



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC CIVIL SUIT NO. 1010 OF 2012

Jane Wambui Mwangi.....Plaintiff/Applicant

Verus

Racheal Eanjiku Kariuki.....Defendant/Respondent

RULING

1. By a Notice of Motion dated 14/12/2012, the Applicant herein **Jane Wambui Mwangi** has sought for various orders.

The application was brought under **Order 40 Rule 1 (a) & (b) and order 51 Rule 1 of the Civil procedure Rules 2010 and Section 3A of the Civil procedure Act** for Orders that:-

- a. The Court be pleased to issue a temporary Injunction against the Defendant restraining her or her servants, agents, nominees and/or employees from transferring, entering, constructing, trespassing or dealing in any way or other manner with the parcel of land and **LR No. Ruiru/Mugutha/Block1/T.442** pending the hearing and determination of this suit.
- b. That the Court be pleased to issue a permanent injunction to the Defendant restraining her or her servants, agents, nominees and /or employees from transferring, entering, constructing, trespassing or dealing in any way or other manner with parcel of land **LR No. Ruiru/Mugutha Block 1 /T.442**.

2. The application was supported by the grounds on the face of the application and by the supporting affidavit of **Jane Wambui Mwangi**. These grounds were that, the applicant is the registered owner of all that parcel of Land known as **LR No. Ruiru/Mugutha Block 1/T.442** situated in Ruiru measuring approximately **0.1228 hectares** or there about. That the Defendant has trespassed on the said premises with intentions of erecting illegal structures and or commuting waste and if the prayers are not granted, she will suffer irreparable damage.

In her supporting affidavit , the applicant averred that she got registered as a proprietor of the suit land on 3/9/1992 and was issued with Title Deed exhibit marked 'A'. She further averred that on 13/12/2012, the defendant trespassed on the said premises with intentions of erecting illegal structures as evidenced by exhibit marked 'C'. She also alleged that she will suffer irreparable loss and damage if the said trespass is not stopped.

3. The Respondent **Rachael Wanjiku Kariuki** opposed the application. She contended that she is the registered owner of the suit property. Respondent further alleged that the applicant obtained registration by false pretence and she was charged in **Thika CMCC No. 4995 /2009** and convicted as per **RWI**.

That further after the conviction, the Court ordered the land Registrar Thika to rectify the Register and the land was thereafter registered in the name of the Respondent. She averred that she is the

bonafide owner of the suit premises and she has exclusive right to use and possession of the same. Respondent sought for dismissal of the applicant's application.

4. The applicant filed a further affidavit and admitted that she was indeed charged and convicted in **Thika CMCC No. 4995/2009** but contended that she has appealed against the conviction and sentence and the Appeal is pending at the High Court. She further contended that the Criminal Court did not order her Title to be cancelled and such order could not have been issued in a Criminal Court. She also averred that she was allocated the land in a bonafide way and Title deed issued to her and therefore she has a good case with high probability of success.

5. The parties herein canvassed the application by way of written submissions.

I have considered that application in totality and the written submissions herein and the relevant Law and I make the following findings:-

The applicant herein has sought for injunctive orders. She must therefore fulfil the principles for grant of injunctive orders. These principles were set out in the case of **Giella Vs Cassman Brown Co.Ltd (1973) EA 358**. These Principles are that the applicant must establish a prima facie case with high probability of success, and that he/she would suffer irreparable loss which may not be compensated by an award of damages. If the Court is in doubt, it may decide the application on the balance of convenience.

6. From the available evidence and annexures herein, there is no doubt that the applicant herein was registered as the proprietor of the suit property – **Ruiru/Mugutha Block1/T 442** on 3/9/1992 as per exhibit marked 'A'. The suit property was acquired after plot ownership ballot as evidenced by exhibit B. **Nyakinyua Investment Company Ltd** through Exhibit 'B', letter dated 2/12/2009 confirmed that plot No. **Ruiru/Mugutha Block 1 /T.442** belong to the applicant **Jane Wambui Mwangi**.

It is not disputed that applicant was charged in Thika Chief Magistrates Court in CMCC No. 4995/2009 and was convicted and sentenced as per **JWM II & JWM III**. The conviction and sentencing was on 27/3/2012. The applicant was charged with an offence of obtaining land registration by false pretence.

The said land parcel was **Ruiru/Mugutha Block 1/T. 442** the suit property herein. What is also clear is that after the conviction and sentence, the trial Magistrate ordered the Registrar to revoke the process. However, it was not clear after revoking the process, who was to be registered as the owner of the suit property.

However, it is not in doubt that on 21/9/2012, the suit land was registered in the name of the respondent **Rachael Wanjiku Kariuki**. Again on 21/6/2012, the Respondent had extracted an order from the CMCC No. 4995/2009 and in the said order, it was indicated in prayer No.b that land Registrar to initiate the process of registering Land Parcel No.**Ruiru/Mugutha Block1/T442** to **Rachael Wanjiku Kariuki**. However, that was not the order issued by the Magistrate on 27/3/2012. On 27/3/2012, the trial Magistrate ordered:-

“Certified copy of judgement to be furnished to the prosecution....Registrar to revoke the process”

The Magistrate did not order that the land be registered in the name of Respondent herein.

However, the Respondent got registered as the proprietor of **Ruiru/Mugutha Block 1/T.442** on 21/9/2012. The presumption herein therefore is that Title Deed issued to the applicant was cancelled. The Respondent herein is the registered owner of the suit property.

7. Section 26(1) of the land Registration Act 2012 provides that, *“The Certificate of Titles issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the*

proprietor shall be taken by all courts as **prima facie** evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except”...

- a. On the ground of fraud or mis-representation to which the person is proved to be a party or,
- b. Where the certificate of Title has been acquired illegally, un-procedurally or through corrupt scheme.

The Respondent herein is the registered owner of the suit property. She got registered using the Court order dated 21/6/2012 . The orders therein, specifically order b that Land Registrar to initiate the process of registering land parcel number **Ruiru/Mugutha Block 1/T 442** to **Rachael Wanjiku Kariuki** was never issued by the Trial Magistrate. The Trial Magistrate also made an order for Registrar to revoke the process. The order of revoking the process did not amount to registering the land in the name of Rachael Wanjiku Kariuki. There was no evidence that before 3/9/1992, the suit property was in the name of the Respondent.

Through Section 26(1) of the land Registration gives the registered proprietor the absolute and indefeasible title, the respondent title herein can be challenged as it was acquired through mis-representation and the same could have been acquired illegally. However, that is a matter that requires to be proved.

I have noted in the Complaint, the applicant has not sought for cancellation of the Title issued to the Respondent. Applicant has sought to be declared the absolute owner of the suit land.

8. The Applicant was prior to 21st September, 2012 the registered owner of the suit. The circumstances that led to the cancellation of her title and the same being registered in the names of the Respondent are suspect. The applicant therefore has been able to establish that she has a **prima facie** with high probability of success. On the second principle of irreparable loss, the applicant has alleged that the Respondent is erecting structure on the suit property. Applicant has attached photographs showing construction material. The Respondent has not denied that she is actually constructing on the suit land as she contends that she is the absolute owner. Respondent relied on Section 24 of the land Registration Act No.3 of 2012 which states that **“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”**

The Respondent alleges that she has a right to deal with the suit property as she deems as she is the registered owner.

If Respondent is erecting structure on the suit land, then that would amount to waste and in the event in future the applicant succeeds in her claim then she will suffer irreparable loss which cannot be compensated by way of damages.

The applicant herein having satisfied the Court on the first two principles, I do not need to deal with the principle of balance of convenience.

The Respondent alleged that applicant had obtained her registration in 1992 by fraud. Applicant was convicted of obtaining Land registration by false pretence. However, there were no Court’s finding that the suit property should be registered in the names of the Respondent.

The ownership of the Title Deed by the Respondent is disputed by the applicant herein.

9. Having now considered the Notice of Motion dated 14/12/2012 and the written submissions and the relevant law, the Court finds that, the applicant has established the threshold for grant of injunctive orders as was held in the case of **Giella Vs cassman Brown ltd.** The Court will consequently allow the applicants Notice of Motion in terms of prayer No.3. The Court will however, not issue a Permanent injunction as that is one of the orders sought by the applicant in the main suit.

The applicant to ensure that the main suit is set down for hearing within the next 12 months from the date of this ruling. Failure to do so, the Interim orders will automatically be discharged unless otherwise ordered by the Court.

- The costs of the application be borne by the Respondent.
- It is so ordered.

Dated, Signed and delivered this 14th day of June, 2013.

L. N. GACHERU

JUDGE

In the presence of:

Ms Atieno the Plaintiff/Applicant

Ms Abongo holding brief Njega for the Defendant/Respondent

Anne : Court Clerk.

L. N. GACHERU

JUDGE