



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Environmental & Land Case 415 of 2009

**JOHN KARANJA WARUI (Suing as the administrator of the estate of the late
Elizabeth Muthoni).....PLAINTIFF**

VERSUS

VINCENT MUNGAI MBUGUA1ST DEFENDANT

GEORGE JAMES KANGETHE2ND DEFENDANT

PATRICK NDONGA3RD DEFENDANT

RULING

At the centre of these proceedings is a parcel of land known as title No.Dagoretti/Riruta/2290 situate in Nairobi. The plaintiff brings this suit against the defendants jointly and severally in his capacity as the administrator of the estate of the late Elizabeth Muthoni who is said to have been the registered proprietor of the said parcel of land before the events leading to this suit took place.

The plaintiff's case against the defendants is that the 1st defendant procured the registration of this parcel of land in his name fraudulently and subsequently transferred the same to the 2nd defendant who knew or ought to have known that the 1st defendant could not pass any title to him.

The plaintiff has set out several particulars of fraud against both the 1st, 2nd and 3rd defendants relating to the said suit property in his plaint. At the end, he complains that the 1st, 2nd and 3rd defendants maliciously and illegally evicted him from the suit premises together with the tenants who were resident therein occasioning serious loss and damage. In the main prayers set out in the plaint he seeks injunction orders against the defendants by themselves, their servants, agents, assignees or any other persons claiming through them prohibiting them from selling, alienating, disposing, accessing, developing or in any other way dealing with the suit property aforesaid.

He also seeks a mandatory injunction against the 2nd defendant requiring him to transfer the suit property to him in trust for the estate of the deceased. There is also a prayer for a mandatory injunction requiring the defendants to grant the plaintiff vacant possession of the suit premises, special damages, general damages and costs of the suit.

There is now on record, an application by way of Notice of Motion under Order XXXIX Rule 1 of the Civil Procedure Rules Sections 3A and 63(e) of the Civil Procedure Act, and not rules as set out in the application, seeking substantive orders of injunction as set out in the prayers of the plaint pending the hearing of the suit.

The reasons set out in support of the application, appear on the face of the application alongside the affidavit sworn by John Karanja Warui the plaintiff herein. The reasons are as follows:

1. The 1st defendant fraudulently filed a suit being ELC No.47 of 2008 against Elizabeth Muthoni (deceased) for, *inter alia*, specific performance for an alleged transfer of the suit premises;

2. The 1st defendant herein knew at the time of filing the suit that the purported defendant in ELC. No.47 of 2008, one Elizaeth Muthoni died 5 years prior to the filing of the suit;
3. The 1st defendant fraudulently obtained an ex-parte order in the suit and proceeded to execute the same and transferred the property of the deceased, the suit property herein to the 2nd defendant without disclosing that the said Elizabeth Muthoni had been long dead;
4. The defendants hiding under the fraudulently obtained ex-parte order have evicted everyone who was in possession of the suit premises and are now preparing to commence extensive construction on the suit premises;
5. The 2nd and 3rd defendants, son and father, were at all material times neighbours to the deceased and were aware of her death as they were neighbours at the time of her death;
6. The 3rd defendant in attempt to cover up the fraud had the land registered in the name of the 2nd defendant who is barely 24 years and in ordinary circumstances unable to purchase or afford the property;
7. There is real threat and/or danger that the defendant may further their fraud by transferring the suit premises to third parties who may be unaware of the fraud.

The 2nd and 3rd defendants have filed a reply to the said application but there is none by the 1st defendant.

When the plaintiff first appeared in court through counsel, interim orders were granted in his favour while the 1st defendant was ordered to be served by way of substituted service. The interim orders have been extended from time to time pending the final determination of this application.

Learned counsel on record agreed to address the application by way of written submissions which they have filed and cited several authorities.

I have taken time to read the said submissions and the cited authorities. Although the plaintiff has sued the defendants in his capacity as the administrator of the estate of his late mother, and stated that he obtained letters of administration *ad litem*, he has not annexed any copy of the grant and in the absence of such a document, *prima facie*, he has no capacity to even bring this suit. That notwithstanding, I shall proceed to address the merits of this application.

Both counsel agree, and so does this court that, the conditions for the grant of an interlocutory injunction are now well settled. 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 otherwise be compensated by an award of damages. Thirdly, if the court is in doubt it will determine the application on a balance of convenience. See *Giella vs. Cassman Brown & Co. Ltd.* [1973] EA 358.

For the plaintiff to succeed against the defendants herein and more so the 2nd and 3rd defendants, he must establish that the 1st defendant fraudulently acquired the title to the suit property and that, with that knowledge, he transferred the same to the 2nd defendant who must have known that the 1st defendant did not have a valid title. This is because, the 2nd defendant cannot be held liable for any fraudulent activities of the 1st defendant if he was not party to the said fraudulent activities.

And therefore, the nexus must be established between the 1st defendant and the 2nd defendant, by the plaintiff, for the plaintiff to obtain restraining orders against the 2nd defendant. The pleadings do not relate to the 3rd defendant because the title exhibited does not bear his name. All averments are directed at the 1st and 2nd defendants. In fact, as at this point, it is not clear as to why the 3rd defendant is a party to these proceedings. That notwithstanding, I have looked at the pleadings and related the same to the averments of the parties herein together with the law applicable.

It is the plaintiff's case that the procurement of the title by the 1st defendant was fraudulent. Although HCCC No.47 of 2008 has

been cited by the plaintiff, this court has not had the benefit of the proceedings therein because they are not annexed and we may never know, in their absence, what was pleaded and the final determination thereof. The matters are more complicated by the absence of the 1st defendant who has been served through substituted service but has elected not to participate in these proceedings.

