



RACHEL MWIKALI KANYOLO (suing on behalf of the estate of
HERMAN SYANDA KANYOLO.....**PLAINTIFF**

VERSUS
1. SIGMA SUPPLIES LIMITED

2. DIPAK SHAH.....**DEFENDANTS**

RULING

1. The Application before the Court is the Chamber Summons dated **12/11/2010** (“Application”) by the Plaintiff/Applicant, **Rachel Mwikali Kanyolo** (suing on behalf of the estate of the late **Herman Syanda Kanyolo**)(“Applicant”). The principal prayer sought is:

That the defendant by himself, his agents and/or servants be restrained from trespassing, encroaching, alienating, transferring, selling, leasing, charging or in any other way dealing with the properties known as Title No. **LR KJD/KAPUTEI NORTH/6742** (“Parcel 6742”) and **LR KJD/KAPUTEI NORTH/6743** (“Parcel 6743”) [both parcels, collectively, [“Suit Properties”] pending the hearing and determination of this suit.

2. The Application is supported by the affidavits of the Applicant sworn on **29/10/2010** and **17/01/2011**. The same is vigorously opposed. The Defendants/Respondents (“Respondents”) filed a Replying Affidavit of **Dipak Shah** sworn on **07/12/2010**.

3. The Application was first placed before *Justice Waweru* on **15/11/2010**. He certified it as urgent and granted interim injunctive relief against the Respondents. The interim orders were extended a number of times. On **09/03/2011**, the parties agreed by consent to canvass the Application by way of Written Submissions. These were confirmed by *Justice Kihara Kariuki* on **02/06/2011**. However, *Justice Kihara Kariuki* could not deliver his judgment before leaving the station. It fell upon me to do so. The matter was placed before me on **25/11/2011** but neither party appeared. I made the direction that I will deliver the ruling on notice based on the record in the file.

4. The Applicant’s case is that the Suit Properties both belong to her late father, **Herman Syanda Kanyolo** (“Herman”). She has annexed copies of titles to that effect. Before her demise, **Herman** had become aware that one, **Naomi Nyambura Wakapa**, who was his cohabitee (“Naomi”), had fraudulently transferred the Suit Properties to herself. **Herman** lodged a criminal complaint over the matter and criminal proceedings instituted against **Naomi**. Simultaneously, restrictions were placed on the Suit Properties. **Naomi** passed away on **06/02/2002** before the criminal proceedings could be concluded.

5. In the meanwhile, it emerged that the restriction placed on Parcel **6742** was removed on **13/04/2004** and the property transferred to **Henry Simaru Kisia** on **03/08/2004**. Upon the complaint of **Francisca Kasyoka Kanyolo**, the widow of **Herman** and also a co-administrator to his estate, that restriction was reinstated on **17/09/2004**.

6. As for Parcel **6743**, the restriction was removed on **17/01/2002** and was equally reinstated on **14/09/2004**. The Plaintiff's position is that the removal of the restrictions was illegal.

7. It appears that both restrictions were again removed on **12/08/2010**. The extracts of titles show that, on the same day, Parcel **6743** was registered in the name of **Miamis Properties Ltd**. On the following day, that parcel was transferred to **Sigma Supplies Ltd**, the 1st Respondent and a title deed issued. Similarly, Parcel **6742** was registered in the name of **Miamis Properties** on **13/08/2010** and transferred to the 1st Respondent and a title deed issued on the same day.

8. The Plaintiff argues that the only story one craft out of this uncontested facts is one of fraud in which the Defendants are involved. Their biggest salvo in this regard is the seemingly mysterious lifting of the restriction on **12/08/2010** followed by a very speedy transfer to **Miamis Properties Ltd** then followed by an even speedier transfer to the 1st Respondent. If the Respondents had done their due diligence on or before **10/08/2010** when they purportedly entered into a sale agreement with **Miamis**, it would have become clear to them that there was a restriction on the Suit Properties and that **Miamis** was not the registered owner. The Respondents express wonder at how the Respondents could have proceeded with the Sale Agreement in the face of the restrictions and then somehow facilitate the mysterious removal of the restrictions and transfer of the Suit Properties to themselves.

9. In the face of the Plaintiff's narrative, the Respondents tell a simple story: the 1st Respondent is a *bona fide* purchaser for value without notice of any fraud or irregularities of the Suit Properties. It did purchase both properties from **Miamis** vide Written Sale Agreement dated **13/04/2010**.

10. As such *bona fide* purchasers for value without notice, the 1st Respondent argues, he is entitled to certain protections. The protections the 1st Respondent cites are those in **sections 28, 39 and 143** of the **Registered Lands Act** (the "Act"). I will turn to this now.

11. **Section 28** of the Act provides that:

The rights of a proprietor of land, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the Court, shall not be liable to be defeated except as provided in the Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;

- a) To the leases, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and
- b) Unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared b section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

12. **Section 39** of the same Act provides:

39. (1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned:-

- a) to inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous proprietor was registered; or
- b) to see to the application of any consideration or any part thereof; or
- c) to search any register kept under the Land Registration (Special Areas) Act, the Government Lands Act, the Land Titles Act or the Registration of Titles Act.

13. Finally, **section 143** stipulates:

143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease, or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

14. The upshot of these sections is the following:

a. First, registration under the Act can only be defeated in accordance with that Act;

b. Second, the Act only provides that a registered proprietor's rights are absolute and indefeasible except where:

i. The rights have not been acquired for valuable consideration;

ii. The rights are trumped by encumbrances and conditions noted in the register;

iii. There are overriding interests declared under section 30 of the Act – including where the proprietor is registered as such as a trustee (whether included in the register or not); and

iv. The registration was obtained or made by fraud or mistake **and** the registered proprietor:

1. Did not purchase for valuable consideration; or

2. Had knowledge of the omission, fraud, or mistake in consequence of which rectification of a register is sought or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

c. Third, a would-be registered proprietor is entitled to rely on the land register entries without inquiring or ascertaining the circumstances under which a previous proprietor was registered. As I see it, the practical significance of this last protection provided by section 39 of the Act is that a person will not be considered to have acted fraudulently or negligently or to have contributed to such fraud or negligence if they do not go behind the register to inquire into the circumstances in which the person they are dealing with was registered.

15. The 1st Respondent invokes the provisions of the Act I have cited above together with the weight of our judicial authorities interpreting them to argue that no cause of action is sustainable against the 1st Respondent. Therefore, the 1st Respondent, maintains, it is not possible for the Plaintiff to establish a *prima facie* case which is a *sine qua non* for the issuance of interlocutory injunction under our extant principles as set out in the case of *Giella v Cassman Brown* [1973] E.A 358.

16. The real question here is whether the Plaintiff can establish that Respondents are privy to some fraud or illegality which saw the passage of title to the Suit Properties from **Herman** to the 1st Defendant. If the answer is no, it follows that under the terms of the statute and our case law, the Plaintiff cannot succeed in her claim to have the Court declare that “at all material times to this suit, the late **Herman Syanda Kanyolo** was and still is the rightful owner and proprietor” of the Suit Properties. It would therefore follow that she would be unable to demonstrate a *prima facie* case under the *Giella* test.

17. To this point, the Plaintiff says the following “anomalies” (their lawyer’s word) point to illegality and

fraud. I will quote verbatim from the Written Submissions:

- a. The Sale Agreement dated **13/04/2010** between **Miamis Properties Ltd** and the **Sigma Supplies Ltd** does not bear a company seal. It is merely signed by the 2nd Defendant in his personal capacity.
- b. The Defendants appear not to have conducted a search prior to purchasing the suit properties since an extract of the title shows that as at **08/08/2010**, [Parcel 6742] was in the name of **Henry Kimaru Kisia** while [Parcel 6743] was in the name of **Naomi Nyambura Wakapa** and both properties had restrictions placed on **17/09/2004** and **14/09/2004** respectively. How then could the Defendants have purchased the suit premises from **Miamis Properties** on **13/04/2010** when **Miamis Properties Ltd** had no title in the property?
- c. How did **Miamis Properties Ltd** acquire property in the suit premises on **12/08/2010** and **13/08/2010** in the face of restrictions which appear to have been conveniently lifted on **12/08/2010**?
- d. The [Land Control Board] applications are undated and not properly filled out. They are not signed by the 1st Defendant.
- e. It is practically impossible for the consent of the Board to have been given on **14/04/2010** yet the sale agreement was done on **13/04/2010**.

18. The 1st Respondent says that none of these facts (which, in my view, are clearly established by affidavit evidence) raises a *prima facie* case of fraud as against it. They rely on the following cases: *R.G. Patel v Lalji Makanji* (1957) EA 314; *John Karanja Warui v Vincent Mungai Mbugua* (Nairobi HCCC 415 of 415; and *Joseph Karisa Mutsonga v Johnson Nyati* (Mombasa HCCC 295 OF 1976). Those cases establish the rule of law that fraud in civil cases must be strictly proved; and the evidentiary standard of proof is higher than on a balance of probabilities: the standard falls somewhere between balance of probabilities and beyond reasonable doubt. Taking this higher standard into account, the Respondents urge, it cannot be said that the Plaintiff has a high probability of success on the merits. They therefore urge the Court to dismiss the Application.

19. It is important at this point to restate the principles applicable to the granting of interlocutory injunctions. They are set out in the celebrated case of *Giella vs Cassman Brown* [supra] in the words of Spry V.P.:

First, an Applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

20. I have anxiously considered the affidavit evidence presented as well as the legal principles applicable namely the *Giella* test and the provisions of the Registered Lands Act. There are factors cited by the Applicant which do raise plausible questions about the complicity of the Respondents in the transfer of property from **Henry** to **Miamis** and then to itself. The speed of the transactions is the first red flag. Between **13/04/2010** when the Agreement of Sale was purportedly signed and **12/08/2010** nothing seems to have happened. Then, action explodes. In a space of two days, the suddenly efficient lands registry manages to lift the restrictions in place; transfer the property to **Miamis**; re-transfer it to the 1st Respondent and issue title deeds. Something about the speed of these transactions raise the uncomfortable feeling that the 1st Respondent was aware that the transaction in question was not “ordinary.”

21. The second factor that seems to raise questions is both the contents of the **Land Control Board** consent and the speed with which the consent was obtained. Filed on **13/04/2010**, again the **Land Control Board** seems to have been extraordinarily efficient in giving its consent the following day.

22. Finally, the biggest elephant in the Respondents' pleadings (to massacre the famous idiomatical

expression), is the question whether the 1st Respondent carried out any due diligence before purchasing the Suit Properties, and if so, what the results of that due diligence were. This is an important query because if it turns out that the 1st Respondent knew that the properties was not registered in the name of **Miamis** and that there were restrictions on the Suit Properties, the protections afforded by the Act would likely vanish.

23. Yet, these issues, at least at this point, raise nothing more than a suspicion that the Respondents know more about these transactions than they are letting out. It is the Plaintiff's obligation to prove her allegations. At this point in the proceedings, it is her burden to show a *prima facie* case. To do this, she has to show that there is a high probability that she will succeed in linking the Respondents to the fraud that was perpetrated in the land registry around **12-13/08/2010**. I am not fully persuaded that the Plaintiff has succeeded in doing so especially given the enhanced evidentiary burden of proof to establish fraud.

24. Turning to the second *Giella* factor, I would be willing to accept that damages would not be an adequate remedy for the Plaintiff. For one, it seems difficult at this point to determine with any specificity the value of the property. Second, there is the presumption, not rebutted here, that where real estate is involved, damages are an inadequate remedy. This is also an important incident of the right of ownership of real estate: it is not open to a defendant to enter another person's land and simply say that no injunction should issue because the owner would be compensated in damages.

25. However, in considering the third *Giella* factor, which I am constrained to do since I have doubts about the probability that the Plaintiff will prevail on merits, I am of the opinion that the balance of convenience here tilts in favor of the 1st Respondent. The 1st Respondent is in occupation of the Suit Properties. It has also invested massive resources in developing the Suit Properties. I would, therefore, resolve the doubts respecting the first *Giella* factor under the third *Giella* factor by holding that the balance of convenience favors the Respondents.

26. Consequently, I will dismiss the Application dated **12/11/2010** with costs and lift all and any subsisting interim orders.

DATED, SIGNED and DELIVERED at MACHAKOS this day 27TH day of FEBRUARY 2012.

J.M. NGUGI
JUDGE