



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. E061 OF 2021

FRANCIS NGANGA KAHOHIPLAINTIFF

-VERSUS-

SERAH WANJIRA NGANGA1ST DEFENDANT

LAND REGISTRAR, RUIRU..... 2ND DEFENDANT

KENYA COMMERCIAL BANK LTD.....3RD DEFENDANT

LUCY WANJIRU NDIRANGU4TH DEFENDANT

RULING

1. The plaintiff and the 1st defendant are said to be an estranged couple. They have three children. The plaintiff, **Francis Nganga Kahohi**, initiated this suit against his estranged wife together with the three other defendants through a plaint dated 11/6/2021. His case was that he was at all material times the registered proprietor of Land Parcel Number **Ruiru/Mugutha Block 1/T.998** together with all the developments thereon, pursuant to a title deed issued to him on 25/9/2010. He built a maisonette on the said parcel of land, where he resided at all material times and where he still resides.

2. He contended that in February 2020, he discovered that the land had been fraudulently and secretly transferred into the name of the 1st defendant using the original title which the 1st defendant had allegedly stolen from his documents file in the house and placed a fake title deed in the same file. He further discovered that the 1st defendant and the 4th defendant had fraudulently used the fraudulent title in the name of the 1st defendant to secure a loan of **Kshs 5,000,000** advanced to the 4th defendant by the 3rd defendant.

3. The plaintiff added that, upon discovering the fraudulent transactions, he reported the matter to the police and upon conducting investigations, the police established that indeed there was fraud and initiated criminal proceedings against the 1st and 4th defendants in **Kiambu CMC Criminal Case No 237 of 2020** where the two were charged with various counts relating to the transactions, among them, conspiracy to defraud; obtaining land registration by false pretenses; and stealing.

4. The plaintiff contended that the transactions were irregular, fraudulent and tainted with illegalities and were a conspiracy on part of the four defendants. He itemized various particulars of fraud, irregularity and illegality on part of the defendants.

5. He sought the following verbatim reliefs against the defendants:

a. A declaration that the plaintiff is the rightful owner of land known as Ruiru/Mugutha Block 1/T.998 and is entitled to exclusive and unimpeded right of possession and occupation of the subject piece of land.

b. An order of permanent injunction restraining the defendants either by themselves, servants, employees and/or agents from trespassing on, further charging, purporting to sell either by public auction or otherwise and/or in any other manner interfering with the plaintiff's quiet enjoyment, occupation and ownership of the land known as Ruiru/Mugutha Block 1/T.998.

c. A declaration that the charge registered over the land known as Ruiru/Mugutha Block 1/T.998 in favor of the 3rd defendant is unlawful, irregular, null and void for all intents and purposes.

d. An order directing the 2nd defendant to cancel the transfer and the title deed in respect of Ruiru/Mugutha Block 1/T.998 issued in favor of the 1st defendant and in place thereof the registration of the subject parcel of land do revert back to

Francis Nganga Kahohi.

e. An order directing the 2nd defendant to cancel the charge over Ruiru/Mugutha Block 1/T.998 in favour of the 3rd defendant and all the other illegal entries on the land register emanating from the illegal transactions.

f. General damages.

g. Costs and interests.

h. Any other further relief that this honourable court may deem fit and just to grant.

6. Together with the plaint, the plaintiff brought a notice of motion dated 11/6/2021, seeking an interlocutory injunctive relief in the following terms:

i. That upon hearing this application inter-parties, this honourable court be and is hereby passed to issue an order of injunction restraining the defendants/respondents either by themselves, servants, agents and/or employees from trespassing on, transferring, further charging, selling by public auction or otherwise, offering for sale and/or in any other manner interfering with the plaintiff/applicant's quiet enjoyment, possession and occupation of LR No. Ruiru/Mugutha block 1/T.998 pending the hearing and determination of the suit herein.

ii. That the costs of this application be provided for.

7. The application dated 11/6/2021 was supported by an affidavit sworn on 11/6/2021 by the plaintiff and a supplementary affidavit sworn on 10/11/2021. He reiterated his case as summarized above. He deposed that all documents attributed to him in relation to the impugned transfer and charge were forgeries. The application was canvassed through written submissions dated 1/12/2021, filed through the firm of *Kabue Thumi & Co Advocates*. The said notice of motion dated 11/6/2021 is the subject of this ruling.

8. The 1st defendant opposed the application through a replying affidavit sworn on 21/10/2021. She admitted that, together with the 4th defendant, they had been charged with offences relating to her registration as proprietor of the suit property and theft of the plaintiff's title. She deposed that she was unaware of any fraud on her part. She admitted that the title to the suit property was first held in the name of the plaintiff, and added that the suit property was their matrimonial home where they both resided until 2020 when she was kicked out. On the allegations of fraud levelled against her, she deposed thus:

“I have read in the plaintiff's affidavit about accusation of forgery, fraud and stealing of the title. This is laughable since the plaintiff is my husband I have matrimonial interest in the suit property. In all affairs and transactions to my recollection the plaintiff was aware, notified and consented.”

9. The 3rd respondent opposed the application through a replying affidavit sworn on 12/7/2021 by Andrew Bore – a recovery manager in the Credit Support Unit of the Bank. He deposed that in October 2019, the 1st and 4th defendants applied for a loan of Kshs 5,000,000 from the bank, for the purpose of purchasing a plot. The loan was to be secured by the suit property. The application was accepted and due diligence was done on the proposed security. Thereafter, the security was perfected and the loan was disbursed. He added that according to their records, the loan was being serviced without interruption. He contended that the plaintiff had not met the criteria in *Giella v Cassman Brown Co. Ltd [1973] E.A. 358*. He urged the court to dismiss the application.

