



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO.1194 OF 2013

ESTHER WANGUI NDEGWA.....PLAINTIFF/APPLICANT

-VERSUS-

HELLEN WAMBUI MERIA.....1ST DEFENDANT

DOUGLAS MURAYA KARUIRU.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR SUED

ON BEHALF OF THE LAND REGISTRAR THIKA.....3RD DEFENDANT

THE REGISTRAR OF TITLES.....4TH DEFENDANT

THE NATIONAL LAND COMMISSION.....5TH DEFENDANT

RULING

Before the court for determination is a notice of motion dated 3rd October 2013, brought by the Plaintiff under section 3A and 63 of the Civil Procedure Act and Order 51 Rule 1, Order 40 Rules 1 and 4 of the Civil Procedure Rules. The Plaintiff is seeking an order to restrain the 1st and 2nd Defendants, their agents, servants and/or employees from transferring, trespassing into, subdividing, constructing and or otherwise wasting or interfering with her quiet enjoyment of the suit property known as **Ruiru/KIU/Block 2(Githunguri) 4308** pending the hearing of the suit.

The application is premised on grounds listed on the face of the application and is supported by an affidavit sworn by the Plaintiff on 3rd October 2013. The Plaintiff's case is that on 2nd June 1968, she and her late husband Ndegwa Thiong'o purchased shares from Githunguri Constituency Ranching Company Limited- Ruiru through share certificate no. 2440. The Plaintiff has averred that she was allocated ballot number 1243 for land parcel number 4308 measuring 1.25 acres. The Plaintiff has annexed as evidence a bundle of copies of payment receipt for monies paid to Githunguri Constituency Ranching Company Limited as well as a share certificate dated 22nd January 1992 issued in her name. The Plaintiff has also exhibited an extract from the register of Githunguri Constituency Ranching Company Limited showing that she was allocated parcel number 4308 while the 1st Defendant was allocated parcel number 493.

The Plaintiff states that she took possession and caused the survey of parcel number 4308 as showed to him by Githunguri Constituency Ranching Company Limited to be carried out, the Plaintiff has averred that she processed title to the parcel. The Plaintiff has annexed as evidence a copy of a title number Ruiru/KIU/Block 2(Githunguri) 4308 dated 26th August 1996 issued in her name. The Plaintiff has averred that in January 2008, she was informed that the 1st Defendant had initiated proceedings at the Thika Law Courts with the intention of dispossessing her of the suit parcel. It is the Plaintiff's contention that she attended the Thika Law Courts where she discovered that the 1st Defendant had initiated proceedings at the Thika Land Disputes Tribunal where an award had been made directing her to transfer the suit property to the 1st Defendant.

The Plaintiff has avers that the award of the tribunal was adopted by the court on 20th August 2008 in Thika Chief Magistrate's Court, D.O case number 63 of 2006 and the proceedings of the said case and the decree issued on 3rd November 2006 have been annexed as evidence. The Plaintiff has contended that on 9th April 2008, the 3rd and 4th Defendants complied with the order of the subordinate court and proceeded to cancel her title and a new title for the suit property was issued in the name of the 1st Defendant. A copy of the Kenya Gazette Vol CIX-No. 60 where Gazette notice no. 8283 was published as well as a copy of a green card dated 23rd February 2011 showing that the Plaintiff's title to the suit property was cancelled have been exhibited.

The Plaintiff states that she lodged restrictions at the Thika Land Registry in a bid to protect her interest, and asserts that the records at Githunguri Constituency Ranching Company Limited indicates that the suit parcel belongs to her and has furnished a letter from the said company confirming this position dated 25/6/2010 annexed and marked "EWN8". The Plaintiff has also annexed a copy of a search dated 23rd February 2011 showing that the 1st Defendant transferred the suit property to the 2nd Defendant. It is the Plaintiff's contention that the 1st - 4th Defendants acted fraudulently and that the plaintiff having lawfully acquired the suit property the Defendants must be presumed to hold the parcel in trust for her as she is still in possession.

The 1st Defendant opposed the application through her replying affidavit sworn on 18th October 2013 where she stated that she was the registered owner of Ruiru/KIU/Block 2/4308. The 1st Defendant annexed a title of the said parcel issued in her name and dated 19th May 2008 and contended that they were the original allottees of the parcel from Githunguri Constituency Ranching Company Limited together with her late husband, Meria Muruu.

