



No. 300

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL CASE NO. 257 OF 2010

TERESA KERUBO
OMBEGO.....APPLICANT

-VERSUS-

JOASH MOSOMI ATANDI1st
RESPONDENT

THE HON. ATTORNEY GENERAL2nd
RESPONDENT

RULING

Teresa Kerubo Ombego, hereinafter “*the applicant*”, filed this suit by way of originating summons, hereinafter “*O.S*” seeking orders in terms:-

- “1. That a Declaration that the sale, subdivision and transfer of land parcel No. Matutu Settlement Scheme/436 without the consent of the applicant is null and void.***

- 2. That an order cancelling land parcel No. Matutu Settlement Scheme/900 and 910 and restoring the aforesaid subdivision to Matutu Settlement Scheme/436.***

- 3. That an order restraining the 1st respondent his agents, servants, and/or employees from interfering with or dealing with land parcel no. Matutu Settlement Scheme/436.***

- 4. That an order directing the Chief Land Registrar and the District Land Registrar – Nyamira to***

cancel the entries made on land parcel No. Matutu Settlement/Scheme/436 and a further cancelling the title issued to the said Joash Mosomi Atandi as a result of the subdivision.

5. That an order directing the District Land Registrar – Nyamira to restore the name of the applicant on land parcel No. Matutu Settlement Scheme/436.

6. That costs of this application be provided for”.

The above reliefs were sought on the grounds:-

“a. That the applicant is entitled to a full share of the beneficial interest to the suit property.

b. That the District Land Registrar – Nyamira, erroneously and illegally removed a caution registered over the said parcel and colluded with the 1st respondent to transfer part of the said parcel of land.

c. That no consent of the land control board was obtained to enable the subdivision and registration of the alleged transfer.

d. That no sale or sale agreement has ever been made to enable the 1st defendant obtain registration.

e. That the applicant stands to suffer great loss and damage if the orders sought are not granted.

f. That this application has been made so timely and without any unreasonable delay”.

In support of the O.S and where pertinent the applicant deponed that she was the original owner of a parcel of land known as **Matutu Settlement Scheme/436** hereinafter **436**, which she single handedly bought and put up a matrimonial home. **436** was charged as a security for a loan and the encumbrance so registered was never cancelled. However on 6th August, 2010 Police officers from Keroka Police Station accompanied by **Joash Mosomi Atandi**, hereinafter the **“1st respondent”** came to **436** and subdivided it having chased away her workers. **436** was subdivided into **Matutu Settlement Schme/900** hereinafter **“900”** and **Matutu Settlement Scheme/901** hereinafter **“901”**. The latter parcel of land was registered in the name of the 1st respondent and **“900”** was left in her name. In the process of the subdivision the respondent destroyed her trees, bananas, maize and beans. Unless therefore the 1st respondent was restrained by an order of injunction, the applicant would continue to suffer great loss and damage. As far as she was concerned there was no consent from the land control board that would have enabled the Attorney General, hereinafter **“the 2nd respondent”** through the District Land Registrar, Nyamira to effect the subdivision and transfer in favour of the 1st respondent suit premises unless there was fraud and collusion between them.

Contemporaneously with the filing of the O.S, the applicant took out a chamber summons application dated even date praying in the main:-

“3. That this honourable court be pleased to issue an order of injunction restraining the 1st respondent by his agents, servants, employees, representatives and/or anybody acting under him from

interfering with, entering, cultivating, dealing with and/or disturbing the applicant's peaceful possession of land parcel known as Matutu Settlement Scheme/436, 900 and 901 pending the hearing and determination of this suit.

4. That this honourable court be pleased to issue an order directing the District Land Registrar – Nyamira to issue the applicant with official search of plot No. Matutu Settlement Scheme/436, 900 and 901.

5. That costs be provided for”.

This application is the subject of this ruling. The first two prayers in application not reproduced above were compromised in terms of the consent order recorded herein on 19th October, 2010.

