



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 556 of 2011

GEORGE KAMAU NJONGE.....PLAINTIFF

VERSUS

1. PATRICK KAGOTHO NJONGE

2. ERASTUS NJOROGE KIARIE.....DEFENDANTS

RULING

1. The Plaintiff by a Notice of Motion dated 13th October, 2011 brought under the provisions of **Order 40 Rule 1 and 4** of the **Civil Procedure Rules, Sections 3A&63 c & e** of the **Civil Procedure Act** and all the enabling provisions of the law essentially seeks orders that:

a) This court be pleased to issue an order of temporary injunction restraining the 2nd Defendant either by himself, his agents, servants, nominees, representatives and or any other person claiming under him from evicting, ejecting and or interfering with the Plaintiff's occupation and use of his portion of 0.50 acres in L.R. No. Limuru/ Bibirioni/1310 and or selling, transferring, alienating, leasing or in any other way dealing with the parcel of land herein pending the hearing and determination of the suit herein.

b) Costs of this application be provided for.

2. The application is based on the grounds on the face of the application which grounds have been reiterated and given evidentiary basis in the supporting affidavit of the Plaintiff dated 13th October, 2011. He states that by virtue of the Judgment of the Limuru Court made on the 29th October, 1974 ('**GKN 1a & b**') and confirmed by the High Court in Nairobi, and as a son of the late Njonge Thaiya he became the owner of 0.50 acres from all that parcel of land known as L.R. No. Limuru /Bibirioni/551. Pursuant to the said judgment, the said parcel of land was sub-divided, and the 1st Defendant was in compliance of the law registered as proprietor of all that parcel of land for the 1st Defendant, the Plaintiff and Peter Mukuna Njonge, with their interests being protected via a restriction. He avers that he subsequently occupied the share of 0.50 acres in 1976 where he built a matrimonial home for his family. He cultivated the remaining portion while pursuing formal sub-division and issuance of the title deeds ('**GNK 2**'). He still occupies the land to date. That he received a letter dated 22nd July, 2011 from the 2nd Defendant claiming he had bought the entire parcel of land vide an agreement dated 16th

May, 2011 from the 1st Defendant. The said letter also gave him notice to vacate the portion he was occupying. His effort to secure the agreement aforesaid was in vain. He states that the transfer of suit land to the 2nd Defendant by the 1st Defendant is fraudulent, illegal, unlawful, null and void for the reason that the 1st Defendant held the land in trust therefore had no capacity to transfer it. The Plaintiff laments that if the 2nd Defendant is not restrained from dealing in the suit land, he stands to suffer immense loss and damages.

3. The 1st Defendant has filed a replying affidavit sworn on 23rd November 2011 in opposition to the application. He contends that he is not aware of the Limuru Court matter neither does he know its origin. He states that at the time of their late father's demise, he was underage. That the administrators of his father's estate never obtained his consent on the mode of distribution of his father's estate i.e L.R. No. Limuru/Bibirioni/531 which land was sub-divided amongst his sons. When he became of age he visited Kiambu Lands Office to find out what portion was his and discovered it was L.R. No. Limuru/Bibirioni/1310. He then paid title fees and acquired title to it in 1995. He avers that at the time he collected the green card there was no indication that the said parcel was owned by anybody else. It is for the aforesaid reason that he maintains that he is the lawful owner of the said land. That he has been residing in Gilgil but has over the years allowed the plaintiff to reside in the suit property as a licensee but there has been occasions when the plaintiff has demanded for a share of the suit property. That if the plaintiff has any claim on account of their deceased father's estate it should be against the entire estate or against the administrators who are responsible for distribution of the whole estate. That he has previously required the plaintiff to vacate the suit premises as way back as 1990 and this cause their appearing before the then area chief and the District Officer. That the plaintiff has all along from the 1990s known that he wants to sell the said land and that he sold it. That the sale to the 2nd respondent was not fraudulent. That the plaintiff did not lodge any caution on the suit property to bar him from selling it. That the plaintiff in filing this suit is motivated by greed and a desire to force him to share the proceeds of the sale of the suit property.

4. The 2nd Defendant in his replying affidavit sworn on 23rd November, 2011 contends that he is a bona fide purchaser for value having bought the property from the 1st Defendant who was holding the land absolutely and not in trust and that he followed the lawful procedure of having the sale transaction passing through the Limuru Land Control Board where no objection was raised. He avers that before purchasing the land he conducted a search at the lands office and confirmed that the 1st Defendant was the owner of the property. He avers that at the time he bought the suit premises the 1st defendant told him that the plaintiff occupied the premises with his consent as a licensee and that he would vacate the property pursuant to his purchase of the same. That he is stranger to the allegations of fraud. That he is a bona fide purchaser for value without knowledge of any alleged defect on the title if any. The Plaintiff has filed a further affidavit sworn on 14th December 2011 where he has reiterated and affirmed his averments in the supporting affidavit. He confirms the Limuru Succession cause to be No. 35 of 1974 and has annexed copy thereof as '**GKN 1**'. He contends that the 2nd Defendant is not an innocent purchaser of the parcel of land in question for he among others reasons did not obtain a valid consent form the board. I have read the affidavits herein and the submissions of the rival parties together with the authorities relied on. The Plaintiff has raised triable issues challenging the competency of the 1st Defendant to transfer the property to the 2nd Defendant and has availed evidence in support of his case. The Defendants on the other hand have contended the said issues by way of evidence. In my view the issues herein will in the interest of justice be best addressed during trial and not at this interlocutory stage. Granting the injunction sought would not be of assistance to any of the parties. I recognise that each land case is unique and the orders to be granted could vary. The principles of injunction as stated in the celebrated case of Geilla vs. Cassman can favour any of the parties from the facts deponed. The issue of ownership must be established though. I also note that the parties in this suit the plaintiff and 1st defendant are related. In my view therefore the status quo should be maintained pending the hearing of this suit. Parties should comply with the provisions of order 11 and fix the suit for hearing. Cost shall be in the cause.

Orders accordingly.

R. OUGO
JUDGE

Dated, signed and delivered this 15th day of March 2013

In the presence of:-

.....FOR PLAINTIFF/ APPLICANT

.....FOR 1ST AND 2ND DEFENDANT /RESPONDENT

.....COURT CLERK