



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 122 of 2012

KAHIGA NG'ANG'A.....PLAINTIFF

VERSUS

THE OFFICIAL RECEIVER *sued as the Trustee of* KAHIGA NG'ANG'A.....1ST DEFENDANT

THE LAND REGISTRAR MURANG'A.....2ND DEFENDANT

NG'ANG'A KAHIGA.....3RD DEFENDANT

R U L I N G

The application dated 8th June 2012 is by way of Notice of Motion and is supported by the affidavit of **Kahiga Ng'ang'a**. The same is brought under the provision of order 40 rules 1, 2 and 4(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of law. The matter at the first instance was heard under certificate of urgency and the same was certified urgent and prayer 2 granted. Prayers 3 & 4 were reserved for *interparte* hence the subject of the Notice of Motion. On the 20th of November, 2011, when the matter came for mention, the parties agreed that the application dated 8th of June 2012 be heard on the 10th of December 2012. Parties further agreed to file and exchange written submissions. I have perused the court file and established that the 3rd Respondent has filed submission however, I have not seen the submissions by the applicant, 1st and 2nd respondents.

The orders sought by the applicant are as follows:-

(3) THAT a temporary injunction do issue restraining the 3rd defendant, his employees, servants, agents or anyone claiming under them from interfering with the quiet possession and occupation of the plaintiff, transferring, effecting transfer, selling, leasing, charging and or disposing or in any other manner whatsoever interfering with Land Reference LOC 2/KANDERENDU/191 (now subdivided into Land Reference LOC 2/KANDERENDU/ 1647 and Land Reference LOC 2/KANDERENDU/1648) pending the hearing and determination of this suit.

(4) THAT the costs of this application be provided for.

The application is grounded on the affidavit of Kahiga Ng'ang'a whose import is as follows:-

a) The plaintiff has at all material times been the registered owner of all that parcel of land known as Land Reference LOC 2/KANDERENDU/191 located at Kigumo, Murang'a measuring 7.5 acres.

b) The plaintiff was astonished in Mid-May 2012 when persons unknown to him came to the land and started viewing it. The plaintiff upon conducting a search of the property established that the same had been fraudulently transferred to the 3rd defendant without his knowledge and/or

consent.

- c) The Land Reference LOC 2/KANDERENDU/191 has now been subdivided into two parcels: Land Reference LOC 2/ KANDERENDU/1647 MEASURING 2.43 Hectares and Land Reference LOC 2/KANDERENDU/1648 measuring 0.404 Hectares.**
- d) The actions by the 2nd and 3rd defendants are malicious, oppressive, arbitrary and illegal. The 1st defendant's actions are malicious, illegal, ill motivated and contrary to the law.**
- e) The plaintiff resides on the suit property together with his family and may be rendered destitute due to the illegal actions of the 2nd and 3rd defendants. Unless the suit property is preserved the plaintiff risks to lose his property.**
- f) It is in the interest of justice that the defendants be restrained from dealing in the property and the subdivisions arising from Land Reference LOC 2/KANDERENDU/191 pending determination of the suit.**

The facts of the case according to Kahiga Ng'ang'a are that he has at all material times been registered owner of all that parcel of land known as Land Reference Loc 2/Kanderendu/191 located at Kigumo Muranga measuring 7.3 acres. In mid-May 2012 persons unknown to him went to the land and started viewing it. He conducted a search and established that the land had been fraudulently transferred to the 3rd defendant without his knowledge and/or consent. The land has now been subdivided into two parcels of land thus LOC 2/KANDERENDU/1647 measuring 2.43 Hectares and Land reference No.LOC 2/KANDERENDU/1648 measuring 0.4 Hectares. Paragraphs 6 of the supporting affidavit particularizes fraud committed by the defendants as follows:-

- a) The 3rd defendant has undertaken Kigumo Land Dispute No.14 of 2010 concerning the suit property without my knowledge and in total disregard of my fundamental right to be heard in a court of law.**
- b) The 3rd defendant has undertaken proceedings of a legal nature whilst Bankrupt and a Receiving order vide Nairobi Bankruptcy Cause No.34 of 2002 subsisting.**
- c) The 3rd defendant undertook a complaint in Kigumo Land Dispute No.14 of 2010 where as the said tribunal lacked jurisdiction on matters of land registered under the Registered Land Act and he had no capacity to do so.**
- d) Failure on the 3rd defendant to notify me of proceedings in Kigumo Land Dispute No.14 of 2010 and Kigumo Principal Magistrates Court L.D.T No.20 of 2010.**
- e) The 2nd and 3rd defendants have fundamentally and completely disregarded of sanctity of title in transferring and registering the suit property in the names of the 3rd defendant.**

The plaintiff states that the actions of the 2nd and 3rd defendant are malicious oppressive, arbitrary, illegal and contrary to the law. He resides on the suit property together with his family and may be rendered destitute if he loses his property.

