



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 128 OF 2009

**SAMUEL ANTHONY MBOGO
KIIRU**

**As Administrator of the Estate of
Kiiru Wanjohi**

(Deceased) PLAINTIFF

VERSUS

**BURUBURU FARMERS CO.
LTD.....1ST
DEFENDANT**

**THE CHIEF LANDS REGISTRAR
.....2ND DEFENDANT**

**THE HON. ATTORNEY
GENERAL.....3RD
DEFENDANT**

**ERIC MBAYA NKAABU
.....4TH
DEFENDANT**

RULING

The Plaintiff has filed an application dated 25th August 2011, seeking to have the 4th Defendant barred by an injunction order from selling, charging, or alienating plot reference number L. R. NBI/BLK/102/38 (hereinafter referred to as the suit property), pending the final hearing of this suit. The Plaintiff is the Administrator of the estate of Kiiru Wanjohi (Deceased), and states in an affidavit sworn on 25th August 2011 that the suit property belonged to the Deceased, who died on 10/12/2000 without having transferred the plot either to the 1st or the 4th Defendants. Further, that the 4th Defendant is however presently registered as owner of the suit property, the said property having been fraudulently transferred first to the 1st Defendant, and later to the 4th Defendant in connivance with the 2nd Defendant.

The Plaintiff further states that he consequently filed the suit herein seeking orders for the cancellation of the 4th Defendant's title to the suit property, and the retransfer of the suit property to himself as administrator of the Estate of Kiiru Wanjohi. He also states that in the month of August 2011 he heard from sales agents that the 4th Defendant is looking for buyers to buy the suit property, and has reasonable fear that if the plot is disposed off before this case is finally heard and determined, the Estate of Mr. Kiiru Wanjohi will suffer irreparable loss and the suit filed herein will be rendered nugatory. The Plaintiff has attached as exhibits the said Letters of Administration issued on 15th February 2002 in H.C. Succession Cause No. 3032 of 2001, a Certificate official search dated 28/4/2008, and Kiiru Wanjohi's Death Certificate showing the Deceased's date of death as 10th December 2000.

The 4th Defendant responded by filing a Replying Affidavit sworn on 19th September 2011. He states therein that the Plaintiff's application and suit as a whole is fatally defective since the Plaintiff herein is a co-administrator of the estate of the Kiiru Wanjohi (Deceased), yet the co-administrator called Elvis Wanjohi Kiiru is not a Plaintiff or party to this suit. The 4th Defendant admits to being presently registered as proprietor of the suit property as alleged by the Plaintiff, and states that he has an indefeasible and good title to the suit property being an innocent purchaser for value without notice. The 4th Defendant further states that the Plaintiff's application for a temporary injunction lacks any merit and should be dismissed with costs since there is no prayer in the Amended Plaint filed herein seeking a permanent injunction. Further, that the Amended Plaint as drawn is fatally defective since the Plaintiff has not pleaded the particulars of fraud as required by law. The 4th Defendant also avers that should the Plaintiff be successful at the hearing of the suit, then he can be compensated by way of damages.

The Plaintiff and 4th Defendant's Advocates agreed to file written submissions. The Plaintiff's Advocate, at the hearing of the application on 23rd January 2012, sought a ruling on the basis of the pleadings and submissions filed. No objection was raised by the 4th Defendant's Advocate. The Plaintiff's Advocate's submissions are dated 18th November 2011, and the Advocate in summary contends that the Plaintiff has established a *prima facie* case in light of the facts pleaded in the foregoing, and relying on the authority of **Giella v Cassman Brown & Co Ltd, (1973) EA 358**. The Plaintiff also refers to and seeks similar orders with respect to his earlier application dated 25th March 2009, which was supported by the Plaintiff's Affidavit sworn on 21st March 2009 and a Further Affidavit sworn on 20th May 2009. The Plaintiff submits that the annexures to the said affidavits show that as late as 23/12/2008 and 4/5/2009 the Nairobi City Council was still demanding rates for the suit property from the deceased Kiiru Wanjohi. Further, that the Department of lands was also demanding land rent from the Deceased as late as 25/2/2008.

