



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KWALE

PETITION NO E01 OF 2021

APOLLO INSURANCE LIMITED.....PETITIONER

VERSUS

KHATIB ABDALLA MWASHETANI.....1ST RESPONDENT

UMAIR MUHAMMAD.....2ND RESPONDENT

JUMA HASSAN SHEE.....3RD RESPONDENT

THE LAND REGISTRAR KWALE.....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1 This ruling is in respect of the Notice of Motion dated 16/7/2021 by the Petitioner herein seeking for the following orders;

1) Spent

2) Spent

3) That pending the hearing and determination of the petition herein, the Respondents be restrained whether by themselves, employees, servants and/or agents from alienating, disposing of, selling, interfering with and /or dealing in any manner whatsoever and howsoever with the Plaintiff's parcel of land known as Land Reference No Kwale/Shimoni Adj/319.

4) That costs of this application be awarded to the Applicant.

2 The Application is brought under the provisions of Order 40 Rule 11(a) & 4 and Order 51 Rule 1 of the Civil Procedure Rules 2020, Sections 1A , 1B and 3A of the Civil Procedure Act, and Section 13 of the Environment and Land Court Act No. 19 of 2011. The application is supported by the affidavit of **Shah Shashikant Mepa** Director of the Petitioner Applicant sworn on 16th July 2021. From the depositions the following facts led to the filing of this suit and also form the grounds of this application among others;-

1) That the Petitioner is the absolute proprietor of Kwale/Shimoni/Adj 319 (the suit property) having purchased the same from one Mzee Kasimu Mwamvumbo at a cost of Kshs 600,000[read Six Hundred Thousand].

2) That a transfer of land document was drawn in July 1994 but as at that time title deeds had not been issued for the Shimoni Adjudication Section and therefore the Petitioner proceeded to the Ministry of Lands and Settlement - Land Adjudication Settlement and obtained a letter dated 2/08/1996 confirming that the property was registered in the name of Apollo Insurance Company Limited and there was no dispute pending over the said plot.

3) That in June 2014 the County Government of Kwale issued rates waiver notice prompting the Petitioner to apply for an official search on 11/6/2014. The Petitioner was advised that the green card relating to the suit property had been lost/misplaced. Consequently, the Petitioner proceeded to apply for opening of a new register as per the procedure provided in law. A green card was subsequently opened whereupon the outstanding rates were cleared and a clearance certificate issued on 13/10/2015.

4) That sometime in July 2019 it was brought to the Petitioner's attention that there was being maintained a green card which reflected the 3rd Respondent as the registered owner. The Petitioner applied to the Kwale Lands Registrar for an official search and a

certified copy of the green card. The same were issued and confirmed the 3rd Respondent as the registered owner with a title deed issued on 11/4/2016.

5) Following the above the Petitioner vide letter dated 5/8/2019 presented to the Land Registrar all supporting documents in support of the Petitioners ownership of the suit property. The Chief Land Registrar on 4/9/2019 summoned all parties concerned to appear and present their original documents for the suit property for verification. That the Petitioners legal team appeared before the then Lands Registrar Kwale with the original title deed and other documents. The respondents did not make any appearance. The Land Registrar verified the Petitioner's title deed and kept the parcel file under lock and key for no further dealings without consent.

6) Subsequently on 8/6/2021 the Petitioners advocates obtained certified copies of the green card and title deed for the suit property and were issued with the same reflecting the 3rd respondent having transferred the suit property to the 1st and 2nd Respondents on 5/4/2017 contrary to the green cards issued on 5/8/2019.

7) That existence of two green cards which were contradictory and therefore pointing to forgery and further that the record of the suit property was destroyed and misplaced.

8) The suit property has a permanent wall and the applicant retains full and unfettered possession of the property. That they stand to suffer loss and damage by loss of their land to third parties.

3 Based on the foregoing the Petitioner seeks for the intervention of the court to forestall the injustice being visited by the 1st and 2nd Respondents by their fraudulent actions and which the 5th respondent was an enabler. Copies of each document cited were exhibited in the supporting affidavit.

