmed as per the mutation form marked annexure JKT4 in its replying affidavit that it has sub divided the suit land. Although the Applicant is not in occupation of the suit properties, there is a real likelihood that the same may be transferred to third parties and therefore making the process of recovery difficult. The court is therefore convinced that the Applicant stands to suffer irreparable harm if the suit property is transferred to third parties.

44. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the injunction against the hardship to be borne by the Respondents by granting the injunction. It is not in dispute that the Respondents are in occupation of the suit properties. Looking at the evidence presented by the parties herein, I find that if the suit properties are not preserved, they may be wasted away.

45. In light of the foregoing, I find that the Applicant has met the threshold for the grant of a temporary injunction. Consequently, the application dated 3<sup>rd</sup> November 2020 is allowed as prayed pending the hearing and determination of this suit Parties to comply with order 11 within the next 30 days.

Ruling Dated and Delivered this **23<sup>rd</sup> day of February, 2022** Virtually.

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**HON. T. MURIGI**

**JUDGE**

**IN THE PRECENCE OF:** -

Kiluva holding brief for Makundi for the 1<sup>st</sup> Respondent

Mutia for the 2<sup>nd</sup> Respondent

Kwemboi – Court Assistant