



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
ENVIRONMENTAL & LAND CASE 77 OF 2010

GEORGE MUIRURI NJENGA1ST PLAINTIFF/APPLICANT
JAMES KARANJA NJENGA2ND PLAINTIFF/APPLICANT

V E R S U S

PAUL KAGUNDA NJENGA1ST DEFENDANT/RESPONDENT RAHAB NYAMBURA KARANJA2ND DEFENDANT/RESPONDENT
DANIEL MUIRURI NJENGA3RD DEFENDANT/RESPONDENT
KANUNGA FARMERS
CO-OPERATIVE SOCIETY4TH DEFENDANT/RESPONDENT

R U L I N G

The deceased John Njenga was a member of the 4th Defendant which was a land buying company. The Plaintiffs are his sons by his first wife Anna Wairimu Njenga (now deceased). In 1975 he bought shares for the two Plaintiffs in the 4th Defendant. The 1st Plaintiff became member No. 433 and the 2nd Plaintiff became member No. 434.

The deceased's second wife was Jane Wanjiru Njenga (now deceased) whose children include the 1st and 3rd Defendants. The Plaintiffs allege that about 1989 Jane brought her niece (2nd Defendant) whom she introduced as the third wife of the deceased. She was otherwise not the wife of the deceased. The 1st Defendant responded

that the 2nd Defendant was the third wife of their deceased father, having been married in 1989. There is no dispute that the deceased died on 12th November, 1994 about five years after the 2nd Defendant came into the picture.

Following the deceased's death, it is agreed, it was the deceased Jane Wanjiru Njenga who applied for letters of administration to succeed the deceased. She died in 2009. It is not clear what became of the Cause.

The Plaintiffs claim that in 2006 the deceased Jane Wanjiru Njenga fraudulently changed the records at the offices of the 4th Defendant regarding plots 433 and 434. She got plot 433 changed from the names of the 1st Plaintiff to the names of the Defendant and plot no. 434 changed from the names of the 2nd Plaintiff to M.N, a minor son of the 2nd Defendant, and for the records to reflect the said 2nd Defendant as the nominee for the plot. There is no dispute that plot no. 433 is what is registered as parcel No. Ting'ang'a/Cianda Block 1/218 and plot no. Ting'ang'a/Cianda Block 1/2073 in the names of the 3rd Defendant. Plot No. 434 was eventually registered as plot no. Ting'ang'a/Cianda Block 1/214 and parcel no. Ting'ang'a/Block 1/2097 in the names of the 1st Defendant with the 2nd Defendant indicated as nominee of the minor.

It is clear from paragraphs 15, 16, 17, 18 and 19 of the plaint that the fraudulent acts were attributed to the deceased Jane Wanjiru Njenga, and to no one else.

The replying affidavit by 1st Defendant indicates that it was their deceased father who, in 1989, withdrew the shares that he had bought for the Plaintiffs and transferred them to him and to the 3rd Defendant; that the change was not done by the deceased Jane Wanjiru Njenga. The Defendant stated that he (the Defendant) then got parcel No. Ting'ang'a/Cianda Block 1/214 registered in his name and parcel No. Ting'ang'a /Cianda Block 1/2097 registered in the name of 2nd Defendant as trustee of M.N (minor) son to 2nd Defendant.

Njoroge Gatua Kiarie swore a replying affidavit on behalf of the 4th Defendant of whom he is the chairman. He stated that it was the deceased Jane Wanjiru who tampered with the records at his company and effected the alleged fraud. He stated that the deceased Jane Wanjiru Njenga effected the changes in the company register without the knowledge of the company members. There will of course be the issue how the deceased was able to access the records, when the tempering was done and whether the alleged crime was reported to the police.

The Plaintiffs filed this suit seeking to be declared the legal owners of the parcels. The 1st Plaintiff sought to be declared the owner of Plot No. Ting'ang'a/Cianda Block 1/218 and Plot No. Ting'ang'a/Cianda Block 1/2073, and the 2nd

Plaintiff to be the owner of plot No. Ting'ang'a/Cianda Block 1/214 and Plot No. Ting'ang'a/Cianda Block 1/2097. They asked that the 1st to 3rd Defendants be ordered to transfer the land to them, the 4th Defendant to rectify their register to reflect this, the 1st to 3rd Defendants to pay general and special damages and the same Defendants to be permanently restrained from trespassing into the suit land and/or entering in or remaining thereon.

With the suit was filed the present application under **Order 39 rules 1, 2 and 3** of the **Civil Procedure Rules**, **Order 6 rule 8** of the **Civil Procedure Rules**, **section 3A** of the **Civil Procedure Act**, the **Registered Land Act (Cap. 300)**, and **section 349** of the **Criminal Procedure Code**, for a temporary injunction to restrain their Defendants and all those acting under them from interfering with these plots until the determination of the suit.

The court received submissions from Mr. Ondieki for the Plaintiffs and Mr. Okeyo for the 1st, 2nd and 3rd Defendants. I have also considered the replying affidavit by the chairman of the 4th Defendant.

The principles to be considered in an application for interlocutory 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; that he is likely to suffer an injury which cannot be adequately compensated in damages; and, if the court is in doubt, it will decide the case on the balance of convenience.

There is no dispute that parcels numbers Ting'ang'a/Cianda Block 1/218 and Ting'ang'a/Cianda Block 1/2073 are registered in the name of the 3rd Defendant, and parcel number Ting'ang'a/Cianda Block 1/214 is registered in the name of the 1st Defendant. Parcel number Ting'ang'a/Cianda Block 1/2097 is registered in the name of the 2nd Defendant as trustee for M. N (minor). The registrations are under the provisions of the **Registered Land Act (Cap. 300)**. Under **section 27** of the **Act** such registration confers on the respective Defendants absolute ownership to the lands. Such proprietorship can only be defeated as provided under the **sections 28** and **30** of the **Act**. It would also appear that the registration was a first one. Under **section 143(1)** of the **Act** the court cannot order rectification of the register by

directing the registration to be cancelled or amended, even if such registration was obtained or made by fraud or mistake. It is also true that a registered proprietor of land is entitled to its exclusive possession, use and quiet and peaceful enjoyment. The Plaintiffs are making claim to these parcels of land. They will at trial be called upon to lead evidence to show that, despite the protection of law that registration has provided to the Defendants, the titles should be rectified by cancellation. Until that is done, and for the purpose of this application, I find that no *prima facie* case with a probability of success has been established. I also do not find that, in view of the foregoing, the Plaintiffs have demonstrated that they will suffer irreparable damage. The balance of convenience usually tilts in favour of a registered proprietor of land.

In conclusion, I dismiss with costs the application dated on 18th February, 2010 and filed on 23rd February, 2010 by the Plaintiffs.

DATED AND SIGNED AT NAIROBI

THIS 28TH DAY OF SEPTEMBER 2010

A. O. MUCHELULE

JUDGE