



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC CASE NO. 67 OF 2020**

**PETER KILONZO & FRANCIS MAKOA KYENZE**

**(Suing as the personal and legal representatives of Estate of**

**JOHN KYENZE KILONZO (Deceased).....PLAINTIFFS**

**VERSUS**

**STAVROULA ROUSALIS.....1<sup>ST</sup> DEFENDANT**

**IFUSION AFRICA LIMITED.....2<sup>ND</sup> DEFENDANT**

**JOHN ALLAN ONCHIRI MASESE.....3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. Vide a Notice of Motion dated 20<sup>th</sup> August 2020, the Plaintiffs/Applicants sought the following orders;

**(a) Spent**

**(b) Spent**

**(c) A temporary injunction do issue restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants herein by themselves, their servants, agents or anyone authorized by them from howsoever selling, alienating, transferring, charging, trespassing onto, making any entries and/or interfering with any requisite registration documents/records thereof or registering any instruments and/or in any other manner whatsoever interfering with or otherwise dealing with the properties known as Land Reference Number 12715/722 situated in the North West of Athi River by virtue of a Grant registered as I.R 46949/1 pending the hearing and determination of the suit.**

**(d) The costs of this application be provided for.**

2. The application is supported by the grounds on its face as well as the affidavit of Peter Kilonzo Kyende, the 1<sup>st</sup> Plaintiff. The Plaintiffs aver that the deceased John Kyenze Kilonzo lawfully purchased Land Reference No. 12715/722 and therefore enjoyed proprietary and beneficial ownership of the said property; that the title to the suit property was deposited with the 3<sup>rd</sup> Defendant for lawful custody; that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in collusion with the 3<sup>rd</sup> and 4<sup>th</sup> Defendants fraudulently transferred the suit property in their names; that the 2<sup>nd</sup> Defendant now claims ownership of the suit property, deliberately dispossessing the deceased's estate; that the illegal transfer of the suit property was without the knowledge, consent or instructions of the deceased; that unless the orders sought are granted the suit property is at risk of being transferred further to third parties at the detriment of the estate of the deceased.

3. The application is opposed. The 3<sup>rd</sup> Defendant filed a replying affidavit where he stated that he acted for the deceased who sold the suit property to the 1<sup>st</sup> Defendant and instructed him to act as his counsel in the transaction; that he was subsequently instructed by the 1<sup>st</sup> Defendant to transfer the suit property to the 2<sup>nd</sup> Defendant that he followed due process in the said transfers; that the transfer was done in 1993, which is 28 years ago and therefore he cannot be expected to have the transfers and that fettering the suit property will inconvenience and prejudice the 2<sup>nd</sup> Respondent.

4. In a rejoinder the 1<sup>st</sup> Applicant swore a further affidavit dated 21<sup>st</sup> April 2021 wherein he stated that the transfer form does not bear the deceased's signature; that the 3<sup>rd</sup> Defendant's affidavit can only be verified by a full hearing and that being administrators of the deceased's estate, they have *locus* to represent his estate.

## **SUBMISSIONS**

5. The Plaintiffs/Applicants filed their submissions on 22<sup>nd</sup> April 2021 where they stated that the Plaintiffs/Applicants had established a prima facie case with a likelihood of success. They relied on the cases of ***Giella vs Cassman Brown & Co. Ltd [1973] E.A 358*** and ***Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR***.

6. Counsel for the Applicant further submitted that the suit land belongs to the deceased but was illegally transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by the 3<sup>rd</sup> Defendant who had custody of the title deed by virtue of being the deceased's advocate. Counsel contended that the transfer documents do not bear the deceased's signature and that there is no evidence to show that the transfer of the suit property from the deceased to the 1<sup>st</sup> Defendant and subsequently to the 2<sup>nd</sup> Defendant was in compliance with law.

