



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 345 OF 2009**

WANGULU ENTERPRISES LIMITED.....PLAINTIFF

-VERSUS-

1. ABDALLA SAID KUGOTWA

2. THADDEUS KIMINZA MUTISO

3. JANE NJERI MUTISO

4. MWICIGI KANIU

5. JANE GATHONI MWICIGI

6. THE DISTRICT LAND REGISTRAR, KWALE

7. THE ATTORNEY-GENERAL.....DEFENDANTS

RULING

The plaintiff's suit by plaint dated **5th October, 2009** was filed with an application by Chamber Summons, brought under Order XXXIX, Rules 1,2,3, 5 and 9 of the earlier edition of the Civil Procedure Rules. The plaintiff sought an Order in the following terms:

“The 2nd, 3rd, 4th, 5th and 6th defendants, jointly and severally by themselves, their workmen, their servants and/or agents or otherwise howsoever, be restrained by temporary injunction from parting with possession of the title deed for the parcel of land known as KWALE/GALU KINONDO/1, further entering upon the said parcel of land...or any part or portion thereof, re-surveying and/or subdividing the same, taking possession of the same or any part or portion thereof and/or from exercising any proprietary rights whatsoever over any part or portion of the said parcel of land....pending the hearing and final determination of the suit filed herein.”

The grounds for this application are set out (in summary) as follows:

(i) the plaintiff is the registered owner of a beach-front parcel of land known as Title No. Kwale/Galu Kinondo/1 whose original freehold title issued in 1977 is still in the plaintiff's possession and has not been transferred to any person;

*(ii) sometime in **August, 2009** the plaintiff discovered that 6th defendant in collusion with 1st defendant, fraudulently cancelled the plaintiff's name from the proprietorship section of the register of title and inserted the name of 1st defendant as the absolute registered proprietor of the said land, and issued 1st*

defendant with another title deed on **7th August, 2006**;

(iii) 1st defendant thus acquired a title deed to the plaintiff's parcel of land, Kwale/Galu Kinondo/1, in 2006 with the connivance and collusion of 6th defendant;

(iv) the circumstances under which 6th defendant cancelled the plaintiff's name from the register and inserted 1st defendant's name are unknown to the plaintiff, because the plaintiff has never received any notice from 6th defendant;

(v) the plaintiff has never engaged in any dealing or agreement for the sale or transfer of the said land with 1st defendant or any other person; and the register of land held by 6th defendant should show that the plaintiff is the registered and absolute owner of the said land;

(vi) the cancellation of the plaintiff as the registered proprietor of the

(vii) plaintiff's parcel of land, Kwale/Galu Kinondo/1 by 6th defendant amounts to an unlawful alteration of the register, and the plaintiff has sought an Order of rectification of the register in the suit;

(viii) the plaintiff has attended no Land Control Board meeting prior to a transfer from itself to 1st defendant of the suit land, and it is still the registered rate-payer in respect of the said land;

(ix) sometime in **August, 2009** the plaintiff discovered that 1st defendant had fraudulently entered into a sale agreement with 2nd – 5th defendants for the sale and transfer of the plaintiff's parcel of land known as Kwale/Galu Kinondo/1 whilst using the fake title, and thereafter 2nd – 5th defendants were irregularly registered as owners of the same property, sometime in **August, 2008**.

(x) the plaintiff has learnt that 2nd – 5th defendants who paid Kshs.19 million to 1st defendant, have commenced a re-survey and sub-division of the said land into many small plots, for sale.

(xi) the result of the re-survey and sub-division will be to create other titles out of Kwale/Galu Kinondo/1, and put other people on the said land, with the effect of completely changing the nature and appearance of the said land, defeating the plaintiff's right and title thereto;

(xii) the plaintiff has learnt that 1st defendant in collusion with his relatives and/or agents has fraudulently entered into other sale agreements for the sale and transfer of the said land and has received large sums from would-be buyers, and one such transaction is already the subject-matter of High Court Civil Suit No. 206 of 2008 which is pending;

(xiii) 1st defendant did not have any good title which was capable of being passed in a lawful transfer, and 2nd – 5th defendants did not acquire a good title to the suit parcel of land;

(xiv) the plaintiff is apprehensive that the said re-survey, subdivision and sale will be carried out to completion, and as a result, the plaintiff may lose its land unless the prayers herein are granted.

Evidence in support of the application is set out in the affidavit sworn by **David Hussein K. Sang**, the plaintiff's general manager, dated **5th October, 2009**.

The 1st defendant, in his replying affidavit of **9th November, 2009** enters upon his depositions by contesting the capacity of the deponent who swore the supporting affidavit; and thereafter he makes general denials of the facts deponed in the supporting affidavit.

The deponent avers that Title No. Kwale/Galu Kinondo/1 was first registered in the names of **Hamisi Athman Mwasengeza; Hamad Alfani Tsumo; Alfani Omari Kugotwa; and Kasim Salim Mwamtaji** – and

that the plaintiff, on **5th February, 1977** “wrongly, illegally and/or fraudulently obtained a title to the suit property”, and “therefore the registration of the plaintiff/applicant as the owner of the suit property is null and void.” The deponent avers that “the family members of the original owners have entrusted [him] to pursue this matter on their behalf.” The deponent avers that “the land registry’s record is a true reflection of the.....status of his legal rights”; and that he has “every right to enter into any transaction with any person in respect of the suit property including with 2nd, 3rd, 4th and 5th defendants....” He further deposes that “the plaintiff...has no right whatsoever over the suit property.”

David Hussein K. Sang swore a supplementary affidavit on **15th April, 2010** averring that the original owners of the suit land referred to in the replying affidavit, had sold the suit property to the plaintiff in **1977**, and the plaintiff has since then, not parted with possession.

Counsel for the plaintiff urged, from the evidence filed, that the plaintiff has for many years held the original title deed to the suit land, and that on **29th June, 1981** this land was charged to National Bank of Kenya Ltd., the discharge taking place on **12th March, 2002**. Counsel submitted that the plaintiff has, otherwise, never had any dealings nor made any sale agreement in respect of the suit land.

Counsel urged that the 2nd – 5th defendants could not have obtained good title to the suit land, on the basis that they were innocent purchasers for value and without notice of any defect in title; for they had become aware of the defect of title before they finalized the transaction; and they failed to exercise due diligence, “*despite being presented with evidence that the title they intended to acquire was defective.*”

Learned counsel submitted that as the determination of basic questions such as the allegation of *fraud*, remained pending, the suit property needed to be preserved “*so that at the end of the day the plaintiff’s suit is not overtaken by events.*”

Counsel urged that the applicant had demonstrated a *prima facie* case for issuance of interim Orders.

Learned counsel, **Mr. Abubakar**, for 1st respondent, submitted that the applicant failed to satisfy the tests for the grant of interlocutory injunctions as set out in the model case, ***Giella v. Cassman Brown*** [1973] EA 358: showing a *prima facie* case; demonstrating *irreparable damage* not compensable in damages; proving the existence of a *balance of convenience* favouring the applicant.

Counsel for 2nd – 5th defendants submitted that the applicant had not established a *prima facie* case: because “*there is no doubt that the 2nd, 3rd, 4th and 5th defendants are the absolute, registered proprietors of plot No. Kwale/Galu Kinondo/1 having been registered on 12th August, 2008.*” These parties, counsel submitted, had “*purchased the land from 1st defendant for valuable consideration and without notice, having done all due diligence before purchase and registration.*” Consequently, counsel urged, “*the plaintiff...has no legal right to protect in respect of the [suit plot], interfere or seek to abrogate the legal, lawful and beneficial rights of the 2nd, 3rd, 4th and 5th defendants*”: and thus, “*the plaintiff clearly has no prima facie case with a probability of success against 2nd, 3rd, 4th and 5th defendants.*”

Counsel further urged that there was no irreparable injury the plaintiff could suffer which could not be recompensed in damages, “*without any interest in land as confirmed from the certificate of official search.*”

To this Court it is evident that the dispute herein turns on *facts too numerous, too complex and too controversial* to be resolved on the basis of mere *appearances* of perception. The plaintiff claims to have *title documents* for the suit land, based on normal legal transactions, and resting against a sequential history of dealings with the suit land. The 1st defendant contests all the facts presented by the plaintiff to explain the background and context of registered ownership of the suit land. The 2nd, 3rd, 4th and 5th defendants maintain that **they** are the registered owners, and that they have all *indicia of ownership* for the suit land. When the fundamental question of the *conferment of property rights* is the claim in land, the

Court has a duty to have it determined on the *merits*, on the basis of *primary evidence* formally adduced; and the Court is **not** inclined to resort to summary procedures.

In this instance, the main cause also pleads *fraud*, as an element in the claim of rights to the suit property. *Fraud*, in its very nature, is highly censurable as a mode of claim of rights; and its existence or non-existence is a matter of proof by primary evidence during the trial of the *main cause*.

Therefore, the Court cannot, at this stage, make Orders that *recognize final rights* to the suit property as inhering in any one of the parties: this question must await determination at the *trial of the suit*.

It follows that *preservatory Orders* are most appropriate at the interlocutory stage; and I will make the following Orders:

(1) The plaintiff shall exercise due diligence to secure the expeditious preparation of the pre-trial stage for the suit of 5th October, 2009.

(2)The case shall be listed for mention and trial directions within 21 days of the date hereof.

(3)In the meantime and pending the hearing and determination of the suit, I hereby grant a temporary injunction against the 2nd, 3rd, 4th, 5th and 6th defendants, jointly and severally by themselves, their workmen, their servants and/or agents or otherwise howsoever, parting with possession of the title deed for the parcel of land known as Kwale/Galu Kinondo/1, or re-surveying and/or sub-dividing the same, or leasing or charging or disposing of, or otherwise alienating any portion whatsoever of the said suit land.

(4)The costs of this application shall be in the cause.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 5th day of March, 2012.

**MAUREEN ODERO
JUDGE**