



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 155 OF 2012

GODFREY NJOGU MUNGAI.....PLAINTIFF

VERSUS

FRANCIS KAGIYA.....1ST DEFENDANT

JACKSON NGUGI KARANJA.....2ND DEFENDANT

JAMES NJENGA GACHERE.....3RD DEFENDANT

**(All sued in their personal capacities and as trustees of Mutura
Self Help Group)**

JEDIDAH MUGURE KUNGU.....4TH DEFENDANT

RULING

1) The plaintiff Mr. Godfrey Njogu Mungai has filed a Notice of Motion dated 22nd March 2012 under section 3A of the Civil Procedure Act, Order 40 Rules 1,2,3,4 & 5 order 37 rule 8 and order 51 rules 1,3 & 12 of the Civil Procedure rules section 30 and 143 of the Registered Lands Act and all other enabling provisions of law seeking the following orders;-

- i. That the defendants/respondents be and are hereby restrained by way of an injunction by themselves, servants, agents or in any other manner howsoever from entering or interfering with the plaintiff's/applicant's possession and enjoyment of L.R No Nachu/Ndacha/1513 and from disposing off, alienating or dealing in those parcels of land known as L.R No. Nachu/Ndacha/1513, 1514 and 1515 until this suit is heard and determined.
- ii. That an inhibition be and is hereby issued restraining dealings in L.R. No. Nachu/Ndacha/1513, 1514 and 1515 until the hearing and determination of this suit or further orders of this court.
- iii. That the defendants/respondents do pay the costs of this application.

The application is based on the following grounds.

- a) The plaintiff/applicant together with 1st, 2nd 3rd & 4th defendants/respondents and one Geoffrey

Karanja Ngereko bought L.R No. Nachu/Ndacha/562 from the previous owner George Kimani Wainaina vide a sale agreement dated 18th January 2005.

- b) The said sale agreement indicated clearly the respective share of each purchaser and the amount of purchase price paid by each.
 - c) Each party was shown its portion on the ground by the seller and took possession thereof
 - d) Pursuant to the said sale agreement the parties were registered as proprietors in common of the land in their respective shares.
 - e) However at partition the portion owned by the plaintiff/applicant and which he has been having possession of since January 2005 being portion A and measuring 0.57 Ha was wrongly registered in the name of the 1st 2nd & 3rd defendants/respondents while the plaintiff/applicant was wrongly registered as the proprietor of portion C measuring 0.40 Ha and in possession of the 4th defendant/respondent.
 - f) The 4th defendant/respondent was wrongly registered as the proprietor of portion B measuring 0.59 Ha which has been in the possession of the 1st 2nd & 3rd defendants/respondents whereas she had bought a portion C measuring 0.40 Ha.
 - g) There are massive errors in the land registers pertaining to L.R Nos Nachu/Ndacha/1513, 1514 and 1515 which ought to be rectified.
 - h) The 1st 2nd 3rd and 4th defendants/respondents have fraudulently conspired to affect the above mentioned wrongful entries to the detriment of the plaintiff/respondent.
 - i) While the plaintiff had clearly bought a portion of land measuring 0.57 Ha portion A No. 1513. The defendants/respondents are now purporting to illegally relegate him to a portion of land measuring 0.40 Ha portion C no. 1515.
 - j) The plaintiff/applicant relies on his parcel of land, being portion A for his livelihood and that of his family and has been doing so since 2005 and stand to suffer irreparable loss and damage if this application is not granted.
 - k) The defendant/respondent intend to interfere with the plaintiff/applicant's possession of his portion of land and will deal with the suit properties in such a manner as to defeat this suit unless stopped by this Honourable Court by way of an injunction.
 - l) The plaintiff /applicant has a strong case with a high probability of success.
 - m) The balance of convenience tilts in favour of the plaintiff applicant.
 - n) It will be in order if this application is granted as prayed.
- 2) The application is supported by the affidavit of Mr. Godfrey Njogu Mungai dated 22nd March 2012. The respondent filed two affidavits one sworn by George Kimani Wainaina dated 19th April 2012 and Jackson Ngugi Karanja (2nd defendant) dated 2nd May 2012. Mr. Karanja swore the affidavit on behalf of and with consent of the 1st and 3rd respondent. The 4th defendant appeared in person and told this Court that she was not opposing the application.

