



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 169 OF 2008

LAWRENCE P. MUKIRI MUNGAI

ATTORNEY OF FRANCIS MUROKI MWAURA.....**PLAINTIFF**

VERSUS

ATTORNEY- GENERAL1ST DEFENDANT

JAMES NDIRANGU.....2ND DEFENDANT

JOSEPH NDIRITU MUGI.....3RD DEFENDANT

ANNAH WANGARI NDIRITU.....4TH DEFENDANT

LYDIA MUTHONI NDIRITU.....5TH DEFENDANT

RULING

Before me for determination is the Notice of Motion dated 16th May 2013 filed by the Plaintiff/Applicant who seeks for orders of injunction restraining the 3rd, 4th and 5th Defendant from disposing off or charging the parcel of land known as Ruiru/Ruiru East Block 7/13 (hereinafter referred to as the "Suit Property") pending the hearing and determination of this application and the Plaintiff's intended appeal. He also seeks for the costs of this Application.

The Application is premised on the grounds listed on the face of it together with the Supporting Affidavit of Lawrence Mukiri Mungai sworn on 16th May 2013 wherein he stated that he is the Attorney of Francis Muroki Mwaura who currently resides and works in the United States of America. He stated further that this court delivered its judgment dismissing this suit and holding that the 3rd, 4th and 5th Defendants were innocent purchasers of the Suit Property for value without notice. He stated further that the Plaintiff/Applicant was aggrieved by that judgment and had filed a Notice of Appeal in the Court of Appeal. He also stated that he had requested for typed copies of the proceedings. He asserted that during

the hearing of this suit, he had tendered evidence showing that Francis Mwaura Muroki purchased the Suit Property in 1988 and a title deed was issued to him in 1992, that Francis Muroki subsequently lost his title deed and was issued with another one on 19th August 1994, that since the date Francis Muroki purchased the Suit Property, he has never transferred it to any person and that to date he holds the original title deed issued to him in 1994 and that about May 2007, the Defendants fraudulently transferred the Suit Property to the 2nd Defendant and subsequently to the 3rd, 4th and 5th Defendant without the approval or consent of Francis Muroki. He then stated that this court made a finding that the 2nd Defendant acquired title to the Suit Property fraudulently that that notwithstanding, the court still went on to uphold the 3rd, 4th and 5th Defendant's title. He then stated that unless the court restrains the Defendants from disposing off the Suit Property, the intended appeal will be rendered nugatory.

The Application is contested. The 3rd Defendant, Joseph Ndiritu Mugi, filed his Replying Affidavit sworn on 28th May 2013 wherein he averred that the suit having been dismissed, the court became *functus officio* and lacks jurisdiction to issue the orders sought. He further asserted that sometimes in August 2012, in total disregard of this pending suit, the Plaintiff/Applicant undertook various construction works on the Suit Property, procured connection of water and electricity in his name and made arrangements for the occupation of the Suit Property by tenants without his consent. He stated that in view of that conduct, the Plaintiff/Applicant is not entitled to an equitable relief which he seeks. He further asserted that the Plaintiff/Applicant had not shown the loss he would suffer which cannot be adequately compensated with damages in case his intended appeal succeeds.

In determining whether or not to give the Plaintiff/Applicant 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.”

Has the Plaintiff/Applicant 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.”

The Plaintiff/Applicant's claim over the Suit Property is a matter that this court has determined in the Judgment delivered on 10th May 2013. This court made the finding that the Suit Property belongs to the 3rd, 4th and 5th Defendants. It is not for this court to consider whether or not the intended appeal to the Court of Appeal has high chances of success.

Secondly, the Plaintiff/Applicant seeking to block the transfer of the Suit Property to another party is a tacit admission that indeed the transfer of the Suit Property to another person does in fact affect the right to recovery of the same. This is the issue that this court adjudicated upon in this suit and arrived at the decision that such transfer to an innocent purchaser for value without notice does in fact extinguish the rights of a previous owner of the same. Hence, the issue of a title being void *ab initio* does not arise.

In light of the foregoing, I do not consider that the Plaintiff/Applicant is entitled to the orders he seeks and I dismiss his Application with costs to the Defendants.

SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2013

MARY M. GITUMBI

JUDGE