REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CIVIL CASE 180 & 220 OF 2011

1. DAVID PETERSON KIENGO…..……..……..PLAINTIFF

2. NKIIRI VICTOR MUCHUBU…..…….……..PLAINTIFF

3. KENAKENA INVESTMENTS LTD…..……..PLAINTIFF

VERSUS

KARIUKI THUO …….…….....DEFENDANT

(CONSOLIDATED)

MARY NJERI THUO……PLAINTIFF

VERSUS

FOUTAIN SAVINGS & CREDIT……..……..DEFENDANT

RULING

1. The ultimate task of law, says Critical Legal Philosopher and theorist Professor Louis Wolcher, is to apportion human suffering.[1] When lawyers and judges forget this, Prof. Wolcher warns us, they merely obscure and mask the infliction or toleration of human suffering which the law legitimizes. The two applications before the Court sound quite like the epitomization of this seemingly pessimistic view of law's ultimate task: to apportion human suffering rather than alleviate it. There are no winners in this story; only protagonists some of whom will suffer less than others by the time the last chapter of this story is written. Here is why.

2. There are two cross-applications before the Court: One is dated 25/07/2011. It is brought by the Plaintiffs in HCCC No. 180 of 2011. The three Plaintiffs in HCCC No. 180 of 2011 are David Peterson Kiengo; Nkiiri Victor Michubu; and KenaKena Investments Ltd. I will refer to them here as "David, Nkiiri & Kenakena." In the main, the application dated 25/07/2011 seeks injunctive relief against Kariuki Thuo – who is one of the Plaintiffs in HCCC No. 220 of 2011 respecting three parcels of land to wit Kajiado/Kitengela/2978; Kajiado/Kitengela/2972; and Kajiado/Kitengela/2974 (together, "Suit Properties 1").

3. The other application is dated 25/08/2011. It is a Notice of Motion Application brought by the Plaintiffs in HCCC No. 220 of 2011 against Fountain Savings and Credit Cooperative Society Ltd. ("*Fountain*"). In addition to Kariuki Thuo, the other two Plaintiffs in HCCC No. 220 of 2011 are Mary Njeri Thuo and Paul Kihoro Thuo. They are all suing in their capacity as the administrators of the estate of Stephen Thuo Kihoro ("Stephen"). I will refer to them as the "*Thuos*." In the main, also, the

application dated 25/08/2011 seeks injunctive relief against Fountain respecting the parcel known as Kajiado/Kitengela/2971(”Suit Property 2”)

4. In a short while, the relationship between Fountain and the other two parties will become clear. For now, suffice it to say that when the Application dated 25/07/2011 came before me on 10/02/2011, with the consent or, at least acquiescence of all the parties, I directed that since the subject matter and the legal issues in the two cases were identical, in order to preserve judicial economy and avoid potentially contradictory orders, the two files should be consolidated with HCCC No. 180 of 2011 being the lead file. I also directed that the two applications be heard contemporaneously.

5. The parties filed written submissions, lists of authorities and also appeared before me on 10/02/2011 to highlight their submissions. I am supremely grateful to the two attorneys – Mr. Muthuva for the Plaintiffs in HCCC No. 220 of 2011 and Mr. Kaikai, the attorney for the Plaintiffs in HCCC No. 180 of 2011. Both attorneys were sublimely professional in their conduct of this case.

6. This case is deceptively simple. Most of the facts are not in dispute. I will briefly rehash the facts and state the issues in contention. It is undisputed that sometime in 2008, Stephen owned outright the parcels of land known as Kajiado/Kitengela/2978;Kajiado/Kitengela/2972;and Kajiado/Kitengela/2974 (together,“*Suit Properties 1*”). Stephen also owned the parcel known as Kajiado/Kitengela/2971 *(“Suit Property 2*”). There are titles to the parcels of land evidencing this. Stephen, however, passed away on 21/08/1999. By the time of his death, he still was the legal owner of the four parcels. For avoidance of doubt, I should clarify that Suit Properties 1 are the subject of HCCC No. 180 of 2011 while Suit Property 2 is the subject of HCCC No. 220 of 2011.

7. Upon the death of Stephen, three of his heirs to wit, Mary Njeri (“*Mary*”), Paul Kihoro Thuo (“*Paul”)* and James Kariuki Thuo (“*James*”)(*together, the “Thuos”),* jointly successfully applied for Letters of Administration Intestate to the estate of Stephen. These were duly issued on 11/07/2001 and confirmed on 22/05/2002. Despite the confirmation of the grant of letters of administration as early as 2002, it would appear that the Thuos did not attempt to transmit the parcels owned by Stephen to themselves or other beneficiaries before 2011.

8. In the meanwhile, much mischief occurred. It would appear that sometime on 23/10/2007, a person by the name Steve Winston Njendu (“*Njendu*”) purportedly entered into an Agreement for Sale with Stephen for the purchase of the Suit Properties 1. The Green Cards to the titles to the Suit Properties 1 show that Njendu was registered as the owner and issued with a titled deed on 21/10/2008 ostensibly pursuant to the Agreement for Sale. It was Njendu who later sold the Suit Properties to David Peterson Kiengo; Nkiiri Victor Michuru; and Kenakena Investments Ltd on or around 16/10/2008.

9. At the same time, around 11/01/2008, the self-same Njendu was similarly able to enter into a “*Sale Agreement*” with Stephen for Suit Property 2 and subsequently had a transfer effected and a title deed issued in his name. The Green Card to Suit Property 2 shows as much.

10.It is important to recall that by the time Njendu succeeded in effecting the transfers of both Suit Properties 1 and Suit Property 2 to himself, Stephen, the purported vendor who was transferring the property to him was long dead. In fact, he had been dead for close to ten years. The Green Cards respecting all the properties unequivocally show that the “transfers” were made between Njendu and Stephen and not by way of transmission as should have happened if the transfers were done by heirs to the estate of Stephen. At this point, therefore, it is possible to say, with little fear of contradiction that Njendu transferred the properties to himself fraudulently. This would have been an easy case to resolve if Njendu’s apparent perfidy had ended there. Only it did not.

11.Armed with the *bona fide* titles issued by the Lands Registry, Njendu entered into subsequent agreements for sale of the properties with David Peterson Kiengo; Nkiiri Victor Michuru; and Kenakena Investments Ltd on the one hand; and Fountain on the other. The case is made messier by the fact that each of the four properties has subsequently been subdivided into myriad of smaller parcels each of which now has its own title. Njendu has since vanished into thin air and cannot be traced even after due report to

the Police and Criminal Investigations Department, he cannot be found.

12.It is important to start my analysis by stating what both these cases are not about. They are not about double allocation or allotment as Mr. Mathuva correctly pointed out. These are not cases where a government agency has mistakenly issued two titles to two different individuals over the same parcel of land. Instead, these are cases where each of the properties had a single root title. That root title was registered in the name of Stephen. However, each property was then fraudulently transferred to Njendu, who then subsequently transferred to third parties. Although the Thuos are reluctant to explicitly say it, it would appear that neither the Plaintiffs in HCCC No. 180 of 2011 nor Fountain, the Defendant in HCCC No. 220 of 2011 were, in any way, privy to the fraud that was perpetrated by Njendu.

13.Where, then, does this leave us? There is no elegant way to resolve this issue. There is only a pragmatic way of doing so. It is in keeping with the objectives of the Registered Lands Act, and, indeed, the entire system of registration of land in Kenya. The Registered Lands Act is based on the Torrens' System. Under this system, indefeasibility of title is the basis for land registration. The State maintains a central register of land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interests in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the State guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealing with the land in question before acquiring an interest. That this is the essence of the Torrens System was stated as early back as 1891 in the case of *Gibbs v. Messer* (1891) AC 254: .

The main object of the Act, and the legislative scheme for the attainment of that object, appear to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author\'s title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed or transfer of mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author\'s title.

14.Practically, the principle of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu's fraud, their titles will be secure and guaranteed by the State. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring an action against the State for recovery of damages but not for possession or ownership of the property.

15.In my view, this statement of the law suggests the *prima facie* resolution of the case: In as long as, at this stage, it cannot be demonstrated otherwise, the assumption is that David Peterson Kiengo; Nkiiri Victor Michuru; and Kenakena Investments Ltd on the one hand; and Fountain on the other are *bona fide* purchasers for value without notice. They had no obligation to go beyond the register to investigate Njendu's title and satisfy themselves of its validity. They did their bit.

16.It is important at this juncture to recall the procedural postures of the cases. The Application dated 25/07/2011 is one for interlocutory injunction pending the hearing and determination of the main suit. The legal principles for granting interlocutory injunctions are now well settled in Kenya. They are set out in the celebrated case of *Giella vs Cassman Brown* (1973) EA 358 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.

17.Hence, a party seeking the drastic remedy of an interlocutory injunction bears the burden of

demonstrating that:

a. that they are likely to prevail on the merits;

b. they will suffer imminent irreparable harm if the injunction is not granted; and

c. The harm they are likely to suffer absent the injunction outweighs the harm the injunction would cause to the adverse party.

18.It follows from the provisional analysis provided above that the Applicants in the Notice of Motion dated 25/07/2011 can, in my view, establish *prima facie* case with a probability of success as against the Thuos for the ownership of the respective suit properties. Since the issue is land, and it is hardly contested that these four parties are the ones in possession of the properties and have even gone ahead to subdivide the properties, it also follows that they are the ones likely to suffer irreparable losses if injunctions are not issued to preserve the *status quo*.

19.In my view, therefore, all the conditions required by our case law on the grant of interlocutory injunctions are met respecting the Notice of Motion dated 25/07/2011. I hereby grant prayer (c) in the Application dated 25/07/2011.

20.Conversely, the Applicants in the Notice of Motion dated 24/08/2011 have for the same reasons failed to show that they are likely to prevail on the merits against Fountain. Neither can they demonstrate irreparable harm if an injunction is not granted. The Application dated 24/08/2011 being a mirror image of that dated 25/07/2011, I am constrained to dismiss it.

21.To recap, the Notice of Motion dated 25/07/2011 is allowed in terms of prayer (c) thereof while the Notice of Motion dated 24/08/2011 is dismissed.

22.Yet, I must return where I began. This is not an elegant solution. It is a hard result for the Thuos. They did nothing wrong. They are merely victims of a fraudster; in fact, they are vicarious victims to the fraudster because they never saw nor dealt with him. It is the other parties to the cases who were directly "*victimized.*" Yet, through the operation of the law, these other parties have an upper hand in retaining possession and ownership of the properties in question. For me, it is not enough that I say that the "*law made me do it*." I believe that the results here are in keeping with the overall policy objectives of the Land Registration Act, whose stability, I also believe, maximizes the welfare of the polity. That does not make the result here any easier for the Thuos. The only saving grace is that they have a course of action against the State for recovery of damages if, eventually, the final resolution of this case mirrors that of the two Applications under consideration.

DATED and **SIGNED** this **5TH** day of **JULY 2012**.

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J.M. NGUGI
JUDGE

DELIVERED and **SIGNED** in open court at **MACHAKOS** this **27TH** day of **JULY, 2012.**

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GEORGE DULU

JUDGE