It is the 1st Defendant's case that the issues raised in this application and suit have already been finalized in court and a decree issued on 3rd November 2006 in Thika Chief Magistrate's Court, D.O case number 63 of 2006 was exhibited. The 1st Defendant has contended that after the decree was issued and subsequent issuance of a title in her name, she legally sold the land to the 2nd Defendant and a copy of certificate of official search dated 25th January 2012 has been annexed as evidence. While stating that the Plaintiff never appealed or contested the decree since it was issued in 2006, the 1st Defendant has averred that the Plaintiff did also not raise objections after the Land Registrar issued a gazette notice for registration of title deed in the 1st Defendant's name.

According to the 1st Defendant, her land parcel known as Ruiru/KIU/Block 2/4308 is different from the Plaintiff's parcel known as Ruiru/KIU/Block 2(Githunguri) 4308. It was contended that the Plaintiff was aware and participated in Thika Chief Magistrate's Court, D.O case number 63 of 2006 and the 1st Defendant annexed a hearing notice dated 16th August 2006 addressed to the parties as well as an application dated 21st August 2007 lodged by the Plaintiff in the said suit.

It is the 1st Defendant's contention that it is now over 6 years and the Plaintiff has never lodged an appeal against the decision issued by the Thika Chief Magistrate's Court. While stating that the suit is res judicata having been finalized by a court, the 1st Defendant has contended that the proceedings before the

Thika Law Courts and the Thika Land Disputes Tribunal culminated into an award which is legal and binding to all parties therein.

The 2nd Defendant also opposed the application through a replying affidavit sworn on 2nd December 2013 by Paul Muraya Karuiru, his duly appointed attorney. The 2nd Defendant has averred that he is the bonafide registered proprietor of the property known as Ruiru/KIU Block 2/4308 having validly and legally acquired the same from the 1st Defendant as evidenced by an annexed copy of title deed dated 29th August 2011 issued in his name.

The 2nd Defendant made reference to the copy of gazette notice no. 8283 published by the Thika Land Registrar on 31st August 2007, contended that it notified the public that the suit property would be transferred to the 1st Defendant after expiration of 30 days if no objection was lodged. It is the 2nd Defendant's averment that a court has power to execute transfer documents where there is an order and the registered proprietor has refused to execute the documents willingly as was the case herein.

The 2nd Defendant averred that he did not act fraudulently or illegally during acquisition of the suit property, and stated that the right to property guaranteed under the Constitution can only be taken away where the court arrives at a finding that the property was fraudulently and illegally acquired. It is the 2nd Defendant's case that he does not hold the property in trust for the Plaintiff since he purchased the property from the 1st Defendant who legally transferred the same to him upon payment of the full purchase price.

The 2nd Defendant has contended that the Plaintiff does not deserve the orders sought as she is guilty of laches since the suit where the 1st Defendant was declared the legal and rightful owner of the suit property was decided in 2008. Further, the 2nd Defendant has contended that the Plaintiff is not entitled to the injunctive relief sought since after determination of the issue of the legal owner of the suit property in 2008, the Plaintiff had the right of appeal or judicial review which she did not exercise. It is the 2nd Defendant's averment that the issues raised here are *res judicata* and that the only proper way of ventilating them would have been through judicial review or appeal. It is also contended that the Plaintiff had 30 days to raise objection to the issuance of a title deed to the 1st Defendant after gazettelement that she surrenders the title to pave way for the issuance of a title to the 1st Defendant.

It is the 2nd Defendant's case that he is an innocent purchaser for value having been issued with a valid title deed which was indefeasible. While stating that he has been in quiet, open, uninterrupted occupation and possession of the suit property since he purchased it in 2009, the 2nd Defendant has averred that the balance of convenience tilts in not granting the orders which if granted, would affect him as the bonafide owner. Lastly, the 2nd Defendant averred that the Plaintiff had not demonstrated that she would suffer loss which cannot be compensated by damages and further, that the Plaintiff had not given an undertaking as to damages.

The application was canvassed by way of written submissions and the Plaintiff in submissions dated 12th March 2014 argued that the principles upon which an injunction can be granted were laid down in the case of **Giella -vs- Cassman Brown (1973)EA 358**. Counsel for the Plaintiff submitted that a prima facie case had been established as the Plaintiff had demonstrated how she acquired the suit property and was the first registered owner. While submitting that the 1st Defendant did not contest the Plaintiff's documentary evidence and did not demonstrate how she acquired the property, Counsel stated that the entire process before the Thika Land Disputes Tribunal and the subsequent decree issued at Thika law Courts was a farce and clever fraud.