7. Counsel pointed out that the now repealed Government Lands Act in Section 18 thereof required that any transfer of a lease needed consent of the Commissioner of Lands. Counsel contended that there was no evidence that consent from the Commissioner of Lands was obtained for transfer of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Counsel further argued that the 3<sup>rd</sup> Defendant did not deny having indicated that the title to the subject property was lost and having sought for issuance of a provisional title.

8. It was further submitted that the transfer of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was done fraudulently. Counsel relied on the cases of ***Joel Kipkirui Arap Koech vs Alice Wambui Magandu & 3 Others [2018] eKLR***, ***Central Bank of Kenya & Another vs Uhuru Highway Development Bank Ltd & 4 Others [2000] eKLR***, ***Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR***, ***Aikman vs Muchoki [1984] KLR 353***, ***Joseph Mbugua Gichanga vs Cooperative Bank of Kenya Ltd [2005] eKLR***, ***Daniel Mbithi Mathiu vs Consolidated Bank of Kenya Limited & Another [2012] eKLR*** and ***Samson Ndambo Ngugi vs Anthony Muchina Kamau & Another [2021] eKLR***, for the proposition that where the Applicant is likely to suffer irreparable injury not capable of being restituted by damages, an injunction should issue.

9. On the question of balance of convenience, the applicants' counsel submitted that the balance of convenience tilted in favour of the Applicants. Counsel placed reliance on the case of ***Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR***.

10. Further, counsel argued that the Applicants had *locus* to file the suit herein and relied on Section 54 of the Law of Succession Act. Counsel cited the cases of ***Re the matter of the Estate of Morarji Bhanji Dhanak (deceased) [2000] eKLR*** and ***Virginia Wangari Ndindi vs Ann Ngima Mari & Another [2017] eKLR*** for the proposition that a limited grant of Letters of Administration Ad Litem is used to represent deceased persons in court proceedings.

11. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their submissions on 26<sup>th</sup> July 2021. They contended that the suit property was validly transferred by the deceased in his lifetime to the 1<sup>st</sup> Defendant on 16<sup>th</sup> April 1993 about 8 years before his demise, and that on 20<sup>th</sup> February 1995, the suit property was again transferred by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant is the current registered proprietor. Counsel argued that the 3<sup>rd</sup> Defendant being an Advocate of the High Court of Kenya, his involvement in the transaction was due to his position as such and that there is no evidence that the title was given to him for lawful custody.

12. Counsel contended that the deceased instructed the 3<sup>rd</sup> Defendant as an Advocate to effect transfer of the suit property to the 1<sup>st</sup> Defendant. Counsel argued that allegations of fraud by the Plaintiffs were not supported at all.

13. Further, counsel argued that the instrument of transfer under the repealed Registration of Titles Act Cap 281 was Form F as provided in Section 34 of that Act, which Form only required the transferor and not transferee to sign, and therefore the annexure PK9 and PK10 show that the same were signed by the transferor. Counsel also submitted that PK7 was a declaration of loss of the title which occurred in the 3<sup>rd</sup> Defendant's office and is not proof that the 3<sup>rd</sup> Defendant is a director of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

14. Counsel also argued that the 3<sup>rd</sup> Defendant was neither proprietor of the suit property nor in possession of it and therefore injunction orders could not be issued against him. Counsel submitted that for 8 years after the suit property was transferred to the 1<sup>st</sup> Defendant, the deceased never raised any claim and that after the death of the deceased it took the Plaintiffs 19 years to make allegations of fraud against the Defendants.

15. It was further contended for the Respondents that if indeed the deceased had informed the Plaintiffs that he had deposited the title in issue with the 3<sup>rd</sup> Defendant, it would not have taken them 20 years to claim for it.

16. Counsel also argued that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are innocent purchasers for value. Counsel argued that the 2<sup>nd</sup> Defendant is protected under the law being the title holder of land as the absolute and indefeasible owner. Counsel pointed out that there was no evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants obtained title to the suit land by fraud.

