



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 163 OF 2019

PETER KAMAU MUNENE.....PLAINTIFF

=VERSUS=

WINFRED WAMBUI GICHURU.....DEFENDANT

RULING

1. The plaintiff brought this suit on 20/5/2019 contending that the defendant had constantly attempted to interfere with his occupation of **Land Title Number Nairobi/Block 110/430** situated in Nairobi. He contended that he was the registered proprietor of the suit property, having purchased it from Paul Ndegwa Waigwa in 2015. He added that he was registered as proprietor of the suit property in 2016. He urged the court to grant him the following verbatim orders:

1. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all the piece of land known as NAIROBI/BLOCK 110/430 (“the suit property”).

2. A permanent injunction restraining the defendant whether by themselves or their servants or agents or otherwise howsoever from entering trespassing and or interfering with the plaintiffs possession and enjoyment of all that property better known as NAIROBI/BLOCK 110/430.

3. Costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit to grant

2. Simultaneous with the plaint, the plaintiff brought a notice of motion dated 17/5/2019 seeking an interlocutory injunction restraining the defendant against trespassing on, wasting, constructing on, alienating, interfering with beacons or dealing with the suit property, pending the hearing and determination of the suit. The application was supported by an affidavit sworn on 7/5/2019 by the plaintiff. He reiterated his case as summarized above and added that his caretaker had informed him that on 24/4/2019, the defendant stormed the suit property and created a scene by claiming ownership of the suit property.

3. The defendant responded to the suit by filing a defence and counter-claim dated 19/8/2019. Her case was that she was bringing the counterclaim in her capacity as administrator of the two estates of Gabriel Gichuru Kuria and Veronica Wanjiku also known as Veronica Wanjiku Gichuru. She denied the plaintiff’s claim and contended that the suit property initially belonged to her later mother Veronica Wanjiku Gichuru together with one Samuel Njuguna Kamau by dint of a share which the two had acquired in Thome Farmers No 1 Limited. Subsequently, Samuel Njuguna Kamau sold his interest in the suit property to her father, Gabriel Gichuru Kuria. Her two parents thereafter became the owners of the suit property. Her parents subsequently made all requisite payments to the lawyers of Thome Farmers No 1 Limited, M/s D. A Nanjero. She further averred that the family of Veronica Wanjiku Gichuru and Gabriel Gichuru Kuria, both deceased, had been in quiet possession of the suit property since 1979 and were shocked to learn that the plaintiff was laying claim to the suit property. It was the case of the two estates of the deceased couple that the title held by the plaintiff was acquired fraudulently because the property belonged to the deceased couple. She sought the following orders in the counter-claim.

a) A declaration that the family of the late Veronica Wanjiku also known as Veronica Wanjiku Gichuru and Gabriel Gichuru Kuria (both deceased) are the bona fide owners of Plot No 727 Thome Farmers No. Limited/Nairobi/Block 110/430

b) An order directed to the Chief Land Registrar being the 2nd defendant by Counter-Claim cancelling the Title issued to Peter Kamau Munene.

c) An order directing the Chief Land Registrar being the 2nd defendant by Counter-claim to issue a Title to the rightful beneficiaries of the Estate of Veronica Wanjiku also known as Veronica Wanjiku Gichuru and Estate of Gabriel Gichuru Kuria upon payment of requisite fees (if any).

d) A permanent injunction restraining the plaintiff in the plaint/1st defendant by Counter-claim either by himself, his agents,

employees and or any person acting under his instructions from trespassing, transferring, disposing and/or dealing with Plot No 727 Thome Farmers No 1 Limited/Nairobi/Block110/430 in any manner.

e) General damages for trespass and for demolition of structures on the suit property

f) Costs of the suit.

4. The defendant responded to the notice of motion dated 17/5/2019 through a replying affidavit sworn on 7/8/2019. She put forth her case as summarized in paragraph 3 above and deposed that on 24/4/2019 and 28/4/2019 goons went to the suit property threatening to evict them from the suit property. They demolished their structures and attempted to forcefully take possession of the suit property. She exhibited copies of Share Certificate dated 28/7/79 in the names of Veronica Wanjiku and Samuel Njuguna, Register, Sale Agreement between Samuel Njuguna and Gabriel Gichuru Kuria dated 8/2/2002, Transfer signed by Samuel Njuguna Kamau, Various Receipts from D A Nanjeru & Co Advocates and Extract of Police Occurrence Book. She urged the court to dismiss the application.

5. Dorcas Ayoma Mbalanya Nanjero swore an affidavit dated 7/7/2019 which was filed by the defendant on 8/8/2019. She deposed that in 1990, while practicing in the name and style of D A Nanjero & Co Advocates, she received a brief from Thome Farmers No 1 Limited to prepare transfers in favour of its shareholders. The company supplied her with the original register which reflected the plot number, the corresponding surveyed title number, share certificate number, the postal address, and the identity numbers of respective plot owners. She added that the register reflected Veronica Wanjiru and Samuel Njuguna Kamau as the owners of Plot No 727 vide Share Certificate No 489. Counsel added that in 2009, Samuel Njuguna showed up in her office and executed a transfer conveying her share in Plot No 727 to Gabriel Gichuru Kuria, husband to Veronica Wanjiku. Counsel further deposed that transfer documents relating to the suit property were subsequently prepared in the names of the couple and forwarded to Lands Office. The Correspondence File at Lands Office thereafter disappeared. Her sworn evidence was that the property belongs to the deceased couple.

