

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 970 OF 2012

MARGARET WARUIRU NGURUPLAINTIFF

VERSUS

MARGARET MUTHONI DEFENDANT

RULING

Coming up before me for determination is the notice of motion dated 24/11/12 in which the Applicant has sought an interim injunction restraining the Defendant from entering and/or transferring land parcel No. Gatwanyaga/Ngoliba Block 1/140 (herein after referred to as the “Suit Property”) pending the hearing and determination of this application and the suit. The applicant also sought an order directing the Officer Commanding Station Ol Donyo Sabuk to ensure compliance. He also sought costs of the application.

The application is premised upon the Supporting Affidavit of Margaret Waruiru Nguru sworn on 24/11/12 in which she averred that she is the legal representative of Lucy Wanjiku Ndukui *alias* Wanjiku Ndukui (hereinafter referred to as the “Deceased”). She stated that the Deceased became a member of the Gatundu Divisional Women’s Wing by paying the entrance fee on 16/2/1971. She said that Gatundu Divisional Women’s wing was transformed to Gatundu Nyakinyua Company Limited and that the Deceased paid to it Ksh. 450/- and later Ksh. 600/- in 1976. She further averred that the Deceased was issued with a Share Certificate and Ballot No. 140. denoting the Suit property of which she took possession until she passed away on 30/8/2010. The applicant further averred that she found a clearance letter from Gatundu Nyakinyua Company Limited issued to the Deceased. She also said that she found another letter dated 23/7/2010 issued by the same company declaring that the Suit Property belongs to the Deceased. She also stated that the letter indicated that there was a dispute of ownership between the Deceased and one Rosemary Wambui Kinyanjui and that according to that letter, Rosemary Wambui Kinyanjui obtained registration as the proprietor of the Suit Property through fraud. She further swore that the transfer of ownership in the Suit Property from the said Rosemary Wambui Kinyanjui to the Defendant was also tainted by fraud. The applicant stated that the Defendant had knowledge of the fraud and substantially contributed to it by neglect to peruse the register and records of Gatundu Nyakinyua Company Limited. The applicant further swore that Rosemary Wambui Kinyanjui has passed away and that the Defendant entered the Suit Property on 15/10/12 and has started cultivating and preparing to construct a residential house on it.

The application is contested. The Defendant filed her Replying Affidavit sworn on 2/5/13 in which she stated that she was the absolute proprietor of the Suit Property having purchased the same from one Rosemary Wangui Kinyanjui in the year 2000 at a consideration of Ksh. 120,000/-. She produced a copy of the Sale Agreement. She further averred that upon attending the Land Control Board, consent was given to transfer the land which was done and a Title Deed issued to her on 2/3/05. She produced a copy of the Title Deed. She further stated that on 25/4/12 and 25/10/12 she conducted official searches on the Suit Property and confirmed that the same is registered in her name.

She further indicated that she was a *bona fide* purchaser for value without notice of any adverse claim on the Suit Property. She further stated that she has been in occupation of the Suit Property for 10 years and has substantially developed it by fencing and cultivating thereon and that she was in the process of constructing a permanent dwelling house. She further stated that a Certificate of Title is to be held as conclusive evidence of proprietorship unless the contrary is proven.

Both counsels for the Applicant and Respondent made their oral submissions all of which have been read and taken into consideration by this court.

The issue for determination is whether the Applicant has met the principles to warrant grant of an interlocutory injunction. I wish to refer to and rely on the precedent set in the case of ***Giella v. Cassman Brown [1973] EA 358*** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Now let us analyze the applicant’s application as against these set principles to determine whether to grant or not to grant the applicant’s prayer for an interlocutory injunction.

Has the applicant established a *prima facie* case with a probability of success? The facts presented before this court show that the only claim to ownership of the Suit Property by the Deceased through the Applicant is based upon copies of receipts issued in the 1970’s and letters issued by Gatundu Nyakinyua Company Limited wherein it is stated that the Suit Property belongs to the Deceased. However, the Respondent has produced a copy of a Title Deed to the Suit Property in her response to the effect that she is the absolute registered proprietor to the Suit Property. The Applicant has alleged that Rosemary Wangui Kinyanjui obtained title to the Suit Property through fraud and that the Respondent was also guilty of fraud. Though the Applicant has set out the particulars of fraud allegedly committed by the said Rosemary Wangui Kinyanjui, it appears to be stretching it when the Applicant alleges that the Respondent was also guilty of fraud. Hence, I cannot see on a *prima facie* basis that the Respondent was guilty of any fraud. In fact, I am inclined to find that even if the said Rosemary Wangui Kinyanjui was guilty of fraud (which is yet to be proved), the Respondent appears to me to have been an innocent purchaser for value without notice of any adverse claim. To that extent therefore, I find that the claim by the Applicant that the Respondents’ title can be challenged on the basis of fraud to be unsubstantiated. Accordingly, I find that the Applicant has not succeeded to establish a *prima facie* case with a probability of success. Having stated that, I see no need in further interrogating whether the other two principles in the case cited above have been satisfied.

In view of the foregoing, the application is hereby dismissed with costs to the Respondent.

SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JULY 2013.

MARY M. GITUMBI

JUDGE