In respect to the allegation that the Plaintiff's land parcel known as Ruiru/KIU Block 2(Githunguri) 4308 was different from the 1st Defendant's parcel number known as LR No. Ruiru/KIU/ Block 2/4302, Counsel averred that this was an attempt by the 1st Defendant to hide the true parcel by purporting to change its registration from the Registered Land Act to the Registration of Titles Act which was an

illegality. It was submitted that the original register of Githunguri Farmers Ranching Company Ltd-Ruiru shows that the 1st Defendant was allocated parcel number 493 which is different from the Plaintiff's parcel. Counsel contended that in further perpetrating the fraud to dispossess the Plaintiff, the 1st Defendant sold the suit property to the 2nd Defendant.

Counsel for the Plaintiff further submitted that the proceedings before the Thika land Disputes Tribunal and subsequent actions were illegal, null and void, and that the tribunal lacked jurisdiction to hear and determine issues on title to land. It was argued that where the land had been registered, that the tribunal could only deal with issues of trespass or land use and reliance was placed on the case of **Wamwea -vs- Catholic Diocese of Murang'a (2003) KLR 384**. Further, Counsel argued that the title issued to the Plaintiff was a first registration which could not be contested in any court of law and the court was referred to the case of **Gathiba -vs- Gathiba (E&L) 357**. As to whether the suit was *res judicata*, it was submitted that the principle does not apply as the lower court in Thika is inferior in jurisdiction to this court.

While submitting that she stands to suffer loss which cannot be compensated by any damages, the Plaintiff argued that unless the 2nd Defendant is restrained by an injunction, he may also dispose the suit property to a third party which would permanently dispossess her. Counsel submitted that the Plaintiff had used her proceeds and her late husband's since 1968 to acquire the land and that 50 years later, she was filially and emotionally attached to the land. It was submitted that the Respondents would suffer no prejudice since the land was already registered in the name of the 2nd Defendant and therefore, that a grant of injunction would safeguard the status quo pending trial.

Further, Counsel submitted that the balance of convenience tilts in favour of granting the injunction since preservation of the property will allow the parties to litigate once and for all without rendering the suit nugatory. Lastly, the Plaintiff submitted that the grant of an injunction would forestall the need for further litigation or having to enjoin new parties should the suit parcel slip out of the ambit of these proceedings by for instance being transferred to a third party who is not a party to these proceedings.

The 1st Defendant filed submissions dated 25th March 2014 where he argued that ownership of the suit property was the subject of a dispute which was prevailed upon by the area District Commissioner and the Land Tribunal whose award was adopted by the Chief Magistrate's Court D.O Case No. 63 of 2006. Counsel for the 1st Defendant referred the court to section 7, 80 and 65(1) of the Civil Procedure Act and Order 42 of the Civil Procedure Rules and submitted that the suit was not properly before the court since the matters raised had been adjudicated and a decree issued in favour of the 1st Defendant,

Counsel argued that the Plaintiff had not proved the principles set out in Order 40 of the Civil Procedure and that the plaintiff had not satisfied the threshold for the granted of injunction as established in the case of Rules and **Giella -vs- Cassman Brown & Co. Ltd (Supra)** While submitting that the Plaintiff had not established a prima facie case, Counsel averred that although the suit was founded on fraud, no evidence of fraud had been displayed and therefore, that the allegation of fraud was a mere statement.

In further submission, Counsel for the 1st Defendant argued that the Plaintiff had not suffered any loss or injury since for over 7 years, she did not take any step to set aside the decree that was made in favour of the 1st Defendant. Reliance was placed on the case of **Jayantilal Dharamsh Gosrani -vs- Hon. Attorney General & 3 others Nairobi ELC No. 972 of 2012** where court declined to grant an injunction for among other reasons, failure by the applicant to establish that he would suffer loss which could not be compensated by damages.

As to where the balance of convenience tilts, it was argued that it was not in favour of the Plaintiff who had been indolent. Counsel submitted that the Plaintiff had not proved that the Respondents were wasting, damaging and or threatening to dispose the disputed property and the court was referred to the case of **Esther Jemindil Keter vs- Salina Jesang Kasi, Eldoret ELC no. 37 of 2013** where the court issued an order inhibiting registration of further dealings on the land while maintaining the status quo in respect to occupation of the suit land.