The application was lodged on the grounds that the 1st respondent with the assistance of police officers from Keroka police Station had invaded **436**, surveyed and fenced it. In the process they had destroyed the applicant's trees, bananas, maize and beans. **436** was her matrimonial home and the respondents had colluded to dispossess her of the same. The affidavit in support of the application sworn by the applicant was a complete replica of the affidavit sworn in support of the O.S and requires no repeating here.

On serving the O.S and the application on the respondent, the 1st respondent was first off the blocks. Through **Messrs Nyachiro Nyagaka & Co. Advocates**, he entered appearance and filed a replying affidavit. That affidavit was to the effect that yes, the applicant was the owner of **436**. However sometimes in July, 2009 she and her husband, **Mr. Zephaniah M. Nyangwara** offered to sell to him a portion of 436 measuring 3 acres at a consideration of Kshs. 2,000,000/=. The agreement was entered into and executed between the 1st respondent and the said **Nyangwara** who also received the consideration aforesaid. The applicant though was to execute the relevant land transfer documents. Prior to the execution of the sale agreement, the applicant undertook to subdivide **436**, obtain the consent to the subdivision and transfer. This she did and **901** being the resultant subdivision of **436** was transferred and registered in his name on or about 3rd February, 2010 after he had paid in full the consideration aforesaid. Though vacant possession was given to him on execution of the sale agreement, he only took actual possession after the transfer. However since then the applicant and her husband had variously attempted to frustrate his occupation and use of **901** by using goons to evict him, demolishing the fence and pulling down structures thereon and sending him SMS threatening him with dire consequences if he took possession thereof. In the circumstances, the applicant had no cause of action against him and the injunction sought was untenable. In support of his case, the 1st respondent annexed to his replying affidavit the mutation form allegedly executed by the applicant, application for consent of the land control board allegedly made by the applicant, the consent by the land control board, the sale agreement between **Mr. Zephania M. Nyangwara** and the 1st respondent, Memorandum of acknowledgement of payments, transfer form, personal identification number certificates (PIN) for both the applicant and the 1st respondent and the title deed.

On 19th October, 2010, when the application was slated for hearing inter partes, both the applicant and 1st respondent sought leave to file further affidavits and also to canvass the application by way of written submissions. Both requests were granted. In her further affidavit in reply, the applicant deposed that she had never been married to **Mr. Nyangwara** now or in the past. Otherwise she was only a witness to the marriage by the said **Nyangwara** and one, **Eunice N. Waweru**. She also assisted **Mr. Nyangwara** to purchase a piece of land adjacent to hers aforesaid. She denied having sold **436** to the 1st respondent through **Nyangwara** nor had she donated Power of Attorney to the said **Nyangwara**. The documents attached to the 1st respondent's replying affidavits were forgeries. That **Mr. Nyangwara** and 1st respondent conspired to forge the documents in support of the alleged sale of a portion of **436** to the 1st respondent and that she had reported the illegal sale of her property to the director of C.I.D who had instructed the PCIO Nyanza to take action. In support of the averments, the applicant annexed appropriate

documents.

The 1st respondent's further affidavit was to counter what the applicant had deponed to in her further affidavit. He maintained that the applicant and **Nyangwara** were a couple, had issues and introduced themselves to him as such. That in a bid to perpetrate her falsehood the applicant was annexing documents purely made to perpetrate falsehoods. That as a result of malicious destruction of his property, **Mr. Nyangwara** had been charged in **Keroka SRMC Cr. Case No. 1263 of 2010**.

I have read and carefully considered the written submissions filed by the respective parties to this application as well as the authorities cited. However, the 2nd respondent has to date not entered appearance nor filed any papers in opposition to the O.S nor to this application.

It requires no gain saying that the principles upon which a court grants a temporary injunction are well settled. Indeed they were so settled thirty seven (37) plus years ago in the celebrated case of **Giella –vs- Cassman Brown & co. Ltd (1973) E. A 358**.

Those principles are:

- i. To grant or not to grant an injunction is an exercise in judicial discretion.**
- ii. An applicant must show a prima facie case with a probability of success.**
- iii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.**
- iv. When the court is in doubt, it will decide the application on the balance of convenience.**

These principles have withstood the test of time. Attempts to add to or subtract from them have been met with resistance, recrimination and abhorrence.

