



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAI ROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 1304 OF 2013

GEOFFREY NJENGA WAITATHU.....PLAINTIFF

=VERSUS=

JAMES MWAURA NJENGA.....1ST DEFENDANT

BENJAMIN NJOGU MUHORO.....2ND DEFENDANT

RULING.

The matter coming up for determination is the Notice of Motion application dated 29th October, 2013 filed by the Plaintiff/Applicant herein **Geoffrey Njenga Waitathu** brought under **Order 40 Rule 1, Order 51 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act** and all other enabling provisions of Law. The applicant seeks for the following Orders:-

- a. That the honourable court be pleased to issue an Order of Temporary injunction restraining the Defendants from in any way dealing with all that parcel of land known as Limuru/Ngecha/2637 pending the hearing and determination of the suit herein.*
- b. That the Honourable court be pleased to grant an order of injunction restraining the Defendants from interfering with the plaintiffs quiet possession and from trespass on the suit property.*
- c. That the costs of this application be provided for:*

The application was premised on the grounds set on the face of the application and on the affidavit of **Geoffrey Njenga Waitathu** . Among the grounds in support of the application are:-the Plaintiff has been the registered proprietor of all that parcel of land known as **Limuru/Ngecha/2637** measuring approximately **0.06 ha** after having excised it from **Limuru/Ngecha/338**; further that the Plaintiff have never transferred the said parcel of land to the 1st Defendant and he has no intention of transferring the same to any person whomsoever; that the said parcel of land, **Limuru/Ngecha/2637**, has a great sentimental value to the Plaintiff as he buried his deceased wife and son on the said parcel of land and the Defendants are now working in cahoots to dispossess the Plaintiff of the said treasured parcel of land ; that unless the orders sought are granted, the Plaintiff stand to suffer irreparable loss and damage not capable of being compensated by an award of damages or in any other way whatsoever .

In his Affidavit , the Applicant averred that he has never transferred land parcel **No.Limuru/Ngecha/2637** to the Defendants and they have no legal right over the said property and that they should be restrained from dealing with the said suit property whatsoever for the interest of justice.

The said application is vehemently opposed by both Defendants who filed their separate Replying Affidavits.

The 1st Defendant, **James Mwaura Njenga** averred that his father **Geoffrey Njenga Waitathu**, the applicant herein sub divided his land **Limuru/Ngecha /338** into six portions and **Limuru/Ngecha /2637** was one of them. He further averred that he is the one who footed the costs of survey subdivisions and titles processing exercise and because of the expenses that he incurred, his father then transferred the said parcel of land to him.

Further, Plaintiff executed all the relevant transfer documents in favour of the 1st Defendant, the 1st Defendant sold the parcel of land to **Benjamin Njogu Muhoro** the 2nd Defendant. It was his contention that the said transfer was finalized in January 2013 with the consent and knowledge of the plaintiff/applicant. He denied that he has defrauded the plaintiff of the said parcel of land and urged the court to dismiss the Plaintiffs application.

The 2nd Defendant in his Replying Affidavit averred that he purchased the suit premises from **James Mwaura Njenga** after paying the full purchase price. He averred that he acquired the land legitimately from the 1st Defendant and further averred that the Plaintiff has not come to court with clean hands. He also urged the court to dismiss the Plaintiff's application.

In his further affidavit, the applicant averred that he has never sold the said parcel of land, **Limuru/Ngecha /2637** to the 1st Defendant as that is where the family graveyard stands and the land cannot be sold or transferred to anyone. He further reiterated that the 2nd Defendant knew very well that the said parcel of land never belonged to the 1st Defendant as he knows that it has a family house as he is a friend to the family and he knows that the same does not belong to the 1st Defendant.

The parties herein canvassed the application by way of written submissions which I have carefully considered. I have also considered the pleadings thereto and the relevant laws and I make the following findings:

There is no doubt that the Plaintiff herein and the 1st Defendant are father and son. There is also no doubt that the land in question **Limuru/Ngecha/2637** was curved from all that parcel of land Known as **Limuru/Ngecha /338** which was registered in the name of the plaintiff herein. There is also evidence that Plaintiff subdivided the **Limuru/Ngecha/338** into three parcels of land and transferred two of them to his two sons, the 1st Defendant being one of them. From the pleadings, it is also evident that the plaintiff retained the suit land **Limuru/Ngecha /2637** where the family home stood and whereupon the plaintiff deceased wife and son were buried.

There is no doubt that the 1st Defendant later sold this parcel of land **Limuru/Ngecha /2637** to the 2nd Defendant who proceeded to demolish the house which was on the said parcel of land. The Plaintiff averred that he did not transfer the suit land to the 1st defeat nor anyone else. He seeks an injunction to restrain the Defendants from dealing with the said parcel of land . The 1st Defendant on his part has alleged that the Plaintiff genuinely transferred the land to him and in return the 1st Defendant legitimately sold the suit land to the 2nd Defendant. The Defendants have urged the court to dismiss the Plaintiff's application.

