



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 56 OF 2019

SAMUEL MWANGI NYAGA.....PLAINTIFF

VERSUS

BETH WANJIRU MURITU.....1ST DEFENDANT

ANTHONY MUHORO MUTHOGA.....2ND DEFENDANT

MOSES KINYUA MUTHOGA.....3RD DEFENDANT

THE LAND REGISTRAR, KIRINYAGA.....4TH DEFENDANT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

By a Notice of Motion dated 19th December 2019, the Plaintiff/Applicant is seeking the following orders:-

(1) Spent.

(2) That this Honourable Court be pleased to grant a temporary injunction restraining the Defendants by themselves, their servants, agents or otherwise howsoever be restrained from selling, leasing, transferring, developing, charging or registering any instrument on all THAT property known as KIINE/SAGANA/3103 as currently sub-divided into land parcels Numbers KIINE/SAGANA/4110, KIINE/SAGANA/4109 (currently sub-divided into land parcel Nos. KIINE/SAGANA/4640 and KIINE/SAGANA/4641 and from disposing off, alienating, transferring, registering, constructing on, cultivating and/or harvesting any crop or otherwise dealing with the property and the same be noted on the relevant land register pending the hearing and determination of this application.

(3) That pending hearing and determination of the suit, the Honourable Court be pleased to grant a temporary injunction restraining the defendants by themselves, their servants, agents or otherwise howsoever they be restrained from selling, leasing, transferring, developing, charging or registering any instrument on all those properties known as KIINE/SAGANA/3103 as currently sub-divided into land parcels Nos. KIINE/SAGANA/4110, KIINE/SAGANA/4109 (currently subdivided into land parcel Nos. KIINE/SAGANA/4610 and KIINE/SAGANA/4641 and from disposing off, alienating, transferring, registering, constructing on cultivating and/or harvesting any crop or otherwise dealing with the property and the same be noted on the relevant land register.

(4) That the costs of this application be borne by the Defendants.

The said application is supported by the affidavit of Samuel Mwangi Nyaga dated 19th October 2019 and a supplementary affidavit also sworn by the applicant on 11th November 2020. In opposition to the said application, the 2nd defendant filed a replying affidavit dated 16th March 2020.

Summary of Facts

The crux of this application as presented in the supporting affidavit and the annexures thereto is that the applicant was the registered owner of all that parcel of land described as KIINE/SAGANA/3103 measuring approximately 0.40 Ha. He annexed a copy of certificate of official search marked 'A'. The applicant deposed that on or about 25th February 2015, he lost the original title to the suit land together with other household belongings when his house was broken into. He reported the incident at Sagana Police Station where he was issued with a copy of Police abstract which he also annexed as 'B'. He thereafter applied for a replacement title deed through the Office of the Land Registrar Kerugoya using the Police abstract and subsequently, he was issued with a new title deed after the same was advertised in the Kenya Gazette

on 22nd May 2015. He also further annexed the Gazette Notice and marked as 'C'. On 25th July 2015, the applicant was issued with a new title deed for the suit property Number KIINE/SAGANA/3103 which he also annexed and marked 'D'. He stated that sometime in the month of December 2017, he visited the lands office to check the current status of his land only to discover that there were people who had illegally invaded the property, sub-divided the same and even constructed thereon and were cultivating on it. Upon conducting official land searches from the Land registry, he was shocked and dismayed to find out that the land parcel No. KIINE/SAGANA/3103 had been closed on sub-division and new title deed issued without his knowledge, information or consent. Upon conducting further searches, he discovered that land parcel No. KIINE/SAGANA/3103 had been sub-divided into two (2) parcels of land being KIINE/SAGANA/4109 and KIINE/SAGANA/4110 whereby land parcel No. KIINE/SAGANA/4109 was further sub-divided into two (2) parcels being Nos. KIINE/SAGANA/4640 and KIINE/SAGANA/4641. The searches further revealed that land parcels No. KIINE/SAGANA/4640 is registered in the name of the 2nd defendant herein while land parcel No. KIINE/SAGANA/4641 is registered in the name of the 3rd defendant. The applicant annexed copies of the certificates of search and marked as 'E'. The applicant contends that the process of transfer and issuance of sub-division title numbers in favour of the respondents are illegal, null and void and did not confer good title to the respondents. He stated that he never sold or parted with possession of the suit property and that the transfers done by the defendants/respondents were fraudulent and without his knowledge and/or consent.