The 2nd defendant avers in his replying affidavit that he is an innocent purchaser for value and is not aware of any fraudulent acquisition of the property by the 1st defendant. If anything, he followed all the procedures required to purchase the property and he cannot be held responsible for any acts that are not his own.

The 2nd defendant has annexed a sale agreement between him and the 1st defendant dated 30th August, 2008 in respect of the said parcel of land. He has also annexed a letter of consent issued by the Land Control Board authorizing the said transaction from the 1st defendant to himself.

Additionally, he has also annexed a payment receipt for the duty paid in respect of the said parcel of land, transfer documents duly executed by both himself and the 1st defendant and the title deed subsequently issued in his name.

It is the plaintiff's case that the certificate of official search shows clearly that there was fraud committed by the 1st defendant and that, the 2nd defendant having obtained such a certificate with entries showing that there was fraud on the part of the 1st defendant then, he should have notice of the said fraud; that he proceeded to purchase the said parcel of land from the 1st defendant, he participated in that fraud and therefore does not hold a clean title.

To counter this, the 2nd defendant avers that he was not party first of all, to the proceedings in Civil Case No.47 of 2008, and any activities of the 1st defendant. He cannot therefore be held liable neither can he be accused of any fraud allegedly committed by the 1st defendant.

This parcel of land is registered under the Registered Land Act (Cap 300) Laws of Kenya. Section 28 of the said Act reads as follows:

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated unless as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities and rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

More significantly, however, are the provisions as set out in Section 39 which read as follows:

“(1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned:

- (a) to inquire or ascertain the circumstances in or the consideration for which that proprietor or previous proprietor was registered; or
- (b) to see to the application of any consideration or any part thereof; or
- (c) to search any register kept under the Land Registration (Special Areas) Act, the Government's Lands Act, the Land Titles Act or the Registration of Titles Act.”

The 2nd defendant was not the first registered proprietor of this parcel of land. However, he is protected by the foregoing

provisions.

It has been submitted, and case law is in support of that argument, where cancellation or interference of a title is sought, then the Commissioner of Lands should be enjoined as a party. See C.A No. 138 of 1997, Pashito Holdings & Anor vs. Ndungu & 2 Others, KLR [E&L] 1 page 295.

In the present case, the plaintiff has not enjoined the Commissioner of Lands and therefore the orders sought may not be available in his favour. Additionally, section 143 (2) of Cap.300 aforesaid provides some protection to the 2nd defendant which may not be open to challenge. It provides as follows:

- “(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor has knowledge of omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

The plaintiff has sought an order against the 2nd defendant requiring him to transfer the suit property to him in trust for the estate of his deceased mother. The 2nd defendant is a proprietor in possession and has shown he acquired the suit property for valuable consideration. He has denied any knowledge of events as pleaded by the plaintiff including alleged fraud against the 1st defendant. It has not been shown that he caused the events complained of or substantially contributed thereto by his act, neglect or default. No collusion has been established between him and the 1st defendant.

It follows therefore that, even if the plaintiff were to seek cancellation or rectification of the title held by the 2nd defendant, the law would be against him because he has not established the nexus between the 1st defendant and the 2nd defendant in respect of the said title.

I note from the pleadings and the prayers that the plaintiff has sought a mandatory injunction against the 2nd defendant. The test has been laid down in several authorities. In Civil Appeal No.332 of 2000, Kenya Breweries Ltd. & Anor vs. Washington O. Okeyo, the Court of Appeal addressed this position and the learned judges said as follows:

“The test whether to grant a mandatory injunction or not is correctly stated in vol. 24 Halsbury’s Laws of England 4th Edition Paragraph 948 which reads –

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if a defendant attempts to steal a match on the plaintiff, a mandatory injunction would be granted on an interlocutory application.”

Also in *Locabail International Finance Ltd. vs. Agro Export & Others* [1986] 1 ALL ER 901 it was stated –

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting an interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

With respect, the evidence presented does not meet that test and therefore such an order is not available to the plaintiff.

The plaintiff has also pleaded that the property belongs to his late mother and that the injury he will suffer if the injunction is not granted is irreparable. There is evidence that the 2nd defendant has taken possession of the suit property and erected a fence. It has not been

suggested that the 2nd defendant is incapable of paying any damages to be incurred by the plaintiff in the event that he succeeds in this suit.

It is common knowledge that land is a valuable subject matter. However, it is also known that land can adequately be valued to the satisfaction of any aggrieved party. In the absence of any suggestion that the 2nd defendant is incapable of paying any damages then there is no justification for such a plea.

And so, the plaintiff in my view, has fallen short of justifying the conditions for a grant of injunction orders sought in the Notice of Motion and therefore, he must fail on the first two conditions. I am not in any doubt whatsoever about my findings herein above, but even if I were, I would find for the 2nd defendant for the reasons that he is a purchaser for value without notice who is in possession of the subject matter. The balance of convenience would in the circumstances tilt in his favour. It follows therefore that the Notice of Motion dated 21st August, 2009 must fail, and the interim orders earlier issued by the court are hereby vacated. To provide a safety net for the plaintiff in the event he succeeds in this case, the 2nd defendant shall execute an undertaking to pay any damages that may arise. The application is dismissed with costs to the 2nd and 3rd defendants.

Orders accordingly.

Dated, signed and delivered at Nairobi this 4th day of March, 2010.

A. MBOGHOLI MSAGHA
JUDGE