



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 170 OF 2008

LAWRENCE MUKIRI

MUNGAI.....PLAINTIFF

V E R S U S

ATTORNEY GENERAL.....	1ST
DEFENDANT	
DAVID MWAURA KARANJA.....	2ND
DEFENDANT	
BENJAMIN KANYINGI NDUNG’U.....	3RD
DEFENDANT	
SIMON KIRUTHI NDUNG’U.....	4TH
DEFENDANT	
MICHAEL MWAURA NDUNG’U.....	5TH
DEFENDANT	
RUTH WANJIKU IHURURU.....	6TH
DEFENDANT	

R U L I N G

Land parcel Ruiru/Ruiru East Block 7/11 was on 21st May 1991 registered in the name of the Plaintiff and title deed issued to him (“LMM1”). He holds the title deed to date. The land measured 0.4000 Hectares. On 10th January 2002 there was an advertisement in the Daily Nation of an acre of land being sold. It was situated 100 metres from the Thika Road. The advertisement was repeated severally. This raised his suspicion. He visited his land and found it had been subdivided into plots whose occupants had commenced construction thereon. He went to Thika Lands Registry and conducted a search. He found that the records held there indicated that on 14th October 1996 the 2nd Defendant had become the registered owner and title deed issued to him (LMM3”). Subsequently, on 9th November 2005 the suit land had passed into the names of the 3rd to 6th Defendants who had eventually subdivided into the following parcels:-

- a) Ruiru/Ruiru East Block 7/276 and Ruiru/Ruiru East Block 7/277 registered in the name of the 3rd Defendant;
- b) Ruiru/Ruiru East Block 7/278 and Ruiru/Ruiru East Block 7/279 in the name of the 4th Defendant;
- c) Ruiru/Ruiru East Block 7/281 and Ruiru/Ruiru East Block 7/283 in the name of the 5th Defendant; and
- d) Ruiru/Ruiru East Block 7/280 and Ruiru/Ruiru East Block 7/282 in the name of the 6th Defendant.

The subdivisions were registered on 5th January 2007, title deeds issued and the register closed.

There is no dispute the Plaintiff did not know the 2nd Defendant. It is the 2nd Defendant who advertised the suit land for sale following which the 3rd to 6th Defendants bought it, subdivided it and each now occupies his plot. The 3rd to 6th Defendants and the Plaintiff are strangers.

The Plaintiff filed this suit seeking a declaration that he was the legal and registered owner of the suit land (and the subdivisions). He wants the titles issued to the 3rd to 6th Defendants cancelled and he be reflected on the register to be the owner. He then seeks eviction of the 3rd to 6th Defendants from the plots, *mesne* profits and costs. His case is that his land has been taken away by acts of fraud perpetrated by the Thika Lands Registry and the 2nd to 6th Defendants.

The 2nd Defendant was served but did not enter appearance or file a defence. On 21st December 2009 an interlocutory judgment was entered against him. The 3rd to 6th Defendants filed a defence and responded to the present application for injunction under Order 39 rules 1 and 2 of the Civil Procedure Rules by way of replying affidavit sworn by the 3rd Defendant on their behalf. Their case is that following the advertisement, they found the 2nd Defendant who had documents of ownership and from whom they bought the suit land for KShs. 600,000/=. They stated that the land had been advertised in “**the Standard**” of 11th and 12th July 2005 (“BKN – 2G” and “BKN – 2b”) as an acre of land in Ruiru for KShs. 0.7 million. The telephone number of the seller had been indicated. The 3rd Defendant contacted the seller and they met and they went up to the land. The seller was the 2nd Defendant whom they did not know before. He had the title deed (“BKN – 3”). The 3rd Defendant went to the Thika Lands Office and confirmed the information (“BKN – 4”) before he invited the 3rd to 6th Defendants to help buy. The Defendant further deponed that he found out from the 2nd Defendant that his wife, one Susan Wanjiru Njogu, was deceased and that they had a minor daughter. The 2nd Defendant produced death certificate and birth certificate (“BKN-5a” and “BKN-5b”). The Defendant then went to the Land Control Board at Ruiru with the 2nd Defendant and his daughter and obtained consent before they went for registration. Their case is that they are innocent buyers for value without notice.

Mr. Kimondo appeared for the 3rd to 6th Defendants, Mr. Menge for the 1st Defendant and Ms Kabuthi for the Plaintiff. I am grateful for their oral and written submissions that were presented on the application for injunction.

It was agreed that the principles for the grant of a temporary injunction have been settled since the

decision in **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**. The applicant has to show a *prima facie* case with a probability of success; he will suffer irreparable loss or damage if the injunction is not granted; and that, in case of doubt, the application will be decided on the balance of convenience.

The suit land belonged to the Plaintiff who neither sold nor transferred it to the 2nd Defendant whom he does not know. The 2nd Defendant did not defend the suit or application and there is a judgment against him. At this stage of the case, I find it was out of fraud that he managed to get the Thika Lands Registry to transfer the title to him and issue him with a title deed when in fact the land belonged to the Plaintiff who held the original title deed. The 2nd Defendant who had no claim or title to the land could not have passed any interest in the same to the 3rd to 6th Defendants, or to any other person.

Mr. Kimondo sought to rely on sections 27 and 28 of the Registered Land Act (Cap. 300) to say that his clients have each an absolute and indefeasible claim to his plot because of the fact of registration. Counsel further relied on section 144 (1) of the Act which gives the right of indemnity by the Government to any person suffering damage by reason of rectification of the register; mistake or omission in the register which cannot be rectified; or error in a copy or extract from the register. In my view, the issue at hand is not about the Plaintiff having suffered damage for which he wants to be paid. He has lost land owing to fraud and essentially wants it back. Sections 27 and 28 of the Act presuppose a situation where the registered claimant has a validly obtained entitlement. Where, like in the case of the 2nd Defendant, one cannot explain how he came to be registered or where he has defrauded the owner of the land, he cannot rely on the indefeasibility of registration or title.

The 3rd to 6th Defendants say they have a good title, but M/s Kabutha for the Plaintiff is asking why they have not produced the consent of the Land Control Board, evidence of payment of Stamp Duty, transfer documents, and so on. The search (“BKN – 3”) that the 3rd Defendant says he did on 26th July 2005 refers. The Plaintiff has problems with it because it is the 2nd Defendant who is indicated to be the applicant. The 3rd Defendant says he paid for the same. It is true the search showed the 2nd Defendant to be the owner. The property was bought for KShs. 600,000/=. The Plaintiff says that was not the obtaining market value as his valuation as of 5th November 2004 (“LMM4b”) revealed the value to be KShs. 800,000/=. I do not think that one can say KShs. 600,000/= was not a good price, given that the valuation was intended for mortgage purposes.

My preliminary view is that the Plaintiff has a *prima facie* case. If I am wrong, then it is important that all the evidence be made available at the hearing for the court to decide one way or the other. Regarding the issue of irreparable damage, it is clear that the Plaintiff’s statutory and constitutional right to private property has been interfered with by acts of fraud. The right has to be protected and cannot be compensated by damages.

In case I am wrong, the competing claims to the land and its subdivisions should be subjected to inquiry at hearing and resolved. In the meantime, the land has to be preserved. This is why I make order restraining the 3rd to 6th Defendants from selling, charging, mortgaging, leasing or in any other manner transferring the suit land, or its subdivisions, until the suit is heard and finalized. To that extent, therefore, the application by the Plaintiff is allowed with costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2011

A. O. MUCHELULE

JUDGE