17. Counsel also argued that the suit cannot be maintained as it is time barred having been filed on 20<sup>th</sup> August 2020, 27 years after the transactions complained of, which is contrary to Section 7 of the Limitation of Actions Act. Counsel contended that there was no proof of fraud that would likely extend the period of limitation.

18. It was finally argued for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that the Plaintiffs lacked *locus standi* to bring these actions because as at the time of the deceased's death, the suit property did not belong to him and was therefore not available to be administered by his personal representatives. Secondly, counsel argued that a grant of Letters of Administration Ad Litem can only enable a person to continue existing litigation and not to institute litigation.

### **ANALYSIS AND DETERMINATION**

19. I have carefully considered the application, the response and the submissions. The only issue that arise for determination is whether the Applicants have met the threshold for grant of temporary injunction.

20. The law governing grant of injunction is provided for in Order 40 Rule 1 of the Civil Procedure Rules as follows;

**where in any suit it is proved by affidavit or otherwise –**

**(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

**(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.**

21. Principles governing grant of injunction are well settled. In the case of *Giella vs Cassman Brown & Co. Ltd [1973] EA 358*, the court held that three conditions must be fulfilled before an injunction is granted, namely;

(a) That the applicant must demonstrate a prima facie case with probability of success,

(b) The applicant must demonstrate that he is likely to suffer irreparable injury that cannot be compensated in damages if the injunction is declined; and

(c) That in the event the court is in doubt, it ought to decide the application on the balance of convenience.

22. In the instant case, the Plaintiffs have alleged that they are the legal representatives of the estate of the late John Kyenze Kilonzo who was the registered owner of Land Parcel Reference No. 12715/722. That the 3<sup>rd</sup> Defendant fraudulently transferred the suit property to the 1<sup>st</sup> Defendant and later to the 2<sup>nd</sup> Defendant when the title thereof had been deposited with him for "lawful custody". I have perused the documents availed by the Applicants. The death certificate shows that the late John Kyenze Kilonzo passed on on 25<sup>th</sup> January 2001. Therefore he never raised any claim about the suit property during his The suit property was transferred to the 1<sup>st</sup> Defendant on 16<sup>th</sup> April 1993. It is therefore clear that for 8 years while the late John Kyenze Kilonzo was alive, he never raised a complaint against the transfer of the suit property to the 1<sup>st</sup> Defendant. The allegation by the Plaintiffs that the title was given to the 3<sup>rd</sup> Defendant for lawful custody, in my view has not been proved. I agree with the Respondents that if indeed the deceased informed the Plaintiffs that his title had been deposited with the 3<sup>rd</sup> Defendant for safe custody, it is strange that the Plaintiffs would wait for 27 years to claim for the same.

23. It is for those reasons that I find that the Plaintiffs/Applicants have not demonstrated a prima facie case with a likelihood of success.

24. The suit property is registered in the name of the 3<sup>rd</sup> Defendant and has been registered as such since 1995. It is my considered view that an order of injunction can only issue against a registered proprietor of a title if there is prima facie evidence challenging the title. The law vests absolute ownership of land in the registered proprietor and the title is not subject to challenge unless it is shown that the title was acquired fraudulently, illegally or unprocedurally. In my considered view, there is no material placed before court to show that the land in issue was acquired by fraud as alleged by the Applicant. The Plaintiffs having failed to demonstrate a prima facie case, have also not shown that they stand to suffer irreparable loss if the injunction is declined.

25. As there is no demonstration of prima facie case with a likelihood of success on the part of the Plaintiffs, coupled with the fact that the 2<sup>nd</sup> Defendant has been the registered proprietor of the suit land since 1995, the balance of convenience tilts in favour of rejecting grant of injunction.

26. In the end, I find and hold that the Plaintiffs/Applicants' Notice of Motion dated 20<sup>th</sup> August 2020 is unmeritorious and the same is dismissed with costs.

27. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 16<sup>TH</sup> DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of:**

Mr. Muthambi for the Plaintiffs/ Applicants

Mr. Ombete for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

No appearance for the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants

Ms Josephine Misigo - Court Assistant