



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
IN THE ENVIRONMENT AND LAND COURT

E.L.C CASE NO. 80 OF 2012

PURITY WANJIKU NDERITU)

PETER NDERITU JULIUS)PLAINTIFFS

(Suing as the personal representatives of NDERITU JULIUS (DECEASED)

VERSUS

HUMPREY WANG'OMBE KAHARIRI.....1ST DEFENDANT

SIMON WACIRA MURIUKI 2ND DEFENDANT

RULING

By their plaint filed herein on 31st May 2012, the plaintiffs, suing as the personal representatives of the Estate of NDERITU JULIUS their father, sought orders against the two defendants in the following terms:-

- a. ***A declaration that the land parcel No. KIINE/SAGANA/3721 was illegally and fraudulently transferred to the 1st defendant and subsequently to the 2nd defendant.***
- b. ***The register of land parcel No. KIINE/SAGANA/3721 be rectified by deleting the defendants names and restoring the names of the deceased as proprietor thereof***
- c. ***Costs of the suit and interest thereon***
- d. ***Any other or better relief.***

Simultaneously with the filing that plaint, the plaintiffs filed a Notice of Motion under **Order 40 of the Civil Procedure Rules** seeking the following orders:-

- a. ***Spent***
- b. ***That the 2nd respondent together with his relatives, agents or anyone else claiming under him be restrained by a order of injunction from up-rooting, cultivating, taking occupation, developing or any other way interfering with the applicants occupants of land parcel No. KIINE/SAGANA/3721***
- c. ***That orders of inhibition be registered in respect of land parcel numbers KIINE/SAGANA/3721, BURUBURU/NAIROBI/BLOCK74/1004, KARATINA B1/192, IRIANI/GATUNDU/612, KIMENJU/MWEIGA BLOCK 3/264, KARATINA PLOT 1192, KARATINA B1/201, KIMENJU/MWEIGA/96, KIINE/GACHARO/700, KONYU/BARICHO/1198, KIRI/MUKUYU/GACHUIRO/397,***

**KIRIMUKUYU/GACHUIRO/399, KIRIMUKUYU/GACHUIRO/414,
KIRIMUKUYU/GACHUIRO/415, KIRIMUKUYU/GACHUIRO/404,
KIRIMUKUYU/GACHUIRO/408, KIRIMUKUYU/GACHUIRO/410, MWEIGA/BLOCK 3,
KIMENJU/96, KONYU/BARICHO 3389 and NGORANO/GATUNGANGA.**

The said application was supported by the affidavit of PETER NDERITU JULIUS the 2nd applicant herein and was based on the grounds, inter alia, that the 2nd respondent's registration as the proprietor of the above parcels of land is tainted with fraud and that he may sell the same thus causing the applicants to suffer irreparably.

In his supporting affidavit, the 2nd applicant has deponed, inter alia, that he and his sister the 1st applicant are the administrators of the Estate of their late father who owned land parcel No. KIINE/SAGANA/3721 which on 11th April 2012 was fraudulently transferred to the 1st respondent who then transferred it to the 2nd respondent and that the said transfers were fraudulent because the Court has not yet distributed the deceased's Estate. It is further deponed that they occupy the said property which they have extensively developed and are growing horticultural products for export thereon hence this application. The 2nd applicant has also annexed to his affidavit the grant issued on 28th January 2011 in Nairobi Succession Cause No. 1851 of 2010 and rectified on 23rd May 2011 as well as a copy of the Green Card in respect of KIINE/SAGANA/3721, application form for the Land Board's Consent for the transfer of the said KIINE/SAGANA/3721 from the deceased to the 1st respondent as well as a certificate of search in respect of the said KIINE/SAGANA/3721 showing it is registered in the names of the 2nd respondent – see annexures **PNJ 1 to PNJ 4**.

The application was opposed by the respondents who filed replying affidavits to the same. In his reply, the 1st respondent stated that the deceased was his father by way of his marriage to his 2nd wife Esther Wanjiru Nderitu and due to the affection that the deceased had for him he (deceased) decided to transfer the property KIINE/SAGANA/3721 to him before his demise and this is supported by a copy of the deceased's last will (annexture **HWK – 2**). That the said transfer was not done fraudulently and therefore, the transfer to the 2nd respondent cannot be challenged. Further, it is deponed by the 1st respondent that the applicants are seeking orders which are already the subject of Succession Cause No. 1851 of 2010 at Nairobi where the applicants have failed to disclose that their late father had a second wife who is also entitled to a share of the Estate and this application is therefore sub-judice.

On his part, the 2nd respondent in his replying affidavit says he is the registered proprietor of the property which he purchased from the 1st respondent and was not aware of any fraud as there were no restrictions or cautions registered against it and therefore he is a purchaser for value without notice and that he never filed any civil case No. P.M.C.C. 136 of 2012 Kerugoya for purposes of removing the restriction.

In a supplementary affidavit, the 2nd applicant denies that the 1st respondent was a son to deceased or that the deceased transferred the land to him adding that this will is a forgery and the transfer was done well after the deceased had died.

Counsels for all the parties have put in their written submissions which I have considered together with the parties affidavits and other annexures in respect to the plaintiffs/applicants Notice of Motion dated 31st May 2012 which is the subject of this ruling.

As indicated at the start of this ruling, the plaintiffs/applicants suit against the defendants/respondents sought two prayers in respect of parcel No. KIINE/SAGANA/3721. However, in their Notice of Motion, the plaintiffs/applicants also seek orders of inhibition in respect of other various parcel of land which are not part of the prayers in the main suit. An interlocutory injunction will not be granted if the prayers sought are at variance with the prayers in the main suit. As the

prayers in the main suit only relate to the property No. KIINE/SAGANA/3721, this ruling is therefore only in respect to that property and not the other properties listed in prayer (c) of the said Notice of Motion.