In the replying affidavit dated 16th March 2020, the 2nd respondent in opposition to the application stated that the affidavit in support of the application is full of falsehoods and non-disclosure of material facts. He stated that he is the registered owner of the parcel of land known as KIINE/SAGANA/4109 having purchased the same from the plaintiff whom he had started the transaction in the year 2012 through his wife one Wairimu Mwangi where they entered into a sale agreement dated 11th January 2013 which was annexed thereto and marked 'AN 1'. The 2nd defendant also stated that the plaintiff gave his wife the express authority to deal and execute the sale agreement on his behalf as he was not able to get permission from his place of work in Muranga. The 2nd respondent also deposed that the sale agreement was drafted by an advocate who they had been referred to by the plaintiff and who had been fully briefed by the plaintiff and had all the documents on the subject property. He further stated that on completion of the purchase price, the plaintiff released to him the consent to transfer which had earlier been issued, the application forms and transfer form and all statutory documents required for the completion of the transfer of the land in his favour. He annexed the documents and marked 'AN 2'. He contends that upon completion of the sale transaction and presenting all the relevant documents to the Land Registrar, he was issued with title deed to the portion he purchased.

By way of a rejoinder, the applicant filed a supplementary affidavit in which he reiterated the contents of the supporting affidavit and stated that contrary to the averments contained in the replying affidavit, he never met the 2nd defendant/respondent in the year 2012 or any other time for the sale of land parcel No. KIINE/SAGANA/4109. The applicant further stated that he knew one Ened Wairimu as a lady he had befriended but fell out in the year 2018 and that he has never given her power of Attorney or authority to sell his land to the 2nd defendant/respondent. He stated that he is not aware of the purported sale agreement and that he has never received any purchase price from the 2nd respondent in the sum of Ksh. 1,100,000/= or any other sum as alleged. The applicant further contends that he was issued with a replacement title in the year 2015 and that he has never sold the suit property to the defendants or at all.

Legal Analysis and Decision

I have considered the affidavit evidence and the annexures both in support and in opposition to this application. It is now well settled that injunctive orders can only be granted upon the Court satisfying itself that the principles set out in the locus classicus case of **Giella Vs Cassman Brown Co. Ltd (1973) E.A 358** are met. The criteria as set out in the aforementioned case is that an applicant must establish that he has a prima facie case with a probability of success; that he will suffer irreparable injury that cannot be compensated by an award of damages; and if the Court is in doubt, the application is to be determined on a balance of convenience. A prima facie case was defined in the case of **Mrao Limited Vs First American Bank of Kenya Ltd & 2 Others (2003) K.L.R 125** as follows:-

“A case in 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case”.

The Court in the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 Others (2014) e K.L.R** outlined the key ingredients of a prima facie as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini-trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities”.

The basis of the applicant's claim is that he lost a title to his property L.R. No. KIINE/SAGANA/3103 which he reported to the Police who issued him with a Police abstract being O.B. No. 10 of 25/02/2015. He then applied for a replacement title deed through the office of the Land Registrar Kerugoya and that he was subsequently issued with a new title deed after the loss was placed in the Kenya Gazette on 22/5/2015. He later learnt with dismay that his land had been closed on sub-division and new titles issued to the defendants who have invaded his land and done construction and developments thereon. He denied having sold the suit property or signed any agreement for the disposition of his rights over the suit property.

From the depositions contained in the supporting affidavit and the annexures thereon, I am satisfied that the applicant has established a prima facie case as defined in the decided cases. I am also satisfied that unless the injunctive orders are issued, the defendants may alienate

the suit properties to third parties thereby causing the applicant irreparable loss.

In my respective view, I am satisfied that the applicant has established the two ingredients for the grant of the injunctive orders sought. The upshot of my analysis is that the Notice of Motion dated 19th December 2019 is merited and the same is hereby allowed as prayed. The costs of the application shall abide the event. It is so ordered.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 5th day of March, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Kabuta, Court clerk – present
2. Applicant/Advocate – absent
3. Respondent/Advocate – absent.