



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

Environmental & Land Case 92 of 2010

JOHN NJUGUNA KIMUNYA PLAINTIFF
V E R S U S
TERESIAH WACUKA KIMUNYA 1ST DEFENDANT
GEOFFREY SITUMA WANYONYI 2ND DEFENDANT

R U L I N G

The Plaintiff filed this suit on 4th March, 2010 and with it was a chamber application for interlocutory injunction against the 1st Defendant regarding parcel Ndumberi/Riabai/4090 and the 2nd Defendant regarding land parcel Ndumberi/Riabai/4089. He went before Justice Msagha on a Certificate of Urgency and obtained *ex parte* orders. He was asked to serve the plaint, application and orders and to come for *inter parte* hearing on 16th March, 2010. The matter came before me. The Defendants did not attend, although there was a Return of Service dated on 11th March, 2010 and filed on 16th March, 2010 showing that they had each been personally served. Regarding service to the 2nd Defendant the Process Server deponed as follows:-

“5. THAT the 1st Defendant on the same day called the 2nd Defendant through his cell phone number 0720770219 and agreed to meet at the Plaintiff’s Advocates Office on 10th March, 2010 where I waited for the 2nd Defendant who came at around 3.00 p.m. and he introduced himself to me and whereby I also introduced myself to him then served upon him with the Court Order together with a copy of the application which he acknowledged service by signing at the reverse of my original.”

There is no dispute the reverse of the original that was annexed has a signature.

Against this affidavit, the 2nd Defendant states that:

“2.....I have never been served with any court documents and only came to know about this matter through a third party who is a colleague of mine involved in the development of my plot No. Ndumberi/Riabai/4049 when he visited to suit premises and was informed about the court order.”

The 2nd Defendant makes no reference to the service sworn to by the Process Server. He does not deny he met the Process Server in the office of the Plaintiff’s advocates. He does not deny the signature attributed to him and which is on the reverse of the original of the chamber application. He is represented. He did not seek the cross-examination of the Process Server on the issue of service. It is notable that the Process Server indicated in the same affidavit that he had served the 1st Defendant. That is not disputed. I find that the 2nd Defendant was served, and that the service was personal and therefore effective.

The 2nd Defendant’s second ground for seeking the review of the interlocutory injunction orders that were granted on 26th April, 2010, following the hearing on 16th March, 2010 which he did not attend, was that he is a *bona fide* purchaser of L.R. No. Ndumberi/Riabai/4089 for value without notice and that he had already made arrangements with the bank for a loan facility to develop the said plot and that such development was worth millions of shillings. This is essentially the defence to the Plaintiff’s claim which is as follows. Land parcel Ndumberi/Riabai/184 belonged to his late father. When his father died, his mother (the 1st Defendant) obtained a confirmed grant in regard to his estate and was registered in respect of the land to hold in trust for her children. The children included the Plaintiff. Instead, the 1st Defendant sold and transferred a portion of the land to the 2nd Defendant. The portion is Ndumberi/Riabai/4089. She was left with Ndumberi/4090. The Plaintiff sought the

nullification of the subdivision and cancellation of the titles. He further sought that the 1st Defendant be ordered to subdivide Ndumberi/Riabai/184 to the rightful beneficiaries.

I am aware that under **Order 39 rule 4** any party dissatisfied with an order for injunction may apply for it to be discharged, or varied, or set aside. I do not, however, think that the exercise of the court's discretion in the application can benefit a party who was properly served and chose not to defend the matter. Secondly, whatever the merits of the 2nd Defendant's claims, it is imperative that the subject matter to which the Plaintiff is laying a claim be preserved until the suit is heard and finalized. The Plaintiff and the 2nd Defendant will be allowed to call evidence and a determination made after the usual inquiry.

The Court of Appeal decision in **Muriuki Marigi –Vs- Richard Marigi Muriuki and Others, Civil Appeal No. 189 of 1996** at Nyeri was referred by Mr. Onyango for the 2nd Defendant who submitted that **sections 27 and 28 of the Registered Land Act (Cap. 300)** provide the 2nd Defendant with an absolute and indefeasible claim to the land by virtue of the registration. In the above case the family of the appellant had sued him seeking that he distributes his land to them and the claim was based on customary law. The Court of Appeal held that the appellant had, by virtue of registration, an absolute and indefeasible claim to the land; that the claims by the family were not noted on the register and neither were they overriding interests; and that the rights of wives and children over their husband's or father's land after are inchoate and accrue only after death. During hearing, the 2nd Defendant will have to persuade the court that the facts of that case are the same as the ones here.

The Plaintiff is saying that he is suing his mother as trustee of his late father's estate who is selling away part of the estate to his detriment. He is saying that whatever title that his mother may have transferred to the 2nd Defendant was subject to that trust.

The 2nd Defendant's counsel referred to **section 39 of the Registered Land Act**. One should also consider the proviso to **section 28**. The issue whether or not the 2nd Defendant provided valuable consideration, was unaware that the 1st Defendant was a trustee of the Plaintiff or that he acted in good faith will all be subject of discussion at the hearing of the suit.

I am aware that usually a registered owner of land should not be enjoined. This is because of the indefeasible claim by such proprietor and also the fact that the registration carries with it the right to possession, occupation, use and quiet enjoyment. The court took the registration into consideration when it decided the undefended application for injunction.

The result is that the application has no merits and is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI
THIS 25TH DAY OF OCTOBER 2010**

**A. O. MUCHELULE
J U D G E**