



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 67 OF 2018

MUGUMOINI FARMERS COMPANY LIMITED.....APPLICANT /PLAINTIFF

VS

INSHWIL BUILDERS ENGINEERS LIMITED.....RESPONDENT /DEFENDANT

AND

EPHRAIM WAITHAKA RUTHA.....RESPONDENT/1ST INTERESTED PARTY

CHARLES WANGONDU SAMSON.....RESPONDENT/2ND INTERESTED PARTY

RULING

1. A brief overview of the matter is that the Plaintiff/Applicant, a body corporate, seeks temporary injunction and caveat placed on parcel of land known as KAKUZI/KIRIMIRI BLOCK 7/37 and its sub-divisions measuring approximately 229 Acres (hereinafter referred to as the suit property) as detailed on the face of the Application pending hearing and determination of the suit. The Application is premised on grounds that the current Directors have learnt that sometime in February 2010, the former Directors purported to fraudulently transfer the suit property to the Defendant, a body corporate as well and in particular that the former directors acted without authority and indeed capacity to transact on behalf of the Applicant.

2. The Application is supported by a Supporting Affidavit sworn by the Applicant's Co-Director, Joseph Kamande Ngone on 16/08/2018 reiterated the grounds on the face of the Application and gave an account of previous suits and Courts orders that were allegedly obtained through concealment and misrepresentation of facts to the Court resulting in the impugned fraudulent transfer of title to the Defendant. Ultimately the Applicant seeks revocation of any title in respect of the suit property to the Defendant and reversion of the title to the Applicant.

3. Before the hearing of the Application, on 21/05/2019 a motion for joinder by two interested parties was made who argued that as bona fide purchasers for value of part of the suit property, they stand to be prejudiced and their proprietary rights will be infringed should they not take part in the proceedings and the Application is allowed. The motion for joinder was allowed on 13/09/2019.

4. In opposing the Application, Patrick Gukura Muraya a co-director of the Defendant swore the Replying Affidavit on 30/11/2018 and averred that the issues raised in the Application are *Res Judicata* and went ahead to highlight previous suits involving the instant parties thereof. It is noteworthy to mention that the contents of the said Replying Affidavit were the subject matter of the Defendant's Preliminary Objection dated 13/09/2018 which was opposed by the Applicant and canvassed by way of submissions before the Court rendered its Ruling on 23/09/2019 dismissing the same with costs.

5. On behalf of the Interested Parties, Charles Wangondu Samson swore the Replying Affidavit on 14/12/2019 and deponed that both he and Ephraim Waitthaka Ruiitha were bona fide purchasers of the part of the suit property and had no knowledge of any alleged fraud. In any case they averred that if any fraud was committed, then the same ought to be a contention between the current and former directors of the Applicant. Moreover, the interested parties raised issue with the Applicant's capacity to prove their position/shareholding in the Applicant company and proof of authority to act in this matter.

6. The Application was canvassed by way of written submissions and authorities which I have read and considered alongside the pleadings filed.

7. The Applicant has submitted that sometime in 2016, the Applicant's directors learnt that the suit property had been fraudulently transferred to the Defendant vide a sale agreement dated 11/07/2003 pursuant to certain orders alleged to have been obtained irregularly and fraudulently in Nairobi HCCC No. 3086 of 1994 (later Thika ELC No. 245 of 2017). The signatories to the said sale agreement were Julius Mbugua Gatuha and Benjamin Kamande Githuka who are said to have had no capacity or authority to transact on behalf of the company as

Directors since they had been removed from office on 17/05/2003. Upon learning of this development, the Applicant's chairman, Joseph Kamande proceeded to Thika Land registry to stop any dealings on the suit property only to be told by the Registrar that the original title had been transferred to the Defendant who in turn sub-divided and sold the suit property hence the instant Application.

8. Further the Applicant has submitted that one of the purported signatories to the affidavits consenting to lifting of prohibitory orders barring the sale of the suit property on diverse dates, the late Julius Mbugua Gatuha was seriously ill in hospital at the time of signing the affidavit on 10/08/2004. Moreover, the Applicant argues that the sale agreement dated 11/07/2003 was not only *void ab initio* for not having been witnessed or commissioned by an Advocate, but it was also vacated by a letter dated 22/01/2004 from the firm of M/S Kamere & Co. Advocates (representing the Applicant then) to the Defendant terminating the transaction. To buttress their submissions, the Applicant has relied on a number of authorities notably **Mohamed & Another –vs- Haidara [1972] E.A 166**, **Giella v. Cassman Brown & Company Limited [1973] E.A 358** and **Nguruman Limited –vs- Jan Bonde Nielsen & 2 others [2014]eKLR**.

