



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
Environmental & Land Case 190 of 2011

HON. DAUDI MWIRARIA PLAINTIFF

VERSUS

MARY NG'ENDO TIBA1ST DEFENDANT

JACQUELINE PAULINE WAIRIMU THARAO2ND DEFENDANT

RUTH WANJIRU THARAO.....3RD DEFENDANT

MUNGAI MBURU4TH DEFENDANT

MARGARET NJOKI RUTHA5TH DEFENDANT

DAVID ODONGA6TH DEFENDANT

DANIEL KURIA WAWERU7TH DEFENDANT

OPONDO OTIENO PATRICK8TH DEFENDANT

GRACE KANGAI GACICI9TH DEFENDANT

SAMUEL KIARIE MBURU10TH DEFENDANT

COMMISSIONER OF LANDS11TH DEFENDANT

DISTRICT LAND REGISTRAR, THIKA12TH DEFENDANT

RULING

The Plaintiff filed an application dated 29th June 2011 in which various orders were sought from this Court. At the hearing of the said application on 30th November 2011, the Plaintiff's Counsel, Mr. Thurania, submitted that they would only be canvassing prayer 5 of the said application. Prayer 5 is seeking orders that pending the hearing and determination of this suit, an interim order of injunction be issued restraining the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th defendants whether by themselves, their agents, assigns and/or servants from further alienating, developing, transferring, leasing, charging the

titles now held by them and/or in any manner whatsoever dealing with the parcels numbered LR NOS RUIRU/RUIRU EAST BLOCK 7/298, RUIRU/RUIRU EAST BLOCK 7/299, RUIRU/RUIRU EAST BLOCK 7/300, RUIRU/RUIRU EAST BLOCK 7/301, RUIRU/RUIRU EAST BLOCK 7/302, RUIRU/RUIRU EAST BLOCK 7/303, RUIRU/RUIRU EAST BLOCK 7/304 and RUIRU/RUIRU EAST BLOCK 7/305 purported to be subdivisions of LR NO. RUIRU/EAST BLOCK 7/53 (hereinafter referred to as the suit property).

The Plaintiff's grounds are that he is the absolute registered owner of LR NO. RUIRU/EAST BLOCK 7/53, and has always had in his possession of the original title thereto. The Plaintiff states that it came to his knowledge that the suit property were being developed by strangers, and that he was able to procure a mutation form dated 23rd January 2007 and which had been filled by the 1st Defendant herein, and which sought to have the suit property divided into sub-parcels expressed to be Numbers 298,299,300,301,302,303,304, and 305. The Plaintiff further states that all indications are that the land was indeed subdivided as sought by the 1st Defendant, and sold to the 2nd to 10th Defendants, and that these transactions were approved by the 12th Defendant while fully aware that the Plaintiff is the absolute registered owner. The Plaintiff avers that he has since caused the 12th Defendant to register cautions over the sub-parcels.

The Plaintiff's Counsel made oral and written submissions dated 14th November 2011, and contends that the Plaintiff has provided clear and uncontroverted evidence that he has a valid and impeachable title over the suit property issued on 21st May 1991. He further submitted that any title obtained subsequent to the Plaintiff's is null, void and of no legal effect and does not grant any party thereof any valid interest in the land. Counsel relied on the authorities of **Gitwany Investment Limited v Tajmal Limited & 3 others (2006) eKLR**, **Samson Kagengo Ogeri v Greenbays Holdings & 2others ,(2011) eKLR**, and **Alberta Mae Gacie v Attorney General & 4 Others, 2006 eKLR**. Mr. Thuraira also submitted that if an injunction is not granted, the Plaintiff will suffer irreparable damage, as he will be put to great expense in restoring the property back to its original state if the developments on the land are allowed to continue, and the likelihood of the Defendants dealing with the suit property adversely will arise, Further that the Plaintiff is willing to comply with any orders as to the furnishing of security if an injunction is granted. Finally, the Plaintiffs submissions also include instances from which fraud can be inferred on the part of the Defendants, and he also comply with any orders as to the furnishing of security if an injunction is granted

The Plaintiff has attached as evidence a copy of the title deed to the suit property registered in his name on 21st May 1991, copies of official searches of the suit property and of the sub-parcels, a copy of the mutation form dated 23rd January 2007 filled by one Mary Ngendo Tiba, and a copy of a letter he wrote to the Chief Land Registrar dated 23rd February 2011.

The Defendants have filed various responses. The 1st Defendant filed a Notice of Preliminary Objection dated 13th July 2011, wherein her Counsel states that the application dated 29th June 2011 as filed in Court has been brought under the wrong provisions of the law, that the same is incurably defective and should be struck out, and that that the orders sought cannot be granted in the circumstances. There was no appearance for the 1st Defendant at the hearing of the application.

The 2nd and 3rd Defendants oppose the application and have filed a Replying Affidavit sworn by the 3rd Defendant on 16th August 2011, wherein they aver that the 3rd Defendant is the registered owner of LR NO. RUIRU/RUIRU EAST BLOCK 7/299 while the 2nd Defendant is the registered owner of L.R. No. RUIRU/RUIRU EAST BLOCK 7/298, having bought the said parcels of land from the 1st Defendant. The 2nd and 3rd Defendants further state that they purchased the said parcels of land after establishing that the 1st Defendant was the registered owner, and having obtained the relevant consent form the land control board, paid stamp duty on the same and thereafter had the said parcels of land transferred to them. The 2nd and 3rd Defendants deny that they were involved in any fraudulent dealing with the 1st Defendant as alleged and with the 11th and 12th Defendants as implied or at all, and aver that they are

innocent purchasers for value and have acquired a registered interest in the said parcels of land.

The 2nd and 3rd Defendants counsel Mr. Makumi further submitted during the hearing of the application that where there are competing titles over a parcel of land, the issue of which is valid is to be decided at full trial, and that in such circumstances no *prima facie* can be established in terms of the decision in **Giella v Cassman Brown & Co Ltd (1973) E.A 358**. Counsel, relying on the authority **Peter Kinuthia Waithaka vs City Council of Nairobi & 2 Others (2005) eKLR**, further submitted that allegations of fraud can also only be established at full trial, that the 2nd and 3rd Defendants are the ones in possession of the said parcels of land, and that the Plaintiff had slept on his rights before coming to court and any loss he has suffered could be adequately compensated by damages. The 2nd and 3rd Defendants have annexed as evidence copies of their title deeds to the said sub-parcels of land, copies of certificates of official search, copies of land control board consent, and copies of the stamp duty declaration, assessments and pay in slip.

The 4th and 5th Defendants responded by filing Grounds of Opposition dated 28th November 2011 stating that the orders sought in the application were incurably defective and unavailable in law. The 7th, 9th and 10th Defendants also oppose the application, and each filed a Replying Affidavit sworn on 12th September 2011. The 7th Defendant in his Replying Affidavit states that he is registered as proprietor of the parcel of land comprised in Title Number Ruiru/Ruiru Block 7/302 measuring approximately 0.0396 hectares, and was so registered on 14/05/2009. The 9th Defendant states in her Replying Affidavit that she is registered as proprietor of parcel of land comprised in Title Number Ruiru/Ruiru Block 7/304 measuring approximately 0.0396 hectares, and was so registered on 19/06/2009. Likewise the 10th Defendant states in his Replying Affidavit that he is the registered proprietor of parcel of land comprised in Title Number Ruiru/Ruiru Block 7/305 measuring approximately 0.0537 hectares, and was so registered on 12/03/2009.

The 7th, 9th and 10th Defendants also state that the said parcels of land registered in their names were purchased pursuant to agreements for sale entered into with the 1st Defendant, and for a consideration which was duly paid and received. The 7th, 9th and 10th Defendants further state that an application was duly made to, and granted by the Ruiru/Land Control Board for consent to transfer the said parcels of land, and that they paid stamp duty in respect to the said transfer and they were thereupon issued with a title to the said parcels of land. The 7th, 9th and 10th Defendants aver that they have constructed their residential homes on the said parcels of land, and have produced as evidence copies of certificates of official search, copies of the sale agreements, copies of the letter of consent, and copies of the stamp duty pay in slips.

Counsel for the 4th, 5th, 7th, 9th and 10th Defendants, Mr Githuka, in oral submissions made at the hearing of the application, and in written submissions dated 29th November 2011, contends that the Plaintiff has failed to establish a *prima facie* case as he has failed to show any existing right in his favour. The Counsel cited the authority of **Mrao Ltd v First American Bank of Kenya Ltd and 2 others (2003) KLR 125** in this regard, and based his contention on the uncertified copy of the title deed annexed to the Plaintiff's supporting affidavit, which copy Counsel submitted is inadmissible under section 35(2) and 68(1) of the Evidence Act.

Counsel relying on various authorities (**John Wambugu Njoroge v K.C.B. Ltd, C.A No. 179 of 1992 (Kisumu)** and **Abiero v Thabiti Finance Comapany Ltd & Another (2001) KLR 508**) also submits that the Plaintiff can be adequately compensated in monetary terms in terms of the undeveloped value of the suit property as at 2006, when the Plaintiff alleges he was wrongfully deprived of his land. Finally Counsel submitted and that since a *prima facie* case has not been established by the Plaintiff, the balance of convenience is in favour of the 4th, 5th, 7th, 9th and 10th Defendants as they reside in and are in actual possession of their parcels of land, whereat they live with their families.

There is also an affidavit on the court file sworn by one Lillian Ajwang Okumu on 24th November 2011, wherein she states that she is the wife of the 8th Defendant who died on 19th December 2007. The

deponent has attached a copy of the death certificate and a copy of title to the parcel of land Ruiru/Ruiru East Block 7/303 registered in the deceased 8th Defendants name. There were no responses to the application from the 6th, 11th and 12th Defendants.

I have read and carefully considered the pleadings, evidence and written submissions by the parties to this application. I will proceed with the determination of the application on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358** and as elaborated upon in **Benir Investments Ltd v Commissioner General & Anor (2010) eKLR**. The Plaintiff has produced evidence of ownership the suit property by annexing a copy of the original title to the suit property. The admissibility of the said copy has been contested by the 4th, 5th 7th 9th and 10th Defendants on the grounds stated earlier in this ruling. I find that the copy is admissible under Order 19 Rule 7 of the Civil Procedure Rules 2010, which gives this court discretion to receive any affidavit notwithstanding any irregularity in its form or any technicality since the lack of certification does not change the substance of the said copy of the Plaintiff's title.

The 2nd, 3rd and 8th Defendants have also produced copies of titles with regard to the suit property. The validity of all the titles produced as evidence in this application, and which title was the first in time are issues to be determined at the full trial, and for this reason I am unable at this stage to find a *prima facie* case in favour of the Plaintiff on the basis of the his copy of title to the suit property. Likewise the issue of whether there was any fraudulent dealing with the suit property is a matter that can only be decided after a full hearing of the suit filed herein.

I will therefore decide prayer 5 of the Plaintiffs' application dated 29th June 2011 on a balance of convenience, and after due consideration of the pleadings and submissions made by the parties as detailed out in this ruling, I hereby order as follows:

1. That the *status quo* be maintained as follows:

(a)The 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Defendants by themselves or through their representatives, agents or servants are restrained from transferring, leasing, charging or undertaking further construction on the land parcels identified as LR NOS RUIRU/RUIRU EAST BLOCK 7/298, RUIRU/RUIRU EAST BLOCK 7/299, RUIRU/RUIRU EAST BLOCK 7/300, RUIRU/RUIRU EAST BLOCK 7/301, RUIRU/RUIRU EAST BLOCK 7/302, RUIRU/RUIRU EAST BLOCK 7/303, RUIRU/RUIRU EAST BLOCK 7/304 and RUIRU/RUIRU EAST BLOCK 7/305 pending the determination of the suit filed herein or until further orders.

(b) The Plaintiff either by himself or through his representatives, agents or servants not to interfere with the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Defendants' possession and occupation of the land parcels identified as LR NOS RUIRU/RUIRU EAST BLOCK 7/298, RUIRU/RUIRU EAST BLOCK 7/299, RUIRU/RUIRU EAST BLOCK 7/300, RUIRU/RUIRU EAST BLOCK 7/301, RUIRU/RUIRU EAST BLOCK 7/302, RUIRU/RUIRU EAST BLOCK 7/303, RUIRU/RUIRU EAST BLOCK 7/304 and RUIRU/RUIRU EAST BLOCK 7/305 pending the determination of the suit filed herein or until further orders.

2. That the Plaintiff to give a written undertaking as to damages to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Defendants within 14 days, and the said undertakings to be filed in Court.

3. That the Plaintiff serves the orders given herein on the 11th and 12th Defendants forthwith.

Dated, signed and delivered in open court at Nairobi this 25th day of January, 2012.

P. NYAMWEYA

JUDGE