



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Civil Suit 90 of 2011

HANNAH
WANJIRU.....1ST
PLAINTIFF

HANNAH
NJOKI.....2ND
PLAINTIFF

**(Suing as Secretary and Treasurer Respectively of LIMURU DIVISION
WOMEN ASSOCIATION)**

VERSUS

JOHN KURIA
KIMANI.....1ST
DEFENDANT

NAOMI WANJIRU
KIARIE.....2ND DEFENDANT

LUCY WANJIRU
NGANG'A.....3RD DEFENDANT

JACQUILINE NDUTA
SIMBI.....4TH DEFENDANT

RULING

The Plaintiffs through a Notice of Motion dated 28th July 2011 and filed on 1st August 2011 are seeking orders for a temporary injunction restraining the 1st Defendant from selling, transferring, disposing, alienating, wasting or in any other way dealing with plot No. Limuru Township/336 (hereinafter referred to as the suit property), pending the hearing and determination of this application and suit. Further, that the said temporary injunction be registered against the said plot.

The grounds for the application are that the Plaintiffs' society was allocated land reference number Limuru Township/336 by the Government in 1989, and that the 2nd, 3rd and 4th Defendants fraudulently issued a power of attorney to a 3rd party who thereafter fraudulently transferred the said plot to the 1st Defendant. Further, that the Plaintiffs have genuine fears that the 1st Defendant might sell, transfer, alienate, dispose or deal with the said plot in a manner as to try to defeat the orders sought herein.

The Plaintiff's case is detailed in a supporting affidavit sworn on 3rd March 2011, and in a supplementary affidavit sworn on 22nd March 2011 by the 1st Plaintiff. The Plaintiffs stated that a draft lease was issued in the names of 2nd, 3rd and 4th Defendants as trustees of the Plaintiff's society, and they contend that the 2nd, 3rd and 4th Defendants have never been officials or trustees of the society, and any registration to that effect was fraudulently done with the aim of obtaining the suit property. The Plaintiffs annexed a bundle of documents including minutes and banking slips to show that they are the *bona fide* officials of the society, and stated that the chairlady of the society, Esther Nyakio Kairu, is now old and sickly, which was the reason this matter was brought to court by its secretary and the treasurer.

The Plaintiffs further averred that the said 2nd, 3rd and 4th Defendants allegedly registered the society in 2008 and a certificate was issued to them, whereas the society had been registered way back in 1987. The Plaintiffs have annexed copies of two certificates of registration of the Plaintiff Society, one issued on 4th December 1987, and the other on 3rd March 2008; a copy of the allotment letter with respect to the suit property; a copy of the draft lease dated 5/12/2008, and a certificate of official search dated 26/10/10 showing that the suit property is registered in the 1st Defendants name.

The 1st Defendant's response is in a replying affidavit sworn on 14th March 2011, wherein he stated that he is the registered owner of the suit property, and annexed a copy of a Certificate of Lease with respect to the suit property issued in his name on 8th June 2009. Further, that he lawfully obtained the registration as proprietor after purchasing the same from the 2nd, 3rd and 4th Defendant who were the *bona fide* trustees and members of the Plaintiff's society.

The 1st Defendant also stated that the members of the Plaintiff's society received the purchase money and were each given dividends from the sale. The 1st Defendant contended that he had no knowledge of any fraud and was a *bona fide* purchaser without any notice of any irregular transactions relating to the suit property. He annexed copies of the minutes of the Plaintiff Society and power of attorney authorizing the sale of the suit property to him, a copy of the 2nd, 3rd and 4th Defendants' lease and copies of payment cheques.

The parties at the hearing of the application on 28th May 2012 relied on the pleadings and submissions filed, which I have read and carefully considered. The main issue is whether the Plaintiffs have established a *prima facie* case on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**. The Plaintiffs have produced in evidence a letter of allotment issued to the Plaintiff Society, and a draft lease to the 2nd, 3rd and 4th Defendants as trustees of the Plaintiff Society. The 1st Defendant on the other hand has produced evidence of title and proprietorship, as a result of a sale of the suit property to him by the 2nd, 3rd and 4th Defendants. The onus is upon the Plaintiffs to show they are or were the *bona fide* officials of the Plaintiff Society at the material times. Section 19 of the Societies Act provides that the Constitution or Rules of a Society shall include the matters specified in the Schedule to the Act, and which include the titles of officers and trustees, their term of office and method of election, appointment or dismissal. The Registrar of Societies must also be notified of any changes in office bearers under section 17. No evidence of such a Constitution or rules have been provided by the Plaintiffs, nor of their election and appointment pursuant thereof.

In addition, the minutes and banking slips produced in evidence by the Plaintiffs as proof of such appointment are from events that took place between 1988 and 1990, and not at the time of the alleged transfer of the suit property to the 1st Defendant in 2008. The 1st Defendant has also produced conflicting minutes showing the 2nd, 3rd and 4th Defendants to be the officials of the Plaintiff's Society at the time of

the alleged transfer. Lastly, the issue as to which of the two different registration certificates of the Plaintiff's Society is the valid one can only be decided after this Court has had the benefit of further evidence during full trial. For these reasons I find that the Plaintiffs have not established a *prima facie* case.

The application dated 28th July 2011 is therefore denied, and the costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____27th____ day of ____July____, 2012.

P. NYAMWEYA
JUDGE