



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wabururu v Kagia & 2 others (Environment & Land Case 750A of 2017)
[2022] KEELC 15484 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15484 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 750A OF 2017**

JG KEMEI, J

DECEMBER 20, 2022

BETWEEN

JAMES NJAU WABURURU PLAINTIFF

AND

FLORENCE WAMBUI KAGIA 1ST DEFENDANT

MUIGAI PHARES THUMBI 2ND DEFENDANT

LAND REGISTRAR, KIAMBU 3RD DEFENDANT

RULING

1. Vide a Notice of Motion dated September 26, 2017 the Plaintiff/Applicant craves for Orders that;
 - a. Spent.
 - b. Spent.
 - c. Pending the hearing and determination of this suit, an Order of inhibition be registered against all that parcel of land being Title No Karai/Karai/1373.
 - d. Pending the hearing and determination of the main suit, this Honorable Court be pleased to restrain the Defendant/Respondent by herself, her servants, agents and/or whomsoever in any means howsoever from selling, charging, encroaching, invading, cutting trees, constructing and/or in any other way interfering with the parcel of land being Title No Karai/Karai/1373.
 - e. The OCS Kikuyu Police Station do oversee the enforcement of Court orders issued.
 - f. Costs of this Application be provided for.
2. The Application is based on the grounds on the face of it that are echoed in the Supporting Affidavit of even date of James Njau Wabururu, the Plaintiff and administrator of the estate of the late Francis



Wabururu Njau (Francis). He deponed that his late father Francis sometime in 1970 bought 12 acres of land out of land parcel Title No Karai/Karai/340 from the late Kamau Karanja Wangui (Kamau) and took possession thereof and planted gum trees. That however, sometimes in 1993 the 1st Defendant's father, Bernard Kagia Njuguna (Bernard) stated that he was a relative of Kamau and was given 6 acres out of Francis' 12 acres of land. Thus Karai/Karai/340 was subdivided into three portions measuring approx. 6 acres each including Title No Karai/Karai/1373 (the suit land) which was allocated to Francis.

3. The deponent added that Bernard fraudulently and illegally had the suit land registered in his name prompting Francis to lodge a caution over the suit land. That a suit was filed namely Nbi HCCC 751 of 2003 where the Court on February 10, 2011 *inter alia* issued a temporary injunction against Bernard from dealing with the suit land pending the determination of the suit. See copy of the Order marked JNW2. That in disregard of the injunction, Bernard transferred the suit land to the 1st Defendant who was issued with a title deed on January 19, 2012. Copy of official search was annexed as JNW3. That all the while Francis was in possession of the suit land by cultivating gum trees but he passed away during the pendency of the suit on February 19, 2015 and was buried on the suit land.
4. That the 1st Defendant filed Kiambu CMCC Misc App No 46 of 2017 against the 3rd Defendant and the Court without knowledge of the history of the suit land, ordered the removal of the caution registered by Francis over the suit land - see JNW4 copy of the order issued on August 2, 2017. That the 1st Defendant also fraudulently transferred the suit land to the 2nd Defendant who cut down the gum trees on the suit land- see copy of the green card marked JNW5. The Defendant also fenced off the suit land and continues to invade it refusing to yield vacant possession. That the Plaintiff and other beneficiaries of the late Francis are apprehensive of denial of their rights to own and use the suit land hence the Application.
5. The 1st Defendant Florence Wambui Kagia swore a Replying Affidavit on October 24, 2017. She averred that the suit land belongs to her late father, Bernard and the Plaintiff has no capacity to institute the instant suit. That her father transferred the suit land to her and she in turn legally sold and transferred the suit land to the 2nd Defendant who is duly registered as the owner of the land as shown by copy of title deed - FWK1. That the Plaintiff has no beneficial interest over the suit land as his late father, Francis owned L R Karai/Karai/1372 where he's buried alongside his late wife and not L R Karai/Karai/1373 as averred by the Plaintiff. That the caution registered by Francis over the suit land was removed upon determination of Nbi HCCC 715 of 2003 that also ordered the eviction of Francis from the suit land. Copy of that judgment is annexed as FWK5. That Francis filed a subsequent suit against Bernard HCCC no 338 of 2008 that was dismissed on June 22009.- see FWK6 copy of the Ruling. That Francis never appealed against any of the Court's decisions.
6. The deponent conceded filing Kiambu Misc App No 46 OF 2017 to remove the caution over the suit land and the same was granted on August 2, 2017 - see FWK7 copy of the Court order. That the copy of the green card does not show Francis as the registered owner of the suit land at any given time. She beseeched the Court to dismiss the Application with costs.
7. Similarly, the 2nd Defendant Muigai Pharis Thumbi filed a Replying Affidavit dated November 10, 2017. He avowed that he's the registered owner of the suit land as evidenced by copy of the title deed marked MPT1 having bought it from the 1st Defendant. Copy of the sale agreement is marked MPT2. That before the said purchase, he carried out due diligence and there was no indication that the land belonged to the Plaintiff. That the 1st Defendant disclosed that her late father had filed three suits over the suit land namely HCCC No 751/2003, 715/2003 and 338/2008 hence the instant suit



is *res judicata*. That the Plaintiff's parents are buried on L R Karai/Karai/1372 and not L R Karai/Karai/1373.

