



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 682 OF 2012

ANNE WAMAHIGA WAHOMEPLAINTIFF

VERSUS

DAYKIO PLANTATIONS LIMITED1ST DEFENDANT

MARY WANJIKU KAMAU.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 13/4/13 in which the Plaintiff/Applicant seeks an order that the 2nd Defendant be restrained from interfering with the Plaintiff’s quiet possession and enjoyment of L. R. No. 13673/332 (hereinafter referred to as the “Suit Property”) pending the hearing and determination of this application. The Plaintiff also seeks the costs of this application.

The application is premised upon the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff wherein she states that initially the 1st Defendant was the owner of the Suit Property, but in the year 2004 it transferred the same to one Daniel Mathenge who sold the same to her. She further states that the 1st Defendant confirmed that transaction and effected the necessary changes in its records and the Plaintiff proceeded to pay the whole purchase price to the 1st Defendant. She states further that she subsequently took possession of the Suit Property in 2008 where she built a residential house and moved in. She stated further that early this year, the 2nd Defendant invaded the Suit Property waving a Certificate of Title and claiming to be the registered Proprietor thereof. As part of her evidence, the Plaintiff attached a statement in her name issued by the 1st Defendant referring to plot No. 914 in respect of which she is shown as having paid a sum of Ksh. 153,000/-.

The application is contested. The 1st Defendant filed its Replying Affidavit sworn by Elizabeth Waithira Ndungu, an employee, who swore that no Agreement of Sale was produced by the Applicant to support her allegation that the Suit Property was sold to her by the said Daniel Mathenge. She also denied that the 1st Defendant was in any way involved in that transaction and upholds the 2nd Defendant’s claim of ownership over the Suit Property as she is the title holder thereof.

In deciding whether or not to grant the Plaintiff her prayer for an interlocutory injunction, this court is obliged to rely on the celebrated case of *Giella v. Cassman Brown [1973] EA 358* where I am to ascertain that the applicant has established a *prima facie* case with chances of success at the trial, that if orders ought are not granted she stands to suffer irreparable injury that cannot be compensated with an award for damages and that if the court is in doubt, it should decide the case on a balance of convenience. To begin with, has the Applicant established a *prima facie* case with a probability of success at the main

trial?

Well the applicant is primarily seeking to establish her ownership rights over the Suit Property. She claims to have bought the same from one Daniel Mathenge with the knowledge of the 1st Defendant who was the initial owner thereof.

She has however not shown any written document to support her allegation. This would have been in compliance with Section 3(3) of the Law of Contract Act Cap 23 which provides-

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

a. The contract upon which the Suit is founded –

i. Is in writing;

ii. Is signed by all the parties thereto; and

b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party”

The Applicant has not been able to produce any Sale Agreement or other written agreement signed by her and Daniel Mathenge or other person indicating she bought the Suit Property. In fact, the Applicant has not convinced this court that she is the *bona fide* purchaser of the Suit Property. On the other hand, there is produced the Certificate of Title over the Suit Property which is in the name of the 2nd Defendant. In that event, the court is bound by the provisions of Section 26(1) of the Land Registration Act which provides as follows:-

“The Certificate of Title 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 a prima facie evidence that the person named as proprietor of land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a part, or

b. Where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.”

As far as I can tell, the title of the 2nd Defendant over the Suit Property has not been challenged on the grounds cited above by the Applicant or anyone else for that matter. That being the case, this court is bound by the law to recognize the proprietorship of the 2nd Defendant over the Suit Property. To that extent, I find that the Applicant has failed to establish a *prima facie* case with a probability of success. In that case, I do not see any purpose in interrogating whether the remaining two elements in the *Giella* case have been met by the Applicant.

Accordingly, this application is hereby dismissed. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST 2013.

MARY M. GITUMBI

JUDGE