10. The 3rd defendant filed written submissions dated 7/9/2021, through the firm of *Njoroge Kugwa & Co Advocates*. Counsel for the 3rd defendant argued that the requisite land control board consent and spousal consent were procured and the suit property was properly charged in favour of the 3rd defendant. Counsel contended that the plaintiff had failed to satisfy the requirements in *Giella v Cassman Brown Co. Ltd [1973] E.A. 358*. Counsel urged the court to dismiss the application.

11. The 2nd and 4th defendants did not file responses to the application. Mr. Mathenge who appeared for the 1st and 4th defendants indicated that although the 1st defendant had filed a replying affidavit, they were not going to submit on the application.

12. The court has considered the application, the responses to the application, and the submissions tendered. Only the applicant and the 3rd respondents submitted on the application. The single question falling for determination in this ruling is whether the plaintiff has satisfied the criteria upon which our trial courts exercise jurisdiction to grant interlocutory injunctive reliefs. The said criteria was outlined in the case of *Giella v Cassman Brown & Co Ltd (1973) EA 358*. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Second, he is required to demonstrate that if the injunctive relief is not granted, he would stand to suffer irreparable damage that may not be adequately indemnified through an award of damages. Third, should there be doubt on both or either of the above two requirements, the court is required to determine the application based on the balance of convenience. Lastly, at the stage of disposing the application for interlocutory injunctive relief, the court does not make conclusive or definitive pronouncements on the substantive issues in the cause.

13. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya & 2 others [2003] KLR 123* defined a *prima facie* case as follows:

“In civil cases, it is a case which on the material presented to the court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

14. In **Nguruman Ltd v Jan Bonde Nielesen & 2 others [2014] eKLR**, the Court of Appeal observed that in considering whether or not a *prima facie* case has been established, the court does not hold a mini-trial. All that the court is required to satisfy itself on is that, on the face of evidential materials presented to the court, the person applying for an interlocutory injunction has a right which has been or is threatened with violation. The Court of Appeal added that the standard of proof of a *prima facie* case is that of balance or preponderance of probabilities.

15. In the application under consideration, the suit property was registered in the name of the plaintiff until September 2019 when the 1st defendant caused the suit property to be registered into her name. Subsequently, the 1st and 4th defendants caused the suit property to be used as security to enable them procure a loan of Kshs 5,000,000 from the 3rd defendant. The plaintiff who is a husband to the 1st defendant alleges that the 1st defendant stole his title from their matrimonial home, caused it to be fraudulently transferred into her name, and fraudulently caused the suit property to be charged to the Bank. It is his case that all the documents attributed to him in the transaction and purporting to bear his signature were forgeries. He has presented some evidence which suggest that there may have been forgeries. These include reports by documents examiners. There is also evidence indicating that the police carried out investigations and subjected the documents to forensic examination. The police subsequently charged the 1st and 4th defendants with various counts of criminal offences relating to the impugned transactions.

16. The suit property is currently charged to the 3rd defendant. Should the 4th defendant default to service the loan, the suit property will be sold and the plaintiff's interest in it will be extinguished. Given the above evidence and circumstances, the court is satisfied that the plaintiff has established a *prima facie* case warranting preservation of the suit property in terms of **Order 40 rule 1** of the Civil Procedure Rules.

17. Further, the plaintiff has presented evidence to the effect that the suit property is his home where he lives with his children. The 1st defendant ceased to live in the suit property in 2020 when the alleged fraud was discovered. Disposal of the suit property by the 3rd defendant will no doubt result into ejection of the plaintiff from the suit property. In the circumstances, the view of the court is that damages may not be an adequate remedy.

18. Lastly, the plaintiff has lived in the suit property all along and still lives there. Serious allegations of fraud have been made and are the subject of this litigation. The balance of convenience, in the circumstances, favours the maintenance of the *status quo* and preservation of the suit property pending the hearing and determination of this suit. The 1st and 4th defendants must, however, ensure that the loan they procured from the 3rd defendant using the suit property as security is serviced without default.

19. The result is that the court finds that the plaintiff has satisfied the criteria upon which our courts exercise jurisdiction to grant interlocutory injunctive reliefs. Consequently, the plaintiff's notice of motion dated 11/6/2021 is disposed in the following terms:

a. The 1st and 4th defendants shall, without default, continue to service the loan they procured from the 3rd defendant using Land Parcel Number Ruiru/Mugutha Block 1/T.998 as security.

b. Pending the hearing and determination of this suit, the said property shall not be sold and no dealings shall be registered against the title relating to the said property.

c. Pending the hearing and determination of this suit, the plaintiff shall continue to have quiet possession of the suit property LR No. Ruiru/Mugutha block 1/T.998.

d. Each party shall within 30 days file and serve a single, bound, paginated, and indexed bundle containing pleadings, witness statements and documentary evidence, to facilitate fast-tracked hearing and determination of this suit.

e. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF MARCH, 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Kabue for the Plaintiff/Applicant

Mr Njiiri for the 1st and 4th Defendants

Ms Waigwa for the 3rd defendant

Court Assistant: Lucy Muthoni