The Respondents case

4 The 1st and 2nd Respondent responded to the application through the replying affidavit sworn by the 1st Respondent on 21st December 2021. It is deposed that sometime in 2016 they expressed interest in purchasing land in Kwale/Shimoni Adj/319 and identified Kwale/Shimoni Adj/319 measuring approximately 6.97 acres. They approached the 3rd Respondent as the proprietor and undertook a search which confirmed the 3rd Respondent was the registered proprietor against title dated 11th April 2016 with no encumbrances. That upon further due diligence they confirmed that the 3rd Respondent acquired the suit property through adjudication where the Adjudication Section Kwale District vide a letter dated 6th April, 2016 confirmed that the 3rd Respondent was the registered owner. Having issued the title it was prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. They then proceeded to execute the sale agreement and transfer on 8th March 2021 which was confirmed through a further search as having been registered. The land was acquired in good faith from the 3rd Respondent who sold it without malice and therefore as bonafide purchaser for value without notice deserved the Courts protection.

5 The Respondents further denied they were party to any fraud and also deposed that they were strangers to the allegations made by the Applicant which was a ploy to deny them quiet enjoyment and constitutional right to own property.

6 The 1st and 2nd Respondents urged the court not to grant the orders sought.

SUBMISSIONS

8 The application was canvassed by way of written submissions. The Petitioner filed submissions on 29/11/2021. The 1st and 2nd Respondent did not file submissions. The Attorney General appearing for the 4th and 5th Respondents through Mr. Waga did not participate in this application.

Petitioner's submissions

9 Counsel for the Petitioner identified two issues for determination 1) Whether the petitioner is entitled to be recognised as the absolute proprietor of the suit property to the exclusion of all other persons and 2) Whether the applicant is entitled to a temporary injunction.

10 It was submitted that the Petitioners were the lawful, registered and absolute owners of the suit property and hold title in respect of the same issued to them on 2/5/2002 and having acquired the same for valuable consideration. That the Respondents never presented themselves before the Land Registrar Kwale county and hence have no colour of right to claim ownership of the property.

11 Counsel contended that the Petitioners had the right to acquire and own property either individually or in association with others as provided under article 40[1] of the Constitution 2010. Further that property rights did not extend to any property that has been found to have been unlawfully acquired- see article 40[6].

12 The Applicant invoked the provisions of Section 26 of the Land Registration Act 2012 to uphold its title and to have the irregular, illegal and erroneous green cards invalidated and declared to be void. Reliance was placed on **Evelyn College of Design V Director Of Children's Department & Another [2013] eKLR** on safeguarding of an absolute and indefeasible title.

13 Counsel referred to the principles for granting orders of injunction enunciated in the case of **Giella V Cassman Brown Ltd [1973] EA 358**. These were 1) The Applicant must show that they have a prima- facie case with a probability of success 2) The Applicant must demonstrate that unless the order is granted, they will suffer irreparable harm which cannot adequately be compensated by an award of

damages and 3) That if the court is in doubt as to 1 and 2 ,the court will determine the application on a balance of convenience. It was submitted that these had been met by the Applicant. Reliance was also placed on **Mrao V First American Bank of Kenya Limited & 2 Others [2003] KLR 125** on what constitutes a prima facie case with emphasis that the Applicant had placed before this court all the documents to show how he had acquired the property and the resulting title deed.

It was contended that if the erroneous green card is left unattended they stood to suffer irreparable harm. **Pius Kipchirchir Kogo V Frank Kimeli Tenai [2018] eKLR** was also relied upon in this regard.

14 On balance of convenience, it was pointed that the balance lies squarely in favour of the Applicant since they held the title documents and had full possession of the suit property and cited the case of Paul **Gitonga Wanjau V Gathuthis Tea Factory Company Ltd & 2 Others [2016] eKLR** to buttress this point.

15 The Applicant prayed for confirmation of the orders sought in the notice of motion.

ANALYSIS AND DETERMINATION.

16 In arriving at a determination, I have considered the application and all the material placed before me by the parties including the submissions filed. Arising from these the court should determine **whether the evidence and material placed before court by the Petitioner has satisfied the conditions upon which a temporary injunction can be granted.**

17 The conditions for consideration in granting an injunction are now well settled in the celebrated case of **Giella vs Cassman Brown & Company Limited (1973) E A 358. The conditions have already been set out herein by Counsel for the Applicant – see paragraph 13 of this ruling. I will also be guided by the provisions of Order 40(1) (a) and (b) of the Civil Procedure Rules 2010** which sets the law and authority on granting of interlocutory injunction key being the need for proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit.

