



IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO 1133 OF 2013

NJERI NGANGA.....PLAINTIFF/APPLICANT

VERSUS

SAMUEL MUIGAI NGANGA.....1ST DEFENDANT/1ST RESPONDENT

MUIRURI NGANGA.....2ND DEFENDANT/RESPONDENT

DIRECTOR OF SETTLEMENT

SCHEME.....3RD DEFENDANT/RESPONDENT

LAND REGISTRAR THIKA.....4TH DEFENDANT/RESPONDENT

RULING

The application for consideration is the Notice of Motion dated 24th September 2013 brought under Order 40 Rule 1 (a), 2,3,4,5 and 6 of the Civil Procedure Rules and section 3A of Civil Procedure Act seeking for orders that an injunction do issue restraining the defendant jointly and severally whether acting by themselves ,their agents, employees, servants, officers or whosoever from evicting the plaintiff and/or the other members of her family, from the suit property and from advertising ,offering for sale, subdivision, selling, transferring, registering and subdivision, transfer and/or transaction whatsoever in respect of the suit property ,alienating or otherwise dealing with the suit property being plot No 325 Gatunyaga and now referred to as LR No Kiambu/Gatunyaga/325 pending the hearing and determination of the suit.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of Njeri Nganga the plaintiff herein who stated that she was the bonafide owner of the suit property initially known as Plot No 325 Gatunyaga and now referred to as Parcel of Land Number KIAMBU/GATUANYAGA/325.She averred that there are people unknown to her have been coming to the suit property to survey it under the pretext of subdividing, selling and/or purchasing the same. That on inquiry she found out that the people behind the subdivision were the 1st and 2nd defendants who were her brothers. That she tried to raise the issue with the defendants but they have been reluctant insisting that the suit property belonged to their late father and therefore they could do as they please. She also averred that her efforts to find out the status of the suit property from the 4th defendant and her attempts to bar any dealings on the suit property have not bore fruits. She avers that she acquired the suit property from Gatunyaga Settlement Scheme in the early 70's and subsequently accommodated her parents and siblings including the defendants who were fairly young when they were forcefully ejected from their

home at Gakoe in Mang'u Thika in the late 70's. She is aggrieved by the conduct of the 1st and 2nd defendant which smirke of impropriety, oppression, fraud, malice, illegality, unconstitutionality, arbitrariness and is unconscionable. She avers that she is reasonably apprehensive that the suit property may be sold to third parties and the end result is to disenfranchise the applicant her eleven children and other siblings of the ownership of the suit property thereby causing them untold misery and irreparable harm should the order herein be declined.

This application is opposed. The 1st defendant, Samuel Muigai Nganga swore and filed a Replying Affidavit on 4th October 2013 on behalf of the 2nd defendant stating that the suit property does not belong to their sister who is the plaintiff /applicant. He averred that his parents were squatters at Gichieki near Kilimambogo College but were settled by the government at Gatwanyaga Settlement Scheme for 2.3 acre plot each. He averred that his father got ballot No 325 where they moved in 1976. He averred that at the time of his father's death in 1981, the records at the settlement office showed that he was the owner of the said land. He stated that on 21st April 1983 a certificate of outright purchase was issued showing their deceased father as the owner. They later petitioned and obtained letter of administration in Thika thereafter they resented the said letters of administration to the Director of Land adjudication and settlement for the issuance of the required documents. That during all these process, the plaintiff did not object to the grant of letters of administration and did not produce her annexed certificate of outright purchase. They denied that the plaintiff resided in the suit property but a place called Munyu. The defendants aver that it is curious that the plaintiff is making a claim on the suit property after the demise of their parents who had settled on the suit land since 1976 alleging that the plaintiffs claim is a second claim after the first claim failed in 2005 at the local board asking this court to dismiss the application.