The 2nd Defendant in submissions dated 27th March 2014 stated that the principles to be considered in granting interlocutory injunctions were set out in the case of **Giella -vs- Cassman Brown(1973)EA 358** and restated in the case of **Beatrice Chelagat Rop & anor -vs- Housing Finance of Kenya Ltd.** It was argued that the conditions for grant of an interlocutory injunction were sequential as held in the case of **Kenya Commercial Finance -vs- Afraha Education Society (2001)1EA 86.**

Counsel for the 2nd Defendant argued that the issue of ownership of the suit property was determined in D.O case no. 63 of 2006 which the Plaintiff had opportunities to appeal, review or seek redress and had failed. Further, it was argued that the Plaintiff had no right to institute a new claim raising the same issues of ownership as were raised in D. O. No. 63 of 2006. Reference was made to section 7 of the Civil Procedure Act and the decision in the cases of **Kagai Mwangi -vs- Ephantus Ngari Mwangi. Kerugoya ELC No. 174 of 2013, John Michael Wanjao -vs- John Kimeto & 2 others Eldoret ELC No. 263 of 2013, Kalume Mumbu Deri & anor -vs- Fundi Wanje & anor (2008)eKLR 2013** where the court found that the matter was *res judicata* despite addition of parties.

The 2nd Defendant submitted that the Plaintiff was estopped from claiming that the decision of the court was flawed since the correct procedure was not followed, the 2nd Defendant argued that equity aids the vigilant and not the indolent. The 2nd Defendant submitted that the Plaintiff was barred by the statute of limitations to raise any cause of action and it was argued that under section 79(g) of the Appellate Jurisdictions Act, an appeal should be raised within 30 days. It is the 2nd Defendant's submission that it is now more than 1825 days since the decision was adopted in the chief Magistrate's Court and therefore, that the applicant who is time barred does not have a prima facie case with probability of success.

The 2nd Defendant placed reliance on section 26 of the Land Registration Act, and submitted that the 2nd Defendant was an innocent purchaser for value without notice. It was submitted that no evidence to show the existence of any fraud or misrepresentation had been raised or that the 2nd Defendant was party to commission of fraud or misrepresentation and therefore, that a prima facie case with a probable chance of success against the 2nd Defendant had not been established. It is submitted the 2nd Defendant who is in possession of the suit property is exercising his right to property as guaranteed by Article 40 of the Constitution.

In further submission, the 2nd Defendant argued that the Plaintiff had not shown that she would suffer irreparable damage if the injunction was not granted. It was submitted that no reasonable person would have waited for more than 5 years to seek redress if they stood to suffer irreparable loss that could not adequately be compensated by damages. Counsel argued that the Plaintiff cannot suffer irreparable loss since the property has already been transferred to the 2nd Defendant.

While arguing that the balance of convenience tilts in favour of the 2nd Defendant who is in possession and was the registered proprietor, Counsel submitted that an injunction against the 2nd Defendant would be improper since the Plaintiff had no claim against the said Defendant. Lastly, it was argued that the Plaintiff had not given an undertaking as to costs and damages and reliance was placed on the case of **Equico None Ltd -vs- Africa Safari Club Ltd & anor(2012)eKLR** where the court stated that any injunction given must be backed by an undertaking as to damages save in exceptional circumstances.

Issues and Determination

Whether the suit is res judicata

The 1st and 2nd Defendants have submitted at length that the suit herein is res judicata for reasons that the matters raised were in issue in Thika Chief Magistrate's Court, D.O case number 63 of 2006

The doctrine of res judicata is provided for under Section 7 of the Civil Procedure Act which states that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has

been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The requirements for *res judicata* as stated in section 7 are that:

- a. There must have been a previous suit between the same parties
- b. The issue before the court must have been finally determined in that previous suit
- c. The issue must have been determined by a court having competent jurisdiction.

It is not contested that the Plaintiff and the 1st Defendant were parties to the Thika Chief Magistrate's Court, D.O case number 63 of 2006 where the award of the Thika Land Disputes Tribunal was adopted. The 1st Defendant submitted that another party who is not party to the current suit was also party to the proceedings at the Tribunal. The 2nd Defendant who subsequently purchased the suit property from the 1st Defendant was however, not party to either of the said proceedings.

Ownership of the suit parcel was in issue between the Plaintiff and the 1st Defendant at the Tribunal and a decision in favour of the 1st Defendant was made. Therefore, parties before the tribunal are the same as in the present suit and the subject matter before the tribunal is the same subject matter in the suit herein.

The Plaintiff has argued that the proceedings before the tribunal were illegal, null and void since the tribunal lacked jurisdiction to hear and determine issues related to title. Under Section 7 of the Civil Procedure Act, a suit can only be *res judicata* if it had been tried before a competent court. It therefore follows that the doctrine of *res judicata* cannot apply where a suit has been tried by a court without jurisdiction.

The court must therefore examine the jurisdiction of the Land Disputes Tribunal and its findings in order to establish whether the tribunal was competent within the meaning of section 7 of the Civil Procedure Act. Before the Land Disputes Tribunal Act was repealed by section 31 of the Environment and Land Court Act, the jurisdiction of Land Dispute Tribunals to deal with land registered under the Registered Land Act (repealed) was found in section 159 of that Act. That jurisdiction was limited by Section 3(1) of the Land Disputes Tribunal Act (repealed) which provided for cases which could be heard and determined by the tribunal. Under Section 3(1) of the Land Disputes Tribunal Act, these were cases of a civil nature involving a dispute as to the division of, or the determination of boundaries; claims to occupy or work on land; or trespass to land.

Therefore, the repealed Land Disputes Tribunal Act did not confer upon the Thika Land Disputes Tribunal the jurisdiction to interfere with the interest of a registered proprietor. In the case of **Damaris Kondoro -vs- Gachanja Gitere & Another Nakuru HCCC No. 127 of 2004, (2005) eKLR**, the court held that the defence of *res judicata* cannot be raised where an incompetent court has purported to determine a dispute. A similar finding was made by the court in the cases of **Kanyinke Ole Sabera & Another -vs- Raphael Lekishon Koikai [2007] eKLR**, **Vincent Kipsongok Rotich -vs- Orphah Jelagat Ngelechei [2014] eKLR**, and **Kagai Mwangi-vs- Ephantus Ngari Mwangi [2014] eKLR**

Therefore, the proceedings in the Tribunal were of no consequences since the subject matter was registered land, which the Thika Land Disputes Tribunal had no jurisdiction to entertain. Therefore, the instant suit is properly before the court the objection on grounds of *res judicata* is not available to the Defendants.

Whether an order for temporary injunction should issue

Since the Thika Lands Tribunal did not have jurisdiction to determine disputes over ownership and/or title

to land and did not therefore have the power to declare the 1st Defendant as the owner of the suit property, the decision of the tribunal was a nullity. The adoption of the award in Thika Chief Magistrate's Court, D.O case number 63 of 2006 and the subsequent actions by the Land Registrar which led to the cancellation of the Plaintiff's title were also a nullity. In the case of **Macfoy-vs-United Africa Co. Ltd (1961) 3 All E.R 1169**, the court stated as follows concerning an act which is a nullity:-

“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

The 2nd Defendant submitted that he was an innocent purchaser for value who acquired the suit property from the 1st Defendant. He exhibited title to the suit property issued in his name. Both the Plaintiff and the 2nd Defendant have alleged to be in possession. It is evident that the ownership of the suit property is contested by both the plaintiff and the Defendants. The Defendants set up their registration status and the title to demonstrate that the property is owned by the 2nd Defendant who purchased the property from the 1st Defendant and had the property transferred to him and is presently the registered proprietor as per the land records. The plaintiff challenges the registration of the 1st and 2nd Defendants as owners of the suit property and alleges fraud. Having held that the Thika Land Disputes Tribunal lacked the jurisdiction to deal with the dispute touching on the ownership of the suit property. I am satisfied that on the material presented by the parties before the court that the plaintiff has demonstrated she has an arguable case that is not vexatious and/or frivolous. I am prepared to hold that a prima facie case has been established that satisfies the definition ascribed to prima facie case by **Bosire JA** in the case of **MRAO LTD –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (2003) KLR 125** when he stated thus:-

“I would say that in civil cases it (prima facie case) is a case in which 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 latter”.

Whether or not there was fraud as alleged by the plaintiff in the registration of the 1st Defendant as proprietor of the suit property is a matter of evidence which the court will make a finding on after hearing the evidence at the trial. There is in my view a need to preserve the suit property until the suit is heard and determined such that the person or party decreed to be the rightful owner to the property at the conclusion of the trial will have access to the same. In the instant application while I decline to grant an injunction to the plaintiff in the terms sought in the application I am satisfied that it is necessary to have the existing status quo maintained such that no party shall adversely deal with the suit property so as to cause waste or damage and I so direct and order.

To preserve the suit property I further make an order under the provisions of section 68(1) of Land Registration Act in habiting the registration of any dealing with the suit land namely **Ruiru/Kiu Block 2 (Githunguri/4308** also described as **Ruiru/Kiu Block 2/4308** until this suit is heard and determined and/or further orders of the court.

The costs of the application shall be in the cause.

Ruling dated, signed and delivered this...24thday of...**October**...2014.

J. M. MUTUNGI

JUDGE

In presence of:

.....For the Plaintiff

.....For the Defendants