The affidavits filed by the parties are quite detailed and in this ruling I will substantially quote from them as they clearly lay out the dispute between the parties. The plaintiff/applicant avers as follows; that the parcel of land known as L.R. No Nachu/Ndacha/562 (the land) was initially registered in the name of George Kimani Wainaina (the seller). That vide a sale agreement vide 18th January, 2005 the initial seller sold the land to the following people and in the following portions and terms, Godfrey Njogu Mungai 1.5

acres Kshs 120,00/-, Mutura Self Help Group 1.5 acres Ksh 120,000/,-, Jedidah Mugure Kungu 1.0 acres kshs 80,000/= and Geoffrey Karanja Ngereko 0.5 acre Ksh 40,000/=-. That the purchasers paid the amounts in full. That thereafter entries were made of the proprietors in the register pertaining to the land at the land registry Kiambu on 17th July 2005 and being entry number 6 as follows, Godfrey Njogu Muhindi – 1.5 acres, Jedidah Mugure Kungu -1.0acre, Geoffrey Karanja Ngereko -0.5 acre, Francis Kagiya Karanja, Jackson Ngugi Karanja and James Njenga Gachere as trustees of Mutura self group 1.5 acres. That a title deed pertaining to the land was issued on 15th July, 2005 reflecting the said position. That all the purchasers continued using the respective portions of the land which they had taken possession of. That the title pertaining to the land was subsequently closed for partition of the land into the following portions L.R No Nachu/Ndacha 1513, 1514, 1515 and 1516. That it is within his knowledge that the surveyor in partitioning the land took into account the respective portions which were in possession of each purchaser. That according to the mutation form he had taken possession of that portion known as L.R No. Nachu/Ndacha/1513 marked as portion A in the mutation form measuring 0.57 Ha; Mutura Self Help took possession of 1514 or portion B measuring 0.59 Ha; Jedidah Mugure Kungu took possession of 1515 or portion C measuring 0.40 Ha while Geoffrey Karanja Ngereko took possession of 1516 or portion D measuring 0.20 Ha. That on 15th May 2008 Jackson Ngugi Karanja; Francis Kagiya Karanja and James Njenga Gachere being trustees of Mutura self help group were wrongly registered as the proprietors of L.R No. Nachu/Ndacha/1513 measuring 0.57 Ha which portion has been in his possession since January 2005 and which ought to have properly been registered in his name. That on the same day 15th May 2008 Jedidah Mugure Kungu was wrongly registered as the proprietor of L.R No. Nachu/Ndacha/1514 measuring 0.59 Ha which portion has been in possession of Mutura Self Help Group and which should have been registered in the group's name. That on the same dated 15th May, 2008 he was wrongfully registered as the proprietor of L.R. No. Nachu/Ndacha/1515 measuring 0.40 Ha and which has been in the possession of Jedidah Mugure Kungu since January, 2005 and which should have been properly registered in her name. That the above mentioned errors culminated in attempting to dispossess him off his rightful portion of land which he has been using since January, 2005 and which measure 0.57 Ha and relegating him to a parcel of land measuring 0.40 Ha. That the said actions were deliberate and were motivated by bad faith on the part of the defendant/respondents whose sole purpose is to dispossess him of his parcel of land through the back door. That he knows that Mutura Self Help Group through its trustees and members intend to wrongfully evict him from his rightful portion of land on the ground and excuse that they are now the registered owners thereof and will do so unless stopped by this honourable court by way of an injunction. That he relies on L.R. No. Nachu/Ndacha/1513 for his livelihood and that of his entire family and he stand to suffer substantial loss and damage if the injunction herein is not granted.