8. The Application was canvassed by way of written submissions. The Plaintiff filed his submissions dated February 19, 2018 through the firm of J M Waiganjo Advocates. Three issues were drawn for determination to wit; whether the suit is *res judicata*; whether interlocutory injunction can be granted and whether an inhibition can be granted. It was submitted that there is no suit that has competently determined the issue of true ownership of the suit land and therefore the plea of *res judicata* does not arise.
9. Secondly that Order 40 [Civil Procedure Rules](#) provides for grant of injunctive relief and an Applicant must satisfy the threshold set in the case of *Giella v Cassman Brown and Co Ltd* (1973) EA 358. That the Plaintiff has established a prima case with high probability of success in his favor upon outlining the history of the suit land which according to him belongs to his late father. That the 1st Defendant was charged in Kikuyu Criminal case no 1034 of 2017 with the offence of obtaining money by false pretenses whereby the 2nd Defendant was the complainant.
10. That the Plaintiff and his family continue to suffer irreparable loss as a result of the 2nd Defendant's dealings over the suit land to their detriment. That it is therefore necessary for the Court to grant interim relief to pave way for the hearing of the main suit. The Plaintiff added that the balance of convenience tilts in favour of the late Francis' ownership of the suit land as the Plaintiff has outlined how the land was acquired.
11. Lastly it was submitted that an order of inhibition is justified to prevent any further dealings on the suit land and this Court is empowered to order such under Section 68 of the [Land Registration Act](#).
12. On the other hand, the 1st Defendant through the firm of Maingi Kamau & Co Advocates filed submissions dated April 4, 2018. She maintained that this suit is *res judicata* based on the determination in Nbi HCCC No 751 of 2003 that ordered the eviction of Francis from the suit land. That even Francis' suit HCCC No 338 of 2008 was found to be *res judicata* and therefore the instant suit ought to be dismissed.
13. The 2nd Defendant submissions dated February 16, 2018 by the firm of Ndungu Mwaura & Co Advocates echoed the 1st Defendant's sentiments. That the instant suit is *res judicata*. That the 2nd Defendant rightly bought the suit land from the 1st Defendant who had obtained it from her late father, Bernard.
14. The main issue for determination is whether the Application is merited.
15. Before delving into that, the Defendants raised the plea of *res judicata* in opposing the Application. This is not the first time the plea is being raised because vide the Preliminary Objection dated October 24, 2017 the 1st Defendant objected to the suit as being *res judicata*. Vide a Ruling dated November 2, 2018 this Court found that this suit is NOT Res Judicata but agreed it was sub judice on account of Nbi Case 751/2003 which has since abated. Having pronounced itself on the same, the Court will not revisit that plea again.
16. To the merits of the Application, the Plaintiff prays that the Court Orders registration of an inhibition over the suit land pending the determination of this case. It is common ground that the issue of ownership of the land remains unresolved in light of the abatement of the Milimani case.
17. Section 68 [Land Registration Act](#) states;

“ 68. Power of the Court to inhibit registered dealings



- 1 The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.
 - 2 A copy of the inhibition under the seal of the Court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.
 - 3 An inhibition shall not bind or affect the land, lease or charge until it has been registered.”
18. The Court’s power to grant or deny an Order for Inhibition is discretionary. It is clear from the rival pleadings that the ownership of the suit has never been conclusively determined on merits. The Plaintiff’s case is that the suit land belonged to his late father while the 1st Defendant is of the contrary view arguing that her father rightly transferred the suit land to her and she later sold it to the 2nd Defendant, the current proprietor. At this stage the Court is dealing with whether or not to preserve the substratum of the case by way of an inhibition and maintenance of status quo.
19. In the persuasive decision in *Daniel Gitau Kuria v Muthoni Mbugua Ndumo & 3 others* [2021] eKLR the Court in making its determination cited the case of *Dorcas Muthoni & 2 Others Vs Michael Ireri Ngari* (2016) eKLR where the Court held as follows:-
- “An order of inhibition issued under Section 68 of the *Land Registration Act* is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The Court issuing such an order must be satisfied that the Applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.”
20. Under Section 26 *Land Registration Act* a certificate of ownership is conclusive proof of ownership of land unless it is impeached on the grounds set thereunder. Whether or not the 2nd Defendant legally acquired the title deed, is a matter for trial upon production of evidence. Accordingly, I find that in the interest of justice the Application succeeds in terms of Prayer c only – that an order for inhibition is granted to last the pendency and determination of this suit.
21. Costs be in the cause.
22. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 20TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mburu for Plaintiff

No appearance for Defendants

Court Assistant – Phyllis / Kevin