In reply to the defendants claim, the plaintiff filed a supplementary affidavit on 12th November 2013 stating that it was her and her husband that resided in Kilimambogo Teachers College. She averred that her deceased father did not ballot for the suit property and that she was the one who balloted and was accordingly allotted the suit property. She added that the fact that her deceased parents and siblings continued to live with her in the suit property, is not ground to disposes her and her family of the suit premises. She also pointed out the fact that the defendants obtained letters of administration without including their sisters as the beneficiaries of the estate was wanting since they did not consent to the subdivision of the suit property. She also averred that the defendants did not deny that they were in the process of alienating the suit property in diverse ways to the plaintiff's prejudice it is apparent that unless the orders sought are granted she will suffer as she has also built a house in the suit property therefore she has interest to the suit property.

Kamau Ngugi and Peter Gatira Wamuyu also swore affidavits in support of the plaintiff's claims. They stated that the plaintiff's late husband Njoroge Gichuhi was their colleague at Kilimambogo Teachers College and they lived within the same compound in the College. That the list of beneficiaries was prepared by Gatira Wamuyu and that the applicant was one of the beneficiaries as her name was called out and she later participated in the balloting exercise which was conducted by the then member of parliament Muigai Kenyatta and was allotted ballot no 325. They aver that the plaintiff also participated in the clearing of the bush to enable the surveyor carry out the surveying exercise and later the plaintiff occupied the suit property like any other beneficiary. They averred that Nganga Muigai, the deceased father of the plaintiff and the defendants was not in the list as he was not an employee of the College and therefore he could not have benefitted as a squatter in the settlement scheme.

Parties filed their written submissions in canvassing this application. The plaintiff filed her submission on 5th February 2014 and 20th March 2014. She submitted that she has produced her documents to support her claim and explained how she acquired it. She also stated that the documents produced by the 1st and 2nd defendants produced documents that were obtained after their father had died which needs to be subjected to scrutiny by the court. She also submitted that the credibility of the deponents in the affidavits will only be demystified in a proper trial. The plaintiff submitted that she does not seek to evict the family members from the suit property but only seeks to restrain the 1st and 2nd defendants from alienating the same to her prejudice and that of her other family members. She added that the 1st and 2nd defendants have not denied that prior to this suit and the interim orders subsisting they were in the process of

subdividing the suit property in a bid to alienate them as they deemed fit. She relied on the case of **Giella –vs- Cassman Brown Limited [1973] EA 358** which touches on the principle requirements of granting injunctions. On the fact of prima facie case with a probability of success the plaintiff submitted that she has a high probability of success having established that she is the rightful owner of the suit property having acquired from Gatuanyaga Settlement scheme. She also stated that she acquired the suit property under section 7 of the Land Act as well as the Land Registration Act and her inalienable rights against deprivation of the same is also buttressed by the said statutes and Article 40 of the Constitution.

On the limb of irreparable injury, the plaintiff cited the case of **Homescope Properties Ltd & another – vs- David Gachuki & Pamela Odera Suedas Chairman & Secretary of Karen Ngong View Estate & another [2014] e KLR** where the court held that a party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is liable to pay for it. She submitted that the other family members stand to suffer irreparable harm that cannot be compensated. She added that this suit is not only an emotive land dispute but a classical feud the court must resolve carefully so as to serve the interests of justice and comprehensively resolve the ownership and occupational rights of all parties involved the ownership and occupational rights of all parties involved herein and this cannot be achieved unless the suit is preserved.

On the limb of balance of convenience the plaintiff stated that the family will be severely dented and prejudiced if the defendants proceed in dealing with the suit property therefore the balance of convenience tilts in favour of preserving the property.

The 1st and 2nd defendants filed their written submissions on 5th March 2014 stating that both parties presented to this court certificate of outright purchase but they added that the letter from the 3rd defendant confirms that the suit property was allocated to Nganga Muigai. They further submitted that the 1st and 2nd defendants presented photographs to confirm that they occupied the suit property. They went on submit that the plaintiff had not proved that she had a prima facie case by stating that the 3rd defendant in its letter stated that the suit property was allotted to Nganga Muigai. On reparable injury the defendants stated that the plaintiff has never been in occupation of the suit property.