The 4th Defendant's Advocate's submissions are dated 20th January 2012. The Advocate reiterates that the application is fatally defective and ought to be struck out. The Advocate gives additional reasons for striking out as follows:- that the application does not state the statutory provisions of either the Registered Land Act or of the Registration of Titles Act upon which the title ought to be cancelled; it lacks grounds of the application; there are no particulars of fraud pleaded in the Plaint; it is not specified whether the Affidavit sworn by the Plaintiff on 25th August 2011 is a supporting affidavit or replying affidavit; and that there is no prayer in the Amended Plaint seeking a permanent injunction. The Advocate also submits that the Plaintiff has failed to prove a *prima facie* case as he has not adduced any evidence of the alleged

fraud as against the 4th Defendant, and in any case the Plaintiff has not shown that the 4th Defendant is incapable of paying damages if the Plaintiff succeeds in his suit. The 4th Defendant has relied on the authority of **John Karanja Warui (Suing as the Administrator of the Estate of the Late Elizabeth Muthoni) v Vincent Mungai Mbugua H.C.C.C. No 415 of 2009 (2010) eKLR** on the issue of balance of convenience, wherein it was held that the balance would tilt in favour of an innocent purchaser for value who is in possession.

I have read and carefully considered the pleadings, evidence and written submissions by the parties to this application. I will first deal with the preliminary issue raised by the 4th Defendant that the present application is fatally defective and ought to be struck out. The application does clearly state that it is brought under Order 40 Rule 1(a) and (b) and Rule 2. Even though the actual statute is not stated, this Court is presumed to know that the applicable law is the Civil Procedure Rules. There is also no requirement that for temporary injunctions to issue under Order 40 Rule 1 that there must be a prayer for a permanent injunction in the Plaint, as the main purpose of Order 40 Rule 1 is to maintain the *status quo* and conserve the property in dispute pending the hearing and determination of a suit, irrespective of the prayers sought in the main suit. In addition, there is no prayer in the application in relation to the cancellation of title that would require the relevant provisions of the law to be cited. Finally, the Constitution obliges this Court under Article 159 to dispense justice without undue regard to procedural technicalities, and whatever procedural defects there may be in the Amended Plaint are in my opinion curable by way of amendment.

I will now proceed with the substantive 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 evidence of ownership of the suit property produced by the Plaintiff is a copy of Certificate of Official Search dated 28/4/2008 showing that Kiiru Wanjohi was registered as owner and issued with a certificate of lease on 9/9/93. After perusal of the court file for a copy of the said certificate of lease, I found additional evidence in the pleadings filed in the Plaintiff's application referred to dated 25th March 2009, particularly the Further Affidavit sworn on 20th May 2009. The Plaintiff in the said affidavit states that the title to the suit property was missing, and he attaches an Abstract from the Police attesting to this fact, and a Gazette Notice No. 10158 of 24th December 2004 on the issuance of a new title deed. The Chairman of the 1st Defendant did file a Replying Affidavit to the said application sworn on 27th April 2009, to which he attached a copy of certificate of lease issued on 13th March 2008 showing that the 1st Defendant was registered as proprietor of the suit property, and another copy of certificate of lease issued on 13th March 2009 showing the 4th Defendant as registered proprietor of the said property.

The validity of all the titles alleged and produced as evidence 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 the copy of Certificate of Official Search dated 28/4/2008. 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 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 that the *status quo* be maintained as follows:

- (a) Both the Plaintiff and the 4th Defendant by themselves or through their representatives, agents or servants are restrained from transferring, selling, leasing, charging or alienating the land parcel known as L. R. NBI/BLK/102/38 pending the hearing and determination of the suit filed herein or until further orders.
- (b) The Plaintiff either by himself or through his representatives, agents or servants is restrained from interfering with the 4th Defendant's possession and occupation of the land parcel identified as L. R. NBI/BLK/102/38 pending the hearing and determination of the suit filed herein or until further orders.

Dated, signed and delivered in open court at Nairobi this 13th day of March, 2012.

P. NYAMWEYA

JUDGE