This being a prayer for an injunction, it has to be considered within the principles set out in the case of *GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358* and which are:-

1. ***The applicant must show a prima facie case with a probability of success at the trial***
2. ***The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,***
3. ***If in doubt, the Court will decide the application on a balance of convenience.***

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity.

Bearing in mind the above principles, the first question that I ask myself is whether the applicants have made out a prima facie case with a probability of success that the transfer of the parcel of land No. KIINE/SAGANA/3721 firstly to the 1st respondent and thereafter to the 2nd respondent was fraudulent. It is not in dispute that the said parcel of land was originally registered in the names of the deceased NDERITU JULIUS before being registered in the names of the 1st respondent on 10th April 2012. It is also clear from the death certificate of the deceased that he died on 7th May 2010. The Court has also seen the will of the deceased in which he has distributed his property amongst his two wives JANE NDERITU and ESTHER NDERITU. It is the applicant's case that this will is a forgery. That will be a matter for trial. In the said will, it is indicated that the property KIINE/SAGANA/37211 (it must have meant 3721) is to be taken by the 1st respondent and that the said property has "***already been transferred to him***". The said will is dated 10th February 2010 and if indeed that parcel of land had "***already been transferred***" to the 1st respondent as at the time of the will, it is difficult to comprehend how an application for the consent of the Land Control Board in respect of the said property was being lodged by the deceased in favour of the 1st respondent in March 2012 some two years after deceased's death! It is curious that the application for the consent of the Land Control Board, the letter of consent and the transfer form are all in the names of the deceased and do not even indicate that he had died. Indeed the transfer of land form which is the 2nd plaintiff/applicant's annexure **PNJ 3** is signed by the deceased before a commissioner of oath and dated 19th March 2012! Given those facts which are not disputed, the plaintiffs/applicants claim that the transfer of land parcel No. KIINE/SAGANA/3721 from deceased to the 1st respondent was done fraudulently appears to be well merited and, in my view, establishes a prima facie case that the said transfer and subsequently the transfer to 2nd respondent were not above board.

And on his part, the 2nd defendant/respondent depones that he is an innocent purchaser for value without any notice of fraud and that he was never a party to Kerugoya P.M.C.C No. 136 of 2012 in which a consent was entered to remove the restriction placed on the parcel of land No. KIINE/SAGANA/3721. Although the proceedings in Kerugoya P.M.C.C No. 136 of 2012 were not annexed, this is a matter that the Court can take judicial Notice of and I accordingly called for the said file. From the proceedings therein, the suit was filed by the 2nd respondent (as plaintiff) against the 1st respondent (as defendant) and the orders sought were the transfer of KIINE/SAGANA/3721 by the 1st respondent to the 2nd respondent. The suit was filed on 9th May 2012 and on 31st May 2012, a consent was recorded granting that prayer. The suit herein was filed on 31st May 2012 and therefore, the 2nd respondent cannot be correct when he depones in paragraph 10 of his replying affidavit that he has "***never filed civil case No. P.M.C.C No. 136 of 2012 Kerugoya nor --- entered***

into any consent for removal of the restriction". The fact that he had to go to Court to have the parcel KIINE/SAGANA/3721 transferred to him is clear evidence that he was not an innocent purchaser without notice. There is also evidence that the 2nd respondent is a complainant in Kerugoya Criminal Case No. 61 of 2013 wherein he is a complainant in a criminal case against the 1st respondent who is charged with obtaining money by false pretences in relation to the sale of the said land. On the basis of the above, it is my view that the applicant has demonstrated a prima facie case to warrant the grant of the injunction sought.

As to the issue of irreparable loss, Justice Ojwang (as he then was) in **SULEIMAN VS AMBOSELI RESORT LTD 2004 2 K.L.R 589** while adopting the three principles set out in the **GIELLA** case (supra) went on to add as follows:-

“Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunction relief should always opt for the lower rather than the higher risk of injustice”.

Adopting the above principle in the circumstances of this case, it is clear to me that the lower risk of injustice dictates that I grant the injunctive relief sought. This is because, the material before me, prima facie, discloses some elements of fraud which I cannot ignore even at this earlier stage without necessarily making my findings on the same which will be for the trial Court.

There is also evidence to suggest that there is intermeddling of part of the property of the deceased's Estate which would be an offence under **Section 45 of the Law of Succession Act** and as Justice Waki (as he then was said) in **MOHAMED VS COMMISSIONER OF LANDS & FOUR OTHERS K.L.R (E & L) 1 at page 217**, it can be no answer to a prayer for injunction that the applicant may be compensated in damages particularly where the transgression is against the law.

If I was in any doubt, which I am not, and was to decide this application on the balance of convenience, the scales would be in favour of the applicant.

The issue of sub-judice was raised by the 1st respondent in his replying affidavit in which he deponed that this matter is already the subject of Succession Cause No. 1851 of 2010 at the High Court in Nairobi. However, this cannot be a serious submission as the cause in Nairobi High Court is Succession Cause which is very different from this matter and further, in the absence of the pleadings in that case, this Court is unable to make a decision as to whether in fact the parties herein are also parties to that Succession Cause.

Ultimately therefore, upon considering all the material before me, I grant the applicants the orders sought in paragraph (b) of the Notice of Motion dated 31st May 2012. Costs in the caus

B.N. OLAO

JUDGE

9TH SEPTEMBER, 2013

9/9/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Ms Mukuha for Plaintiff – present

Ms Kiragu for 2nd Defendant – present

Mr. Ndeda for 1st Defendant – absent

COURT: Ruling delivered this 9th day of September, 2013 in open Court.

B.N. OLAO

JUDGE

9TH SEPTEMBER, 2013