3) Mr. Goerge Kimani Wainaina the seller of the suit property averred as follows; On 18th January, 2005, the parties and one Goeffrey Karanja Ngereko jointly on one part and himself on the second part got into a sale agreement for sale of all that parcel of land known as Nachu/Nacha 562 of which the purchasers intended to be proprietors in common. The purchaser only identified their portions of interest in terms of acreage indicated in the sale agreement. As at the same time of signing the agreement and until 15th November, 2005 there was no sketch map showing the actual intended subdivision of the said land. As at the time of signing the sale agreement, he had not shown any of the said purchasers a particular specific area for occupation or use within the larger parcel of land which a particular purchaser was buying as the same had not been surveyed in terms of the acreage bought by each of them. He only showed them the whole parcel of land for them to use in common. Mutura Self Help Group and Godfrey Njogu Mungai (plaintiff) bought equal acreage of 1.5 acres but no specific area on the large parcel of land was designated to either of them or the other remaining purchaser. At various times after the sale, he signed applications for consent to subdivide and transfer the said whole parcel to the purchasers jointly according to the acreage bought by each purchaser. At the land control board meeting, no specific area on the larger parcel of land was designated for use or occupation to either Godfrey Njogu Mungai or Mutura Self Help Group who had bought equal acreage. He also later signed a transfer form in favour of the said purchasers as proprietors in common indicating the precise acreage bought by each of them to facilitate registration as such thereof which transfer also never disclosed and/or designaged a particular portion to either Godfrey Njogu Mungai or Mutura Self Help group. He stopped dealing with the said purchasers after he signed the transfer hereinabove mentioned thus conveying the land to them and from that them to date he do not know who took what portion as he was not involved in the subsequent

application and issuance of individual titles to the said purchasers.

4) Mr. Jackson Ngugi Karanja avered as follows; That vide a Sale Agreement dated 18th January, 2005, one George Kimani Wainaina sold all that parcel of land known as Nachu/Ndachu/562 to Mutura Self Help Group (represented by the 1st, 2nd, and 3rd defendant), Godfrey Njogu Mungai, Jedidah Mugure Kungu and Geofrey Karanja Ngereko to hold and own as proprietors in common in the following shares, 1.5 acres, 1.5 acres, 1.0 acres and 0.5 acres respectively. The said agreement, save from indicating the acreage each joint purchaser was taking up and the price thereof, never identified the shares thereof as purported by the plaintiff/application in terms of portions A,B,C and D. Subsequently, the vendor and the purchaser executed a transfer on 18th January, 2005 having applied for and obtained consent to transfer from the Land Control Board, Kikuyu. The transfer was registered and a title deed issued on 7th July, 2005 in the joint names of the aforesaid purchaser. That they as joint proprietors in common, applied for consent to partition the parcel of land being Nachu/Ndachu/562. In the application for consent to partition into four (4) portions aforesaid, which the plaintiff duly signed for, the shares were as follows, portion A-1.5acre, portion B-1.5acre, portion C-0.5acre and portion D-1.5acre. The consent to partition was granted as prayed and is dated 5th January 2006. Neither in the said application for consent to partition nor in the consent to partition was there indicated what particular portions between A and D, which both were for 1.5 acres would go to either the plaintiff or to Mutura Self help Group who bought equal shares of 1.5 acres each. The plaintiff's/applicant's position that he was given portion A by the vendor is thus untrue as even the Sale Agreement aforesaid never classified and/or identified the portions as A,B,C and D, that in any event at the point of partitioning the vendor had ceased having any interest on the Land as a title had been issued to the purchasers already jointly on 7th July 2005. Following the consent to partition, the land was surveyed and mutations form issued which all the joint proprietor duly signed for. The said mutation and field diagrams show the petitioned parcels as follows, portion A-0.57 ha (1.5acre) -1513, portion B-0.59 ha(1.5 acre)1514, portion C-0.40ha(1 acre) -1515, portion D-0.20 ha (0.5 acre)-1516 and Road -0.06 ha. That in paragraph (d) of the mutation form describing the persons interested, it was not specified of who between the plaintiff or Mutura Self Group would take portion A(1513) or portion B(1514) which were supposedly to be of equal acreage but one is slightly bigger. On 15th May, 2005 the title to the land Nachu/Ndacha/562 was closed for portioning of new numbers 1513-1516. On 15th May 2008, the parcel number Nachu/Ndacha 1513 was duly registered in the name of 1st 2nd and 3rd defendants as trustees of Mutura Self help Group. On 5th January 2012, almost four(4) years later, the title deed was finally issued to Mutura Self help Group. Mutura Self Help Group currently is the registered proprietor of Nachu/Ndacha/1513 with the 1st 2nd and 3rd defendants registered as proprietors and holding as trustees. He does not know why the Registrar of lands Kiambu, registered the plaintiff as proprietor of portion Number 1515 and registered the 4th defendant as proprietor of portion number 1514 and Mutura Self Group had nothing to do with it. That on realizing this anomaly, the District Surveyor, Kiambu duly wrote to the District Land Registrar on 7th July, 2011 asking him to amend his records so that the parties who had been allocated parcels whose acreages do not conform with their shareholding in the land get their rightful parcels and this only affected the plaintiff and the 4th defendant and failure to amend the same by the Land Registrar cannot be blamed on the parties herein as the mistake was on his part. The plaintiff is well aware of this letter but chose not to disclose these facts and is guilty of non-disclosure of material facts when obtaining the interim injunction. That Mutura self help Group was rightfully registered as proprietor of portion number 1513 took possession and have been cultivating on the same since 2008. That before the portioning, the joint proprietors were cultivating the larger parcel of land Nachu/Ndacha/562 communally and no single proprietor had been given or granted a particular entitlement by the vendor and/or by the joint proprietors to a particular or specific portion or area on the large parcel of land contrary to what is falsely alleged by the plaintiff/applicant. None of the joint proprietors has put up any buildings on their portions to date but they all cultivate the same. That the initial survey map drawn by District Surveyor Kiambu, presented for approval by the District Surveyor by the joint purchasers in the year 2005 and to which the plaintiff seems to be alluding to when he claims that parties had identified their shares in terms of plots numbers A, B, C and D is very different from the field diagram and observations on site JNK 6 finally adopted on issuance of the mutation form as far as the numbers A,B,C and D are concerned. In JNK10 aforesaid, the plot to which the plaintiff lays claim against is marked as B (1.5 acres) and not as A . In JNK 10 Plot A is for (0.5 acres), Plot C for 1.0 acres