The Plaintiff has come to court seeking for equitable relief. The above equitable relief is granted at the discretion of the court. However, the said discretion must be exercised judicially. See **Hasmukh Khetshi ShahVs Tinga Traders ltd, Civil Appeal No. 326 of 2002 (2002) KLR 4628 where the court held that;**

“It must be stated at the outset that the granting of the interim Injunction is an exercise of judicial discretion”.

In deciding whether to grant the Orders sought, I will take into account the fact that an injunction being an equitable remedy cannot be granted to a party who has demonstrated openly by his conduct that he is underserving of the equitable relief sought. **See David Kamau Gakuru Vs National Industrial Credit Bank Ltd Civil Appeal No. 84 of 2004.** Therefore it is trite law that an applicant who seeks for injunction must come to court with clean hands and in such an application, the court should not delve in substantive issues and finally make concluded views of the dispute before hearing oral evidence. (See **AGIP KENYA LTD v. MAHESHCHANDRA HIMATLAL VORA & ANOR. Civil Appeal (Mombasa) NO. 213 of 1999.**)

Since the applicant has sought for injunctive relief, he must satisfy the conditions for grant of such orders, the said conditions were well established in the case of **Giella Vs Casman Brown & Co.Ltd 1973 EA 358.** These conditions are:-

- a. The applicant must establish that he has a prima facie case with probability of success.***
- b. That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c. When the court is in doubt, to decide the case on a balance of convenience.***

Has the applicant herein satisfied the above stated conditions to warrant this court grant him the orders sought?.

Firstly, the applicant had to establish that he had a prima facie case with probability of success. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125.** The Court of Appeal described prima-facie case as:-

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

Has the applicant herein established that he as a prima facie case with probability of success?.

From the available evidence, there is no doubt that the Plaintiff was the registered proprietor of the suit property. He further averred that he is in possession of a copy of the Title document and that he had entrusted the 1st Defendant with the Original Title Document. It is also evident that the 1st Defendant later transferred this parcel of land **Limuru/Ngecha 2637** to the 2nd Defendant, **Benjamin Njogu Muhoro** . It was the plaintiff’s contention that he did not bequeath the land in question to the 1st Defendant nor did he allow him to sell it to another person. It is also evident that the 1st Defendant later transferred this parcel of **Land Limuru/Ngecha 2637** to the 2nd Defendant, **Benjamin Njogu Muhoro** . It was the Plaintiff’s contention that he did not bequeath the land in question to the 1st Defendant nor did he allow him to sell it to another person. It was the Plaintiff’s further contention that he did not sign the transfer document as alluded by the 1st Defendant. The issue of whether the Plaintiff bequeathed the suit land to the 1st Defendant or not or whether he signed the transfer documents is a contested issue. The said facts can only be decided after calling of evidence and interrogation of the said evidence during cross examination.

Though the parcel of land is allegedly registered in the names of the 2nd Defendant as per the evidence of official search the Plaintiff herein has disputed that registration. I have considered Section 26 of the Land Registration Act, which provides that such certificate of registration is prima-facie evidence that the registered person as the proprietor of such land is the absolute and indefeasible owner. In effect it means that since the 2nd Defendant is the registered proprietor then he is the absolute and indefeasible owner.

However, such certificate of title can be challenged on the grounds of **fraud, misrepresentation** or where the certificate of title has been acquired illegally, unprocedurally or through a **corrupt scheme**. The applicant herein has alleged that the 2nd Defendant acquired registration to the suit land through fraud.

The issues raised by the Plaintiff need to be interrogated through calling of evidence. The plaintiff has therefore established that he has a prima-facie case with probability of success. The 2nd Defendant also did not attach the said certificate of registration but only a certificate of official search, since the Plaintiff has a copy of the certificate of Title, then as provided by **Section 26(1) of the land Registration Act**, the plaintiff is the absolute proprietor herein.

On the second issue of irreparable damage or loss that cannot be compensated by an award of damages, the Plaintiff alleged that it is on the suit land that his late wife and son were buried. He further averred that he attaches a lot of sentimental value to this parcel of land. That fact was not disputed by any of the Defendants herein. Therefore the court finds and holds that sentimental value cannot be measured and thus compensated by an award of damages. The Plaintiff has been able to successful establish that condition that he will suffer irreparable loss which cannot be compensated by an award of damages if the Order are not granted. The Plaintiff having denied that he transferred the suit land to any of the Defendants herein, and having been the original owner of the suit land means that the balance of convenience tilts in his favour.

For the above reasons, the court finds that the Plaintiff's Notice of Motion dated 29th October, 2013 is merited. The Court consequently allows the said application in terms of prayers No.3 and 4 with costs to the Plaintiff/Applicant.

It is so ordered.

Dated, signed and delivered this **18th day of July, 2014**

L.GACHERU

JUDGE

In the presence of

..... for the Plaintiff

..... 1st Defendant

.....2nd Defendant

Kamau : Court Clerk

L. GACHERU

JUDGE