6. The application was canvassed through written submissions. The plaintiff's counsel submitted that the two issues falling for determination in the application were: (i) Whether the registration of the plaintiff as the owner of the suit property is absolute and indefeasible and not liable to be challenged; and (ii) Whether the plaintiff/applicant has a prima facie case as the owner of the suit property.

7. Counsel submitted that the plaintiff purchased the suit property from one Paul Ndegwa Waigwa, a registered land title holder, hence the seller passed to the plaintiff a good title. It was further submitted that the plaintiff had demonstrated that he acquired the suit property through a valid sale agreement pursuant to which he was registered as proprietor of the suit property. It was contended that the plaintiff had demonstrated a *prima facie* case with a probability of success and had satisfied all the requirements in **Giella v Cassman Brown [1973] EA 358**. Counsel for the plaintiff urged the court to grant the application.

8. The defendant's counsel submitted that the defendant had demonstrated that they have been in possession of the suit property all along and had further demonstrated how they acquired the suit property and the history of the suit property. It was argued that granting the injunctive orders in favour of the applicant would deny the defendant's family access to their land which the family has had since 1979. It was contended that the defendant stood to suffer irreparable harm if they were kicked out of the suit property they have held since 1979.

9. I have considered the application, the response thereto, and the parties' respective submissions. The single question falling for determination in this application is whether the plaintiff has satisfied the criteria for grant of an interlocutory injunction. That criteria was articulated in **Giella v Cassman Brown [1973] EA 358** and is well settled. A party seeking an interlocutory injunction is required to demonstrate a *prima facie* case with a probability of success. Secondly, he is required to demonstrate that he stands to suffer irreparable damage (which cannot be indemnified by way of damages) if the injunctive order is not granted. Lastly, when there is doubt on either of the above conditions, the court is required to determine the application based on the balance of convenience.

10. The applicant has come to court waving a title relating to the suit property, acquired in 2016. He is also waving a sale agreement dated 18/9/2015 between himself and one Paul Ndegwa Waigwa. On her part, the defendant contends that her late mother, Veronica Wanjiku Gichuru together with one Samuel Njuguna Kamau jointly acquired the suit property through their shareholding in Thome Farmers No 1 Limited in 1979. Samuel Njuguna Kamau subsequently sold his share to the defendant's father, Gabriel Gichuru Kuria. The defendant's parents then became the owners of the suit property. It is the contention of the defendant that the family of Veronica Wanjiku Gichuru and Gabriel Gichuru Kuria (the couple) has been in possession of the suit property since 1979 when Veronica and Samuel acquired it through their shareholding in Thome Farmers No 1 Limited. She contends that the Title held by the plaintiff is a product of fraud.

11. Presented to the court by the defendant in opposition to the application is an affidavit sworn by Dorcas Nanjero, Advocate. Her evidence at this interlocutory stage is that the suit property is a sub-division out of land acquired by Thome Farmers No 1 Limited. The said land buying company bought the land and allocated it to its shareholders. The company allocated the suit property to Veronica Wanjiku Gichuru and Samuel Njuguna Kamau jointly. The latter subsequently sold his share to Gabriel Gichuru Kuria. She was the advocate appointed by Thome Farmers No 1 Limited to process titles in the names of the allocated shareholders. She caused the transfer documents in the names of Veronica Wanjiku Gichuru and Gabriel Gichuru Kuria to be presented to Lands Office for registration. Subsequently, the Correspondence File at Lands Office disappeared. The Directorate of Criminal Investigations is seized of the matter. She presented documentary evidence to support her position.

12. Without making any definitive or conclusive finding, what emerges from the materials presented to the court at this point is that the suit property belonged to and has been in possession of the deceased couple. The deceased couple's family continued to have possession after their demise. Whether or not Mr Paul Ndegwa Waigwa had an authentic title to pass to the plaintiff is a question to be determined at the substantive hearing of this suit. Secondly, at this stage, going by Ms Nanjero's evidence, there appears to be doubt on the root and authenticity of the title which the plaintiff is waving. Thirdly, whether or not the plaintiff was privy to or aware of the fraud alleged by the defendant is a matter to be determined at the hearing. In view of the above doubt, I will not grant the plaintiff the injunctive order sought. I will instead preserve the suit property and the obtaining *status quo* and focus on disposing the substantive suit soonest.

13. In light of the foregoing, the plaintiff's notice of motion dated 17/5/2019 is disposed in the following terms:

a) The estates of the late Veronica Wanjiku also known as Veronica Wanjiku Gichuru and Gabriel Gichuru Kuria shall remain in possession of the suit property but shall not dispose any interest therein or develop or waste the suit property, pending the hearing and determination of this suit.

b) The plaintiff shall not sell, charge, lease or in any manner dispose the title he holds in relation to the suit property, pending the hearing and determination of this suit.

c) Costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Kirwa for the Plaintiff/Applicant

Court Clerk - June Nafula