and plot D for 1.5 acres. The initial map JNK 10 does not indicate who between the plaintiff and Mutura Self Group was allocated either plot B or Plot D therein each measuring 1.5 acres. The two portions measuring 1.5 acres are differently marked in different letters on KML5 and JNK6. The plaintiff/applicant has come to this court with unclean hands and is thus not entitled to the order of temporary injunction sought. The plaintiff's entitlement is for 1.5 acres in Nacha/Ndachu/1514 currently wrongly registered in the name of the 4th defendant and as such the plaintiff has no rightful claim against the 1st, 2nd and 3rd defendant/respondents. The plaintiff/applicant has not demonstrated to this Court any prima facie evidence that he is the proprietor of Nachu/Ndacha/1513 in light of the contrary evidence exhibited herein by the 1st, 2nd and 3rd defendants/respondents being the title deed and title extract thereof showing the entries on the register (that is JNK7 and JNK8 respectively) and as provided for in sections 27, 32(2), 37(1) and 37(2) of the registered land act cap 300 laws of Kenya. The 1st, 2nd and 3rd defendants/respondents have rights as proprietors under sections 28 of Registered land acts as read together with section 106 A of the Registered Land Act. The plaintiff's suit is fatally defective and a non-starter for failure to properly plead particulars of fraud as the registrations herein were carried out by the District Registrar of Land, Kiambu against which the orders in the suit are directed and as such particulars of fraud, if any should and ought to have been pleaded against the registrar of lands, Kiambu and District Surveyor, Kiambu who are not parties herein. That the non-joinder of the Registrar of lands herein and the Honourable Attorney General against whom orders are sought in the plaint renders this suit fatally defective as even a late joinder of the said parties in the present already instituted suit would be unlawful for failure to comply with section 13A of the Government proceedings Act Cap 40 laws of Kenya. The plaintiff did not give notice of the suit to all members of Mutura Self Help Group which is not a legal entity as provided in law and as such the plaintiff's suit herein is defective as against the 1st, 2nd and 3rd defendants/respondents.