Whether plaintiff has established a prima facie case with a probability of success.

19 In **Mrao Ltd vs Ltd vs First American Bank of Kenya and 2 others, (2003) KLR 125** which was cited with approval in **Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR**, the Court of Appeal defined a prima facie case as:

"A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

20 The Applicant has presented before the court evidence in support of how they acquired the suit property culminating into them obtaining the title thereto. I have seen among others copies of sale agreement 'SSM5', transfer drawn in 1994 'SSM6', Rates clearance certificate 'SSM13'. Of importance is a copy of the Title Deed issued to Apollo Insurance Company Ltd on 2/5/2002 'SSM3'. An explanation has also been given for the time lapse between the transfer and the issuance of the title to the Applicant and supporting evidence adduced. Further **they have also been paying the outstanding land rates on the suit property "Rates Clearance Certificate SSM3". Facts depicting the full history have been presented to this court with supporting evidence. What more would this court require at this stage? In this regard I'm reminded of the case of Kenleb Construction Ltd vs New Gatitu Service Station Ltd & another, (1990) eKLR where the court stressed as follows; -**

"To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."

21 The 1st and 2nd Defendant have in their response exhibited copies of Certificate of Official Search indicating the proprietor as the 3rd Respondent 'KAM 2' based on title deed issued on 11th April 2016, the said title deed dated 11/04/2016 'KAM3'. Transfer of Land dated 8/03/2017 between the said 3rd Respondent and the 1st and 2nd Respondents herein. I have also seen an entry of the said transfer in the copy of the green card.

22 From the material placed before this court it is apparent that the Applicants title was issued years earlier than the 1st and 2nd Respondents title. Clearly **there exists a right which has apparently been infringed by the Respondents to call for an explanation or rebuttal from them. I find that the Applicant has established a prima facie case.**

Whether the plaintiff will suffer irreparable injury/loss that cannot be compensated by an award of damages

23 The Applicant alleges that they have at no particular point and time transferred the suit property to anyone or assigned any rights in the property to third parties. That they have justifiable reasons to believe that the 1st and 2nd Respondents may attempt to dispose of the land as there are two green cards with contradicting information to the ownership of the land. The nature and extent of the alleged loss has been disclosed and demonstrated by the Applicant as being the eminent loss of the land to third parties. In the case of **Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court of Appeal considered irreparable injury as follows:

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more

than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is, injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

24 The court is satisfied that the Petitioner has demonstrated the risk of irreparable loss or injury on the basis of the material on record.

iii) In whose favor does the balance of convenience lie?

25 In the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factor y Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue on balance of convenience expressed itself thus: -

"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the *status quo* in determining where the balance on convenience lies. "

26 From the evidence tendered before this court it is clear that the balance of convenience tilts towards granting the injunction to the Applicant. Their title was first in time and in any case, they have deposed they are in possession of the suit property. Copies of two green cards on the suit property with contradicting information raises apprehension that the integrity of the register could be further compromised. It is imperative that this is protected by this court pending the hearing and determination of the dispute. Left open further dealings on the suit land will muddle the situation further.

27 For the foregoing reasons, I find the Notice of Motion Application dated 16th July 2021 has merit. It is hereby ordered;-

1. THAT pending the hearing and determination of this Petition, a temporary order of injunction be and is hereby issued restraining the Respondents by themselves, employees, servants and or agents from alienating, disposing of, selling, interfering with and /or dealing in any manner whatsoever and howsoever with the suit parcel of land known as Land Reference No. **Kwale/Shimoni Adj/319**.

2. Costs shall follow the event.

DELIVERED AND DATED AT KWALE THIS 2ND DAY OF FEBRUARY, 2022.

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Gitahi H/B for Ms. Waihenya.....the Applicant/Petitioner

N/Afor the 1st and 2nd Respondents

N/A..... for the 3rd Respondent

Mr. Wagafor the 4th 5th and 6th Respondent.

Mr. Denis Mwakina..... Court Assistant.