



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 497 OF 2013

STEPHEN CLEARANCE NJOROGE1ST PLAINTIFF

RUTH NYAMBURA KARIUKI 2ND PLAINTIFF

VERSUS

JOHN NYOKO WAITHAKA..... DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 23rd April 2013 in which the Applicants sought for the following orders:

1. Spent
2. That a temporary injunction be issued restraining the defendant from evicting the Plaintiffs from the parcel of land known as Kabete/Nyathuna/3311-3318 (hereinafter referred to as the “Suit Properties”) or from constructing or fencing the Suit Properties or interfering with the possession of the same or alienating, transferring, disposing off or dealing with the suit properties in any manner whatsoever pending the hearing and determination of this application.
3. That a temporary injunction be issued restraining the defendant from evicting the Plaintiffs from the parcel of land known as Kabete/Nyathuna/3311-3318 (hereinafter referred to as the “Suit Properties”) or from constructing or fencing the Suit Properties or interfering with the possession of the same or alienating, transferring, disposing off or dealing with the suit properties in any manner whatsoever pending the hearing and determination of the main suit.
4. That costs be provided for.

The said application is supported by the grounds appearing on the face thereof as well as the Supporting Affidavit of Stephen Clarence Njoroge sworn on 23rd April 2013 in which he stated that he is the legal representative of the estate of his grandfather Stephen Kariuki Richo (deceased) and that his co-Plaintiff is the only surviving child of his said grandfather. He further stated that the only two known assets that belonged to his grandfather were the land parcels Kabete/Nyathuna/199 (now closed upon subdivision and the resultant titles are the Suit Properties) and Kabete/Nyathuna/T.271. He noted that the Defendant has since sold Kabete/Nyathuna/T. 271. He further stated that some of his cousins have been cultivating and living on the Suit Properties. He stated further that it came as a great shock to him to learn that the Defendant had subdivided the stated property into the Suit Properties after the death of his father Naphtali Waithaka Nyoko and was advertising them for sale without their knowledge or consent. He disclosed that before the property was subdivided and one year before his grandfather died, the said property was transferred to Naphtali Waithaka Nyoko under fraudulent circumstances as a gift in consideration of natural love and affection. He further stated that his grandfather executed the transfer document by way of affixing his thumb print which is questionable because he always signed all documents. He stated that the

transfer of the Suit Properties to Naphtali Waithaka Nyoko and the resultant transmission of the same to the Defendant were fraudulent hence they are registered to hold the Suit Properties in trust of the estate of his grandfather which includes them. He stated further that the entire estate of his grandfather and the beneficiaries thereto stood to suffer unless the Defendant is restrained from selling the Suit Properties.

The application is not opposed. Despite service upon the Defendant of this application together with all the pleadings filed herein, the Defendant did not file any response.

In determining whether or not to give the Plaintiff/Applicants the orders they seek of an interlocutory injunction, I will refer to and rely on the principles laid down in the celebrated case of **Giella versus Cassman Brown (1973) EA 358** 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.”

Have the Plaintiff/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Have the Plaintiff/Applicants established a ‘genuine and arguable case’? The Plaintiff/Applicants have admitted that the current registered proprietor of the Suit Properties is the Defendant. However, they claim that the process through which the Defendant came to be the registered proprietor of the Suit Properties is tainted by fraud and they therefore seek to challenge this registration on that basis. We must therefore turn attention to the specific process through which the Defendant came to be the registered proprietor of the Suit Properties in order to establish whether his title may be challenged on that basis.

The Plaintiff/Applicants produced some documentation as part of their Supporting Affidavit which are instructive on the process that was followed for the Defendant to become the registered proprietor of the Suit Properties. The first document is the green card for land parcel Kabete/Nyathuna/199. It shows that the late Stephen Kariuki Richo became the registered proprietor of this parcel of land way back in 1958. It then shows that in 1981, Naphtaly Waithaka Nyoko became the registered proprietor thereof. There was produced by the Plaintiff/Applicants a transfer document for that particular transfer from the original owner Stephen Kariuki Richo to Naphtaly Waithaka Nyoko. That transfer document clearly shows that the consideration for that transfer was by way of gift and the estimated value was indicated as Kshs. 50,000/-. It was signed by Stephen Kariuki Richo by way of affixing his left thumb print thereon. This transfer is clearly indicated on the green card and it is indicated that Naphtaly Waithaka Nyoko was issued with a Land Certificate over that parcel of land in the same year 1981. The same green card thereafter shows that the same parcel of land was thereafter transferred to the Defendant, who is a son of Naphtaly Waithaka Nyoko, in the year 2013. A title deed was issued to the Defendant in 2013 and it is indicated that the title was thereafter closed on subdivision of that parcel of land to the Suit Properties. Copies of searches conducted on the Suit Properties indicate that they are all registered in the name of the Defendant.

The only reason why the Plaintiff/Applicants are alleging fraud in this transaction is their claim that Stephen Kariuki Richo used to sign documents by his signature and not by affixing his thumb print as he did on the transfer document produced in evidence. The Applicants produced a charge document between Stephen Kariuki Richo to Standard Bank Limited dated 29th August 1977 indicating that he signed the

same by way of signature. It is on this basis that they challenge the thumbprint affixed to the transfer document and further allege that there was fraud. There is no doubt that Stephen Kariuki Richo was a very elderly man who died in 1982, one year after he transferred that parcel of land to Naphtaly Waithaka Nyoko. He could have been ailing to the extent that he was incapable of signing a document in the usual way. Looking at the facts herein, I am not convinced that there was any fraud in that transaction. Further, I see no good explanation given by the Applicants as to why they waited for 22 years to lapse since that transfer was made for them to now allege that there was fraud. Based on that finding, I am not convinced that the Plaintiff/Applicants have shown that they have a genuine and arguable case and thus they have failed to establish that they have a prima facie case with chances of success at the trial.

With that finding, I conclude that the Plaintiff/Applicants have not satisfied the first condition for the grant of an interlocutory injunction as stipulated in the *Giella* case cited above. That being the case, I see no reason to further interrogate whether the other two conditions in that case have been satisfied.

Therefore, this application is hereby dismissed. No order as to costs.

SIGNED AND DELIVERED AT NAIROBION THE 20TH DAY OF SEPTEMBER 2013.

MARY M. GITUMBI

JUDGE