I have considered the affidavits, the written submissions and the authorities that the parties have filed in supporting their claims. The issue for determination is whether the plaintiff is entitled to the prayer of injunction sought. The law on temporary injunctions is now settled law as deduced from numerous case decisions. The gist of a temporary injunction is the preservation of the suit property pending disposal of the main suit. In addressing this, courts have set conditions to be fulfilled before the discretion of granting the temporary injunction is exercised. These are that the Applicant must show that there is a prima facie case with probability of success; that the Applicant might otherwise suffer irreparable damage which would not easily be compensated in damages; and, if court is in doubt, it will decide the question on the balance of convenience. **See Giella –vs- Cassman Brown Limited.**

In addition, **Order 40 of the Civil Procedure Rules (CPR)** requires the existence of a pending suit. It provides that where it is proved to court that in a suit, the property in dispute is in danger of being wasted, damaged or alienated by any party to a suit, the court may grant a temporary injunction to restrain, stay, and prevent the wasting, damaging and alienation of the property.

On the question of whether there is a prima facie case, this court has looked at the annexures from both the plaintiff and the defendants. They both have certificates of outright purchase. The plaintiff's certificate was issued on 14th April 1983 while that of the defendants was issued on 21st April 1983. Both certificates emanate from the same settlement scheme and were issued the same year, month and in a difference of a week. This therefore needs interrogation of the witnesses to ascertain whose certificate is valid.

The plaintiff has explained to this court through her affidavits how she acquired the suit property and how her family members came into the said property but the defendants have rebuffed the plaintiff's allegations stating that their deceased father was the beneficiary of the allotted suit property which is a

settlement scheme. It is therefore not clear as to how this suit property was acquired and the only way this issue can be judiciously determined is by having this suit set for hearing where all the parties will be given an opportunity to tender evidence for this court to ascertain who the legal owner of the suit property is. I therefore do not find that the plaintiff has established that she has a prima facie case with probability of success.

I will therefore consider the second limb of whether the plaintiff has proved that she will suffer irreparable damaged/injury if the injunction is not granted. The applicant needs to demonstrate that she has a claim in the main suit which even if awarded damages would not be adequately compensated for by the loss she will suffer if the injunction is not granted. The case of **Aikman-vs-Muchoki (1984) KLR 353** the Court of Appeal held that

“My understanding of the Court of Appeal decision in Giella case is that the court proceeds to consider the second condition of irreparable harm which cannot be adequately compensated for an award of damages only if it entertains some doubt on the first condition of the probability of success, like when the court thinks that the plaintiff has a fifty /fifty chance of success, however where going by the material placed before it at an inter parties hearing of an application for injunction it appears to the court that the plaintiff has a strong case like where it is clear that the defendant’s act complained of is or may be unlawful the issue whether or not damage can be adequate remedy for the plaintiff does not fall into consideration. A party should not be allowed to maintain an advantageous position by flouting the law simply because he is liable to pay for it”

In the present matter the plaintiff alleges that the 1st and 2nd defendants have the intentions of disposing the suit property because she has seen persons unknown to her coming to the suit property to survey in the guise of sub diving the same. The defendants have not refuted the claims that they intend to sell the suit property but claim that they were sub-diving the property amongst the sons of the deceased. It is therefore clear that there is activity taking place in the suit property which the plaintiff is apprehensive that if the court does not give its orders they will be prejudiced. She also alleges that this is the property where siblings and her immediate family reside and if the orders are not granted the family will be deprived of ownership, use and occupation. This is irreparable harm that cannot be compensated by damages.

On the balance of convenience the Court finds that in this application the dispute should be given a chance to be resolved after due process in court has been followed at the same time being alive of the fact that the court has powers to impose such conditions as it deems fit in the interest of justice, were it to grant a temporary injunction as provided by Section 3A of the Civil Procedure Act.

Order 40 Rule 1 reads,

“.....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.”

Having now carefully considered the applicant’s Notice of Motion dated 24th September, 2013 the written submissions and the relevant laws, the Court finds that the same is merited and is allowed in terms of prayer No.3 with costs in the cause.

It is so ordered.

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

L. GACHERU

JUDGE

In the Presence of:-

Kago for Plaintiff/Applicant

Thuo for 1st and 2nd Defendant/Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE