



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 770 OF 2013

MARY WAGICI KIARIE (suing as the administratrix

and legal representative of the estate of

LIVINGSTONE KIARIE.....PLAINTIFF/APPLICANT

VERSUS

SAMSON MUIRRI GAITHINGU ALIAS

NOAH MUIRURI SAMSON1ST DEFENDANT

OLIVE WACHUKA KIAMANI.....2ND DEFENDANT

RULING

The application for determination is a Notice of Motion dated 1st July 2013 brought by the Plaintiff under section 3, 3A and 63(c) of the Civil Procedure Act, Order 40 Rules 1(a) and 4 and Order 51 Rule 1 and 3 of the Civil Procedure Rules. The Plaintiff is seeks an order to restrain the 2nd Defendant from charging, transferring and or disposing of any interest in land parcel **Karai/Gikambura/3432** (herein after referred to as the suit property) pending the hearing and determination of this suit.

The application is premised on four grounds listed on the face of the application and is supported by the Plaintiff's affidavit sworn on 1st July 2013 where the plaintiff has averred that the 2nd Defendant is the registered proprietor of the suit property. The Plaintiff has contends that she is seeking to preserve the suit property which was sold by the 1st Defendant to the 2nd Defendant in a sale which she is challenging in this suit. The Plaintiff has contended that she has a prima facie case with high chances of success as she is enforcing her rights as a beneficiary of the estate of **Samson Gaithingu** (deceased) whose interest in the suit property was irregularly transferred to the 2nd Defendant by 1st Defendant. The Plaintiff has averred that there will be no prejudice if the suit property is preserved until the determination of the suit.

In response to the application, the Defendants filed a notice of preliminary objection dated 13th February 2014 where they stated that the suit and application were incurably defective for want of form. According

to the Defendants, this suit is sub judice as applications dated 27th February 2013 and 13th March 2013 filed in High Court PA No. 1701 of 1999 are still pending. It is the Defendant's contention that the Plaintiff's suit is founded on an alleged nonexistent beneficial interest in **HC P. A No. 1701 of 1999** to which the 2nd Defendant was not a party and further, that the claim is founded on unsustainable fraud claims. Lastly, the Defendants objected to the application on grounds that the 2nd Defendant was a bona fide purchaser for value and that the prayers sought had no basis in law.

Parties were directed to file submissions and the Plaintiff filed submission dated 3rd June 2014 whereas the Defendants did not file any submissions. The Plaintiff submitted that the 1st Defendant unilaterally and fraudulently subdivided land parcel no. **Karai/Gikambura/820** and sold and transferred the subdivisions known as **Karai/Gikambura/3431** and Karai/Gikambura 3432 to the 2nd Defendant.

Counsel for the Plaintiff submitted that the 1st Defendant's actions were in contravention of orders issued in **HC Succ. Cause no. 1701 of 1999** on 30th July 2010 where the deputy registrar was to execute documents to facilitate subdivision and transfer of land parcel **Karai/Gikambura/820**. The Plaintiff submitted that since the 1st Defendant obtained registration of land parcels **Karai/Gikambura 3431** and **Karai/Gikambura/3432** in his name fraudulently, he could not pass a good title to the 2nd Defendant.

Counsel argued that the Plaintiff had satisfied the requirements for grant of temporary injunction as laid down in the case of **Giella -vs- Cassman Brown(1973)EA 358**. It was submitted that the Plaintiff was pursuing property forming part of the estate of her late husband Livingstone Kiarie who was one of the beneficiaries of the estate of his father Samson Gaithingu.

In further submission, the Plaintiff stated that if conservatory orders are not issued, the 2nd Defendant may sell off the suit property to third parties thereby rendering this suit nugatory. It was submitted that land being a unique commodity with special and unique geographical features cannot be accurately assessed on monetary terms. Counsel argued that monetary compensation would not be adequate to compensate the Plaintiff if she was evicted from the suit parcel where she had lived over the years. Reliance was placed on the case of **George Njenga Kagai -vs- Samuel Kambi Njoroge (2004)eKLR**

Counsel for the Plaintiff submitted that no party would be prejudiced if the orders to preserve the subject matter of the suit are granted. In response to the notice of preliminary objection filed by the Defendants, it was submitted that the Plaintiff's interest in the estate of Samson Gaithingu in **HC No. 1701 of 1999** were not farfetched since the certificate of confirmation of grant shows that Livingstone Kiarie(deceased)was a beneficiary. Counsel averred that the Plaintiff herein was the administrator of the estate of Livingstone Kiarie (deceased). Lastly, it was submitted that fraud was an issue of fact and that the same would be proved during the hearing of the suit.

The issue for determination is whether the Plaintiff has satisfied the conditions for grant of an interlocutory injunction as enunciated in the case of **Giella – vs- Cassman Brown & Co. Ltd (supra)**.

The Plaintiff has averred that the suit property was one of the subdivisions of **Karai/Gikambura/820** which was owned by Samson **Gaithingu (deceased)**. She has contended that Karai/Gikambura/820 was subject to **HC Succ. Cause No. 1701 of 1999** where according to the certificate of confirmation of grant, her late husband namely Livingstone Kiarie was named as a beneficiary of the estate of Samson Gaithingu (deceased) who was his father. The Plaintiff has averred that she is the personal representative of the estate of Livingstone Kiarie (deceased) whose interest as a beneficiary of the estate of Samson Gaithingu she is pursuing.

In her pleadings, the Plaintiff has contended that there was fraud and irregularity in the sale of the suit property to the 2nd Defendant by the 1st Defendant. The Plaintiff contends that her beneficial interest in **Karai/Gikambura/820** was disposed without her knowledge or consent and she has sought *inter alia* a declaration that the subdivision of Karai/Gikambura/820 was irregular, unlawful, null and void. The plaintiff states herself and her late husband have occupied a portion of **Karai/Gikambura/820** (now

subdivided into portions **Karai/Gikabura/3431 and 3432**) and that she has a semi permanent house on the portion now described as **Karai/Gikambura/3432** which she is now claiming. In my view taking into account all the facts and circumstances the plaintiff has demonstrated that she has a prima facie and arguable case as defined in the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125**. The plaintiff has put forth a case which suggests her rights may have been infringed and in the circumstances it is incumbent on the defendants to respond to and rebut the case put forth by the plaintiff. It is only at the trial that the interests and rights of the parties can be ventilated. As the subject matter is the parcel of land that the 1st Defendant is alleged to have fraudulently subdivided and sold the resultant subplots to the 2nd Defendant it is essential that the subject matter be preserved so that it is available when the suit is determined.

In the premises I find and hold that the plaintiff’s Notice of Motion dated 1st July 2013 has merit and I accordingly grant an order preserving and conserving title land parcel **Karai/Gikambura/3432** in terms of prayer NO. (3) of the Notice of Motion.

I in the circumstances of the case order that the costs of the application be in the cause.

Ruling dated, signed and delivered at Nairobi this....19thday of...November.....2014.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant