



REPUBLIC OF KENYA
HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NUMBER 398 OF 2010

MARGARET NJERI NJENGA. PLAINTIFF/APPLICANT

VERSUS

JOSEPH NDUNGU KINYANJUI..... DEFENDANT/RESPONDENT

RULING

Following the filing by the plaintiff of a plaint on 17th of August, 2010 she filed a Chamber summons dated 12th August, 2010. The prayers in that application are as follows: -

- 1. This application may be heard as a matter of urgency and necessary orders issued thereto be dispensed to the other parties, with the date of hearing.(sic)***
- 2. This honourable court to be pleased to issue the necessary orders to stop all the proceedings of the tribunal court which is scheduled to be heard at Mutati.***
- 3. Costs of this application be in the cause.***

This application was filed under certificate of urgency. Thereafter, another Chamber Summons application dated 19th August, 2010 was filed on 20th August 2010, by the same applicant. The orders sought in this later application are as follows: -

- 1. That this application be heard as a matter of urgency in the first instance and orders issued thereto be ordered to be dispensed upon the defendant herein. (sic)***
- 2. That this honourable court be pleased to issue the necessary orders thereby restraining the defendant/respondent, his agents and/or servants from interfering with LR. Nos 1117, 1720 and 1721 all held by Nyakinyua Investment Limited and registered in the names of the plaintiff/applicant the suit premises of which were transferred to the plaintiff/applicant by her deceased mother in law in the year 1996.***
- 3. Costs of this application be provided for.***

This application, as well as the application dated 12th August 2010, have grounds on the face of the respective Chamber Summons. Each of the application was filed with a supporting affidavit sworn by the applicant. The applications were served. Ms. Nganga Ngigi & Co. Advocates came on record for the

defendant/respondent. As the parties herein only canvassed the application dated 19th August 2010, I take it that the application dated 12 August, 2010 has either been overtaken by events or been abandoned. I will therefore, mark it as so abandoned and dismiss the same.

The application dated 19th of August, 2010 has grounds, which I will reproduce verbatim: -

a) The deceased Beth Nyathira Kinyanjui was the original person to be registered in the said plot No. 1117, 1720 and 1721 in trust for the plaintiff/applicant and at the time of her death the deceased had already sworn an affidavit thereby allocating the same to the plaintiff/applicant since the applicant was the one who had contributed to the full payment of the said plots.

b) The defendant is taking advantage of plaintiff's husband who is the brother to the defendant (and) is unable to represent himself to any court of law hence a lay man. (sic)

c) The defendant has already requested the plaintiff's husband to produce some other two titles before the Assistant Chief, and when he took the photocopies of the same title deeds namely Kiganjo/Kiamwangi/299 and Kiganjo/Kiamwangi/T.91, he fraudulently transferred the same and later subdivided the same and thus the plaintiff fears that the same may arise against the said LR. No. 1117, 1720, and 1721 thereby leaving the plaintiff desperate.

In the supporting affidavit to the application, sworn by the plaintiff/applicant on 19th August, 2010 it was deponed inter alia, that the registered proprietor of all the parcels of land transferred them to the applicant as evidenced in an affidavit sworn on 19th October, 1996; that the defendant wants the applicant to produce the said documents to the area Chief but she fears producing the same because she had produced other title deeds for land which were later fraudulently transferred and subdivided; that unless this matter is heard urgently and the defendant restrained by this court from interfering with plot No. 1117, 1720 and 1721 respectively, the applicant stands to suffer irreparable losses and damages as the respondent wants to use his fraudulent ways to transfer and subdivide the same to his other brothers, while the applicant is the one who paid for the same through her mother in law.

The applicant swore a further affidavit on 23rd August, 2010 and filed it on the same date. It was deponed in the said affidavit, inter alia, that she had forgotten to annex the title documents. That the same were now annexed as share certificate 0018, 0033 and 0022. The applicant also filed a further affidavit sworn on 5th September, 2010. In this affidavit, it was deponed, inter alia, that there were additional shares bought by the husband of the applicant. It was also deponed that the respondent herein had transferred land reference No. Kiganjo/Kiamwangi/299, and Kiganjo/Nembu/283 and Kiganjo/Nembu/277. It was deponed that this additional claim be included in the proceedings herein.

The applicant swore yet another further affidavit on the 8th of September, 2010 which was filed on the 9th September, in which she made a number of allegations which cover issues relating to payment of dowry and other disputes on coffee plants.

In response, the respondent filed a replying affidavit to the application dated 12 August, 2010. The said affidavit was sworn on 11th September, 2010 and was filed on 13th September 2010. I have already stated that this application is treated as abandoned, therefore I will not say anything further on this affidavit.

With regard to the application dated 19th August 2010, the respondent through his advocates Nganga Ngigi & Company, filed grounds of opposition. The grounds are as follows: -

- 1. That the application is an abuse of the honourable court's process as the applicant has another application dated 12 August 2010 still pending in court.**
- 2. That the prayers sought in the application cannot issue as they are not prayed for in the plaint.**

3. That the plaintiff's application is incurably defective at law.

The same advocate, filed a Notice of Preliminary Objection on 25th of October 2010. The grounds of objection are as follows: -

1. That the prayers sought in the application are different and strange from the prayers sought in the plaint.

2. That the plaintiff's whole suit is incurably defective at law as no leave of the court was sought before the filing of suit.

3. That the plaintiff's suit ought to be brought through judicial review and the same should be struck out with costs.

I will mention here that the applicant also filed what is described a counter replying affidavit sworn by herself on 4th October 2010. The same was filed on 5th October, 2010. The applicant further filed a counter replying affidavit sworn by herself on 11th November 2010 which was filed on 15th November, 2010.

On the hearing date, the applicant addressed the court in person in support of the application. It was her contention that she was entitled to a permanent injunction against the defendant. Mr. Ngigi for the respondent strongly opposed to the application on the basis of the preliminary objection and grounds of opposition filed. Counsel contended that, all that the applicant was trying to do was to prevent the defendant from pursuing the matter through the Chief's office or Land Tribunal. Counsel stated that the applicant should have approached the court through the Judicial Review Procedure under Order 53 of the Civil Procedure Rules.

I have considered the application, documents filed and arguments on both sides. Some of the affidavits filed by the plaintiff/applicant after the affidavit sworn on the 23rd August 2010 raised issues which are not part of the issues in the plaint. The plaint relates to land parcel 1117, 1720 and 1721. Any other subject matter raised, cannot be part of the proceedings herein, and cannot in any event be brought into these proceedings through an interlocutory application.

The application I am dealing with is the application dated 19th August, 2010. The documents annexed to the affidavits dated 23rd August, 2010 are in respect of plots Nos. 1117, 1720 and 1721. These are the plots in contest in the suit. The names on the face of the photocopy documents annexed, appear to be the names of the plaintiff as the owner of plot No. 1117. She also appears to be the transferee of Plot No. 1720, and also transferee of Plot No. 1721. Of course, the true ownership will have to be proved through evidence which is yet to be tendered in court. It suffices to say that, in my view, through the counsel for the respondent says that these proceedings and application are incurably and the applicant has no locus standi defective, I will disagree with that. In my view, with the documents placed before me, I am convinced that the applicant has a sufficient interest in the subject matter, thus she has locus standi.

The choice for going for Judicial Review is for the party who is coming to court. It depends on the circumstances of the case. Ultimately, after evidence is tendered and this matter determined, it will come out if this is a matter which should have gone for Judicial Review or not. At this preliminary stage, the court is not in a position to substantively determine that issue one way or the other. Therefore, I cannot strike out the application or the whole case because no leave was sought or granted to commence Judicial Review Proceedings.

The prayers are also not strange to the prayers sought in the plaint, as alleged by counsel for the respondent. In the plaint, the applicant is seeking for a permanent injunction. Therefore, seeking interlocutory injunctive orders before the hearing and determination of this case cannot be said to be a strange prayer.

I find and hold that the applicant has established a prima facie case in terms of the reasoning in the case of **GEILLA VS CASSMAN BROWN LTD [1973] EA 358**. That is the first consideration in an application for interlocutory injunctive orders. The second consideration, also given in the same case, is whether the applicant will suffer irreparable loss if the interlocutory injunctive orders are not granted. In my view, if in this matter which is pending in this court, no interlocutory injunction orders are granted and a Land Tribunal purports to determine this matter, then the applicant will suffer irreparable loss or damage. It will also mean that proceedings might continue in two different forums simultaneously, which will not be in the interests of justice. This matter, having already been filed in this court, it is just and equitable to the parties that this court does not let another tribunal determine the issues involved, as in that case, this court will be abdicating its responsibility to do justice.

The other parameter to be considered by the court, in such an application, also stated in the **GEILLA** case (supra) is the balance of convenience. With the facts placed before me, I am of the view that the balance of convenience is in favour of the applicant. She has come to this court and exhibited documents which prima facie, show that she has an interest in the subject three plots.

On the above reasons, this application will succeed.

Consequently, I find merits in the application dated 19th August, 2010 allow the same and order as follows: -

- 1. Temporary injunction is hereby issued against the defendant/respondent, his agents/or servants from interfering with LR. 1117, 1720 and 1721 until the hearing and determination of this case.***
- 2. Costs of this application will be in the cause.***

Dated and delivered at Nairobi on 9th this day February 2011.

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GEORGE DULU
JUDGE

In the presence of

Margaret Njeri – applicant in person
Joseph Ndungu – respondent in person
C Muendo – court clerk