



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. E004 OF 2021**

**JAMES KABURU WACHIRA ..... APPLICANT**

**-VERSUS-**

**HAUSTON MUCHURI WERU .....1<sup>ST</sup> RESPONDENT**

**DAVID MUNDIA MUCHUGU ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR – NYERI ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....4<sup>TH</sup> RESPONDENT**

**RULING**

1. I have before me for determination a Notice of Motion application dated 26<sup>th</sup> February, 2021. By the said Motion, James Kaburu Wachira (the Plaintiff) prays for an order that pending the hearing and determination of this suit, an order of injunction do issue restraining the Defendants whether by themselves, their representatives, agents or servants from alienating, selling, leasing, encroaching and/or trespassing upon, interfering with, wasting, constructing on or dealing with all that parcel of land known as Iriani/Gatundu/104.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds:

*(a) That the Plaintiff's grandmother and father are the registered owners of the said parcel of land measuring 7.08 Ha;*

*(b) That the Plaintiff has been in possession of the original title deed in the names of Samuel Wachira Kaburu and Jane Muthoni Kaburu who are both now deceased;*

*(c) That in a manner that is unclear, the Defendants got hold of a fraudulent title deed that enabled him to sub-divide the suit property into land parcels numbers Iriani/Gatundu/1286, 1870, 1871 and 1872;*

*(d) That the Plaintiff has neither sold the suit property nor leased the same to the Defendants or consented to the sub-divisions.*

*(e) That the Defendant has gone ahead and obtained a shared title deed in his name under one of the illegal sub-divisions;*

*(f) That the Defendant is known for selling off parcels of land and the suit property may be on the verge of being disposed off by the Defendants; and*

*(g) That unless this court issues the orders prayed for, the Plaintiff stand to suffer irreparable loss and damage.*

3. The application is opposed. In a Replying Affidavit filed herein on 23<sup>rd</sup> March, 2021, Houston Muchiri Weru (the 1<sup>st</sup> Defendant) denies that he dealt with land parcel number Iriani/Gatundu/104 as alleged by the Plaintiff or at all. On the contrary, the 1<sup>st</sup> Defendant avers that on 11<sup>th</sup> March, 2020, he did enter into a sale agreement with the Plaintiff wherein the Plaintiff sold to him a portion of land measuring 0.430 Ha out of a parcel of land known as Iriani/Gatundu/1286 at a consideration of Kshs.1,500,000/-.

4. In that respect, the 1<sup>st</sup> Defendant avers that on the said 11<sup>th</sup> March, 2020, he deposited the sum of Kshs.500,000/- into the Plaintiff's Account No. 1522 held at Wananchi Sacco Karatina Branch, and that he later transferred the sum of Kshs.1,000,000/- to the Plaintiff's account held at the Co-operative Bank, Karatina Branch on 3<sup>rd</sup> August, 2020.

5. The 1<sup>st</sup> Defendant asserts that it is the Plaintiff who then proceeded to sub-divide the said Land Parcel Number Iriaini/Gatundu/1286 into Land Parcel number Iriaini/Gatundu 1870, 1871 and 1872 before transferring Parcel Number 1871, to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant further avers that he has since learnt that the parcel of land referred to by the Plaintiff that is Land Parcel Number Iriaini/Gatundu/104 was closed on 27<sup>th</sup> June, 2016 upon sub-division thereof into the new parcels of land now known as Iriani/Gatundu/1286 – 1290.
6. David Mundia Muchugu (the 2<sup>nd</sup> Defendant) is similarly opposed to the Plaintiff's application. In a Replying Affidavit also filed herein on 23<sup>rd</sup> March, 2021, the 2<sup>nd</sup> Defendant denies that he dealt with the parcel of land known as Iriani/Gatundu/104 fraudulently as alleged by the Plaintiff or at all. On the contrary, the 2<sup>nd</sup> Defendant avers that on 5<sup>th</sup> February, 2020, he entered into a sale agreement with the Plaintiff wherein the Plaintiff agreed to sell to him a portion of land measuring 0.9 Ha to be excised from land parcel Number Iriaini/Gatundu/1286 at a consideration of Kshs.4,700,000/-.
7. Pursuant to that Agreement, the 2<sup>nd</sup> Defendant avers that he paid a deposit of Kshs.200,000/- to the Plaintiff through his Co-operative Bank Account at Karatina Branch on 3<sup>rd</sup> August, 2020. The 2<sup>nd</sup> Defendant avers that he never dealt with land Parcel Number Iriani/Gatundu/104 and that he has since learnt that the said parcel of land was closed on 27<sup>th</sup> June, 2016 upon sub-division.
8. I have carefully perused and considered the Plaintiff's application and the response thereto by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. I have similarly considered the written submissions and authorities placed before me by the Learned Advocates for the parties. The Land Registrar Nyeri and the Honourable the Attorney General sued herein as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants neither entered appearance nor did they respond to the application.
9. The Plaintiff has urged this court to grant an order of injunction restraining the Defendants from alienating, selling, trespassing upon, interfering with and/or dealing with all that suit property described as Iriaini/Gatundu/104. It is his case that he is in possession of the original title to the suit property measuring 7.08 Ha. and that in circumstances unknown to him, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have fraudulently sub-divided the said property and obtained titles in their names.
10. The conditions for the grant of an interlocutory injunction were long settled in the celebrated case of **Giella -vs- Cassman Brown and Company Limited (1973) EA 358**, where the court declared that:
- “First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**
11. As to what would amount to a *prima facie* case in a matter such as this one, the Court of Appeal offered guidance as follows in **Mrao Limited –vs- First American Bank of Kenya Limited (2003) eKLR**:
- “A *prima facie* case in a 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.”**
12. In the matter before me, it is contended by the Plaintiff that he is the grandson of Samuel Wachira Kaburu and Jane Muthoni Kaburu who are the registered proprietors of the suit property. According to the Plaintiff, the said registered proprietors are now deceased and he is in possession of the original title deed.
13. While he does not say when his grandparents died, the Plaintiff avers that at some point in time, he had an intention of selling the property to the Defendants but the same never materialized. Subsequently when he applied for a Green Card to know the status of the property, he discovered that the same had been sub-divided and tiled deeds had been issued to the two Defendants for some of the sub-divisions.
14. Other than exhibiting a copy of the titles deed for the parcel number Iriaini/Gatundu/104 which is in the name of the said Samuel Wachira Kaburu and Jane Muthoni Kaburu, the Plaintiff has not placed any evidence before this court as to his alleged relationship with the two individuals said to be deceased and or clearly explained on what basis he now claims the suit property.
15. While the registered proprietors may as well be the Plaintiff's grandparents, that fact alone, on its own, does not give the Plaintiff the *locus standi* to lay a claim on the suit property as he has purported to do herein. Where the Plaintiff is claiming the parcel of land as the heir of, or administrator of the estate of his grandparents, it was incumbent upon him to take out letters of administration for the estate of the deceased prior to the filing of such a claim.
16. It was apparent from a perusal of his pleadings that the Plaintiff has not taken any such steps. That is indeed clear from paragraph 8 of the Plaintiff's supporting affidavits wherein he states as follows:
- “8. That further succession for that piece of land has never been conducted, hence the respondent (sic) maliciously and fraudulently obtained documentation to enable him subdivide the suit property and register one of the subdivided parcel on his name without any authorization whatsoever.”**
17. At any rate, while the Plaintiff purports that he was unaware of how the Defendants came to be in possession of titles for two sub-divisions from the suit property, he has not denied that he executed two separate sale agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. While he

states in the Supporting Affidavit that he only had an intention to sell the property but that the sale did not go through, he does not deny that he received various sums of money from the Defendants as consideration for the portions of land they were buying.

18. From a perusal of the Sale Agreements it is clear that as at the year 2020 when he executed the Agreements with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the property on sale was, as stated by the Defendants parcel number Iriani/Gatundu/1286 and not the parcel number Iriani/Gatundu/104 as stated in the application before me. That being the case, it was apparent to me that as exhibited by the Defendants in that respective Replying Affidavits, the existence of title No. Iriani/Gatundu/104 was in doubt and the sub-division thereof could not be attributed to the two Defendants.

19. In the premises, I was not persuaded on the material placed before me at this stage that the Plaintiff has a prima facie case with a probability of success at the trial, and/or that he stands to suffer irreparable loss or damage unless the orders sought herein are granted.

20. Accordingly the plaintiff's application dated 26<sup>th</sup> February, 2021 is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF NOVEMBER, 2021.**

In the presence of:

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**J. O. OLOLA**

**JUDGE**