When considering an application for an injunction the court must be wary as not to make definitive findings at the interlocutory stage on issues which are best left for full trial. The case for the applicant from the O.S, the application, supporting affidavit and indeed in her own written submissions is that her **436** was fraudulently subdivided and a portion thereof measuring 1.20 Ha transferred and registered in the name of the 1st respondents. That portion is known as **901**. The remaining portion in her name is **900**. However the case for the 1st respondent is that the applicant jointly with her husband one, **Zephaniah M. Nyangwara** sold him **901** for a consideration of Kshs. 2,000,000/= which he duly paid upon which **901** was transferred and registered in his name. The receipt of consideration by **Nyangwara** has not been expressly denied. Although the 1st respondent claims that the applicant is a wife of **Nyangwara**, the applicant has expressly denied that title or status. However, a close scrutiny of the documents filed in this case reveals some sought of close relationship between the two. But these are matters which will have to be addressed at the formal hearing of the O.S and on evidence. However an injunction being an equitable and discretionary remedy a party is entitled to seek the same with clean hands. Such party as the applicant herein has to be candid with the court. She should not conceal certain facts which are to her disadvantage nor should she deliberately mislead the court. There is more that meets the eye in these transaction. I do not think that the applicant has been forthright and candid with the court so far. There are certain things in this case which simply do not add up. The applicant knows a lot

more regarding the transaction than she has been willing to disclose. She has obviously concealed certain material facts with regard to the transaction. That alone should disentitle her to the remedy.

The applicant has conceded in the application that **901** has been transferred and registered in the name of the 1st respondent. Until such transfer and registration is recalled, the 1st respondent is entitled to enjoy the benefits which come with such registration vide sections 27 and 28 of the **Registered Land Act**. It may well be that he 1st respondent acquired **901** fraudulently. It is also possible that he acquired it legally going by the documentation on record. These are issues which will have to be resolved at the trial and on evidence. This being the scenario, I am unable to hold that the applicant has established a prima facie case with a probability of success. In my view, the case as it is can go either way.

I do not see what irreparable damages the applicant shall suffer if the injunction is denied. **Mr.**

Nyangwara, whom the applicant acknowledges as a friend received a colossal sum of money from the 1st respondent on account of the purchase of **901**. The applicant has not expressly denied that fact. Yet though the said **Nyangwara** was the centre piece of the transactions whether fraudulently or not, the applicant has not seen it fit to enjoin him in these proceedings despite his own admission that he was somehow involved in the sale and subsequent transfer of **901** fraudulent or otherwise to the 1st respondent. What does this say of the candidness of the applicant? Yet the same applicant has admitted **Nyangwara's** involvement in the transaction. Again what steps one may ask, has the applicant taken against the said **Nyangwara** being in the know that infact he was the prime mover of the transaction. If anything the complaints to the C.I.D to intervene in the matter by both the applicant and **Mr. Nyangwara** are calculated attempts to exonerate **Nyangwara** from his imbroglio. That is what a careful reading of the letters to the Director of C.I.D by both **Mr. Nyangwara** and the applicant tells me. Until this matter is resolved in one way or another, I cannot see what irreparable injury the applicant will suffer if the current status quo obtaining on the ground is maintained until the hearing and final determination of the O.S. If she succeeds, she will get her land back. If she loses, the court will have confirmed that the 1st respondent acquired his **901** legally.

Finally and with regard to balance of convenience, taking into account what I have said so far, I think that the balance of convenience tilts in favour of the 1st respondent. Let the parties remain in occupation of their **900** and **901** respectively and enjoy their possession thereof until the hearing and final determination of the O.S.

The upshot of the foregoing is that I find the application unmerited and is accordingly dismissed with costs to the 1st respondent.

Ruling dated, signed and delivered at Kisii this 17th day of January, 2011,

ASIKE-MAKHANDIA

JUDGE