9. On the other hand, the Defendant submitted that the Applicant has failed to demonstrate particulars of fraud to warrant the grant of the prayers sought and went ahead to fault the Applicant for failing to disclose existence of former suits between the parties.

10. Similarly, the Interested Parties contend that as bona fide purchasers and registered properties of some parcels of the suit property, are not aware of any fraudulent transactions as alleged by the Applicant and in any event, a complaint had been lodged at the Directorate of Criminal Investigations (DCI) and after investigations, no one was charged for any fraudulent dealings with the DCI outcome terming the issues as being civil in nature. Therefore, it was submitted, that allowing the Application would be prejudicial to their proprietary rights because in so doing the same would constitute arbitrary acquisition of property contrary to Article 40 of the Constitution. Lastly the interested parties highlighted that any allegation of fraud must be proven with tangible evidence and in this instance the Applicant has failed to do so. Reliance was placed on the following cases; **Bamburi Cement Limited –vs- Chief Registrar & Attorney General (2018) eKLR**, **Republic –vs- Registrar of Tiles Mombasa & 4 others Ex-parte A.K Abdulgani Limited [2018] eKLR** and **Kuria Kiarie & 2 Others –vs- Sammy Magera (2018) eKLR**.

11. The issue arising in my view is whether the Court should be pleased to grant temporary injunction on the suit property pending hearing and determination of the main suit.

12. The principles for the grant of an injunction were laid out in the case of **Giella vs Cassman Brown (1973) EA 358**. In the said case the Court stated that the Court needs to consider three principles. First, that an Applicant has to establish a prima facie case with a probability of success, secondly that an injunction will not normally be granted if damages can be a sufficient remedy, and thirdly, if in doubt decide the matter on a balance of probabilities.

13. On the first limb the Applicant has demonstrated that it has a prima facie case with a probability of success based on the face of the pleadings on record that the purported directors and indeed signatories had been removed from office; indeed, one of the Directors, the late Julius Mbugua was said to have been hospitalized at the material time stated above and his widow, Grace Wambui has deponed as much and disowned the purported signature as a forgery. The other alleged signatory Benjamin Kamande has also denied knowledge of the impugned sale agreement. Lastly, in Nairobi HCCC No. 3086 of 1994, the firm of Advocates led by Advocate Simon Kamere acting for the Plaintiff therein has denied lifting of the Prohibitory orders obtained in respect of the suit property on 09/04/2009 and further confirmed writing a letter dated 22/01/2004 to the Defendant herein terminating the intended sale of the suit property. All these factors necessitate inquiry by the Court, hence the prima facie case.

14. Secondly, on the issue of damages being a sufficient remedy, it is noted that the subject matter of the suit is land and there is clear affidavit and prima facie evidence that the Respondent has subdivided and disposed of some of the parcels. This is a case where the Applicants cannot be adequately be compensated by way of damages. It is my humble view therefore, that granting temporary injunction would be fair and just pending hearing of the main suit.

15. On whether the Court should be pleased to order a caveat on the suit property, it is my take that a grant of temporary injunction as discussed above will serve the desired end of preserving the suit property pending hearing of the main suit.

16. In the end, I grant the application and hereby order that a temporary injunction do issue against the Defendant and interested parties prohibiting any interference, selling or disposing off of the suit property and its sub-divisions pending the hearing and determination of the main suit.

17. The costs shall be borne by the Respondent and the Interested parties in favour of the Plaintiff.

18. **It is so ordered.**

DATED, SIGNED AND DELIVERED ONLINE AT MURANGA THIS 25TH DAY OF FEBRUARY 2021

J.G. KEMEI

JUDGE

Delivered online in the presence of:

Mrs Beaco for the Plaintiff

Kanyi Ndumo for the Defendant present but muted

1st and 2nd Interested Parties

Court Assistants: Kuyiki & Njeri