5) Counsels made oral submissions in Court Mr. Njogu for the applicant argued that land is a delicate matter and there is need to preserve the suit premises, that the plaintiff on the facts deponed has a prima facie case with a high probability of success and is likely to suffer irreparable damages as he is on the ground and the balance of convenience tilts in his favour. He argued further that at the time of partitioning that is when the mischief was done and their intention was to have the register rectified and that before that happens the injunctive order should issue as the land is in danger of being disposed off. Mr. Njagi for the respondent in opposing the application submitted that there is no prima facie case set out by the plaintiff to warrant the injunction which is an equitable remedy. That the plaintiff's claim is premised on fraud against the defendants yet the authority who registered the land is the Government through the Land Registrar. That the fraud cannot be lodged against the defendants but the Land Registrar and the only person who can cancel the title is the Registrar of Lands who has not been enjoined nor the Attorney General. He argued further that the balance of convenience tilts in favour of the 1st, 2nd and 3rd defendants who are the registered proprietors in their capacity of trustees of Mutura Self Help, in line with the provisions of section 27, 32 (2), 37(1) and (2) of the Registered Land Act Cap 300. On irreparable damage he argued that the applicant has failed to show how he will suffer as he bought the same acreage as the 1st and 3rd defendants.

6) I have carefully read and considered the affidavits filed by the parties together with their annexures. The facts as deponed in the affidavits have been laid out in this ruling in detail as deponed by the parties. Having considered them I find as follows, the parties are in agreement that they bought the suit land as joint purchasers. The applicant claims that at the time the agreement was done the land had been partitioned into portions, this is denied by the 1st, 2nd and 3rd defendants. The said defendants got the original seller to depone facts on what happened during the sale. From Mr. George Kimani's affidavits it is clear that at the time he sold the property the plaintiff and the respondents they purchased the property as proprietors in common and no portions had been identified. These facts were not challenged by the plaintiff. I therefore do agree with the 1st, 2nd and 3rd respondents that the plaintiff is guilty of non-disclosure of material facts in the matter. It is apparent that the parties know their acreage and that an anomaly happened as explained by the respondent in paragraph 18 of their replying affidavit. I do agree with the respondent's counsel that the applicant cannot blame the respondents for a mistake done by the land registrar. In his affidavit the applicant has failed to show the fraud that he particularizes in his plaint at paragraph 16. It is apparent that the Land Registrar should rectify the mistake or errors that were done

when the titles were being issued. I note that the Registrar of Land Kiambu has not been joined as a party to this suit. A letter was done by the District surveyor to the District Land Registrar Kiambu on the 7/7/2011 stating the sub-divisions that had been done and stating further that the only problem was the registration where the parties were allocated parcels whose acreages do not conform with their shareholding in the land. From the agreement the applicant and the 1st, 2nd and 3rd defendants were to get the same acreage of 1.5acres. It is apparent that the portion of land the applicant claims to occupy is the one that was given to the 1st, 2nd and 3rd respondent. Fraud is alleged by the applicant against the defendants but there is no evidence as of now as this can only be proved when the matter is heard and determined. The 1st, 2nd and 3rd respondents have a title JNK 7 that show that they own Nachu/Ndacha/1513. The applicant should indeed follow up the issue of his registration with the Land Registrar on the issue of acreage as he has the backing of the land surveyor. I note that land is a sensitive issue and the issue of acreage of the portions and title should be sorted out. To preserve the suit premises and in the interest of justice even though the 1st 2nd and 3rd respondents have a title I will grant prayers 1 and 2 of the application dated 22nd March 2012. I however grant the orders on condition that the applicant gives an undertaking on damages within 30days from the date of this ruling. The parties should endeavor to sort out the issue of acreage with the Land Registrar as soon as possible. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 22nd day of June 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the Applicant

..... For the 1st, 2nd & 3rd Respondents

..... For 4th Respondent

..... Court Clerk