The 3rd defendant filed a replying affidavit of 20 paragraphs. The gist of the affidavit is that during land demarcation in 1956, he caused his land parcel LOC 2/KANDERENDU/191 to be registered in the name of his anticipated son first born Kahiga Ng'ang'a as the law forbid one to be registered in two parcels within the same adjudication area. He was registered in LOC 2/KANDERENDU/188. The applicant was born in 1958 and was four years when the title deed was issued in his name. The applicant is a polygamist of three wives and when his sons became adults, he showed them where to utilize and construct their residences.

In the suit premises he has shown his three sons namely Kahiga Ng'ang'a (plaintiff), John Macharia and

Paul Muchiri (deceased) their portions. The 3rd defendant respondent has heavily invested on the parcel of land by planting 7,000 tea bushes and residential houses.

This dispute was before the Kigumo Disputes Tribunal and a decision was made. It is alleged that the plaintiff was served but failed to turn up for hearing. I have not seen an affidavit of service or evidence of service, though there is evidence that form b (summons) were prepared. The tribunal forwarded the award to Kigumo Principal Magistrate's Court as required by law. The court issued orders as required by law and the transfer forms were duly executed. Upon execution of the transfer forms by the Executive Officer of the court the 3rd defendant proceeded to apply to the Land Control Board and obtained a consent. He lodged the documents at the District Land Registrar Murang'a and was issued with a title deed.

The 3rd respondent filed his submissions on the 28th of November, 2012. The import of the submissions is that there is no evidence of the alleged sale in paragraph 10 of the supporting affidavit. Moreover there is no evidence that the 3rd respondent intended to acquire consent to transfer the land in dispute. The 3rd respondent further submitted that there is no evidence of fraud as he only executed a court order pursuant to the decision of the Kigumo Land Disputes Tribunal.

I have considered the pleadings and affidavits in this suit and do find that the plaintiff has established a prima facie case with a probability of success on the following grounds:-

(a) The Environment and Land court has jurisdiction to nullify a decision of the Land Disputes Tribunal if it is established that the same is null and void.

(b) The allegation that the plaintiff was not aware of the proceedings of the Kigumo Land Disputes Tribunal if proved would render the proceedings of the Tribunal a nullity as it would offend the principle of fair trial.

(c) The fact by the 3rd defendant that the property was registered in the plaintiff's name before he was born and that the whole family of the 3rd defendant has been utilizing the land from time immemorial as family land intimates that the land is likely to have been registered in the plaintiffs name in trust for the whole family, hence there is a likelihood that the Land Dispute Tribunal did not have jurisdiction to arbitrate on the issue of Trust.

When a court is approached with such an application being a custodian of law, must examine the averments made in the application to form a tentative opinion as whether there is any substance in the allegations. I have examined the allegations by the plaintiff and do find substance in them. Temporary orders are granted on basis of prima facie findings. The second issue to be considered is whether the plaintiff is likely to suffer injury that cannot be compensated adequately through damages, recoverable in an action if the uncertainty was determined in his favour in trial. On this issue since the plaintiff resides on this parcel of land with his family, I do find that any eviction as feared would cause him damage that cannot be adequately compensated in monetary terms.

The upshot of the above is that the plaintiff has satisfied the principle in *Giella -VS- Cassman Brown & Co. Ltd 1973 EA 358* however, I decline to issue the orders as prayed but do order that the status quo be maintained to the effect that no further dealings by the Kigumo Land Control Board, and the District Land Registrar Murang'a in Land Reference No.LOC 2/KANDERENDU/1647 and LOC 2/KANDERENDU/1648 until the hearing and disposal of the suit. Costs to abide by the outcome of the main suit. Orders accordingly.

Dated, signed and delivered at Nyeri this 19th day of March 2013.

A. OMBWAYO

JUDGE