

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE 49 OF 2007**

HELLEN NJERI MUREITHI PLAINTIFF

VERSUS

1. ANGELA NYAWIRA NDIUNI

2. CHIEF LAND REGISTRAR..... DEFENDANTS

RULING

What is for consideration in this ruling is the Chamber Summons dated 28th June 2007. The Plaintiff/Applicant has brought this action against the two defendants alleging that the first defendant in collusion with the second defendant transferred her late husband's property namely; Tetu/Unjiru/1397 to the plaintiff. That in so transferring the second defendant issued the 1st defendant with a title over Tetu/Unjiru/1373. The plaintiff therefore seeks by her plaint that the court will order cancellation of that title and reinstate her late husband's name in the title 1397. The plaintiff by her application the subject of this ruling seeks an interlocutory injunction to stop the first defendant from sub-dividing, selling or parting with the title 1373. In her affidavit in support of that application the plaintiff deponed that the first defendant colluded with the land registrar the second defendant and thereby cancelled her late husband's title number 1397 and instead issued the plaintiff with a title number 1397. She said in so doing the defendants had deprived her husband's estate of that property. That the first defendant had sub-divided the title 1373 and the plaintiff was now fearful that she would alienate the property to third parties leaving her and her children landless. The application was strenuously opposed and in opposition the 1st defendant stated that she is the registered owner of the title 1373. That title came as a result of her application to the land registrar of 13th January 1996 for a combination of two titles namely Tetu/Unjiru/655 and 658. as a consequence of that combination she was given a new title of number 1373. She denied that there was a further sub-division resulting in the title now being claimed by the plaintiff namely title number 1397. That if there was such sub-division the same was done without her consent. On or about December 2006 she applied for consent to sub-divide her title number 1373 into three portions to enable her distribute her land to her dependents the plaintiff being one of them. She informed the plaintiff of her action and requested the plaintiff to accompany her before the land board. She declined. The 1st defendant further stated that she discovered the title in possession of the plaintiff namely number 1397 was fake. She annexed a map as proof that there was no sub-division which resulted in the title being claimed by the plaintiff. The first defendant also relied on an affidavit sworn by the District land Registrar. In that affidavit it was deponed that in accordance with documents held at the land officer there was no sub-division giving effect to the title number 1397. He confirmed that the first defendant initially had two properties namely Tetu/Unjiru/655 and 656. Those two were combined after an application and resulted in the title 1373. That title was in the name of the 1st defendant. On the complained being made by the first defendant of the existence of the title the subject of the plaintiff's claim investigation was initiated. That investigation found that the title being claimed by the plaintiff was fake and accordingly the land registrar in a Kenya Gazette of 5th June 2007 cancelled the title being claimed by the plaintiff. The plaintiff in support of her claim relied on the case of *Nganga Mucheru & other versus Michael Gichuhi Muiru High Court Civil Case NO. 527 of 2005 Nrb.* In this case the court found in an application for an injunction that the applicants having shown that he had an interest in land an injunction would be issued and the court would determine what kind of interest the applicant had

at the full hearing. The plaintiff argued that in this case by annexing a title in her late husband's name she had proved that she had an interest in land and all the other issues raised by the first defendant on whether or not her title was valid could only be considered at the full hearing. The plaintiff further relied on the case of *Lifico Trust Registered v Patel [1985] KLR*. The holding of this case was in part as follows;

“The appropriate forum for deciding weighty issues of law raised is at the trial and not in the course of interlocutory proceedings”.

The defendant on her part relied on the case following case, *Nairobi HCCC No. 8 of 2004. Kenya Hotels Ltd – versus – Kenya Commercial Bank & another*. The defendant relied on the following holding in that case;

“Forced entry, for purposes of trespass, does not connote the drawing of blood – an illegal entry without any colour of right or legal backing or express backing or express consent of the owner of the property is a forceful entry”.

She further relied on the following case, *Court of Appeal at Mombasa Civil Appeal No. 39 of 2002. Mrao Ltd – versus – First American Bank of Kenya*

2 others, and the following holding.

“A prima facie case in civil application includes but is not confined to a “genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

What the plaintiff seeks is an interlocutory injunction. The principles to be considered in granting an injunction were set out in the case of *Giella v Cassman Brown & CO Ltd [1973] E.A. as follows;-*

“An applicant must show a prima facie case with a probability of success. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. When the court is in doubt, it will decide the application on the balance of convenience.”

What the court will first consider is whether the plaintiff has shown a prima facie case with a probability to success. The title which the plaintiff claims is registered in her late husband's was revoked or cancelled by the land registrar by virtue of section 42 RLA. Having so cancelled that title does not exist. What however the plaintiff seeks is an injunction over the 1st defendant's property. The court finds that the plaintiff is not entitled to an injunction over a property registered in the 1st defendant's name. This indeed was the find in the *Court of Appeal Case No. Nai 349 of 2003 Venture Capital & Credit Ltd – and – Consolidated Bank of Kenya Ltd*. The plaintiff therefore has failed to prove that she has a prima facie case which would entitle her to the prayer sought. In respect of other principles the plaintiff did not show that she would suffer irreparable injury if an injunction was not granted. Having made that find on those two principles I find that I entertain no doubt that the plaintiff has not satisfied them and I therefore need not consider the third principle. I therefore find that the plaintiff's application by way of chamber summons dated 28th June 2007 must and does fail. The same is hereby dismissed with costs to the 1st defendant.

Dated and delivered at Nyeri on 10th December 2007.

MARY KASANGO

JUDGE