



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 138 OF 2017

GABRIEL NJOKA KANGANGI.....PLAINTIFF

VERSUS

KIMUNYE TEA FACTORY LIMITED.....1ST DEFENDANT

DAVID WAWERU NJOROGE.....2ND DEFENDANT

AND

SOSPETER KITHUMBU MURAGURI.....INTERESTED PARTY

RULING

1. By a notice of motion dated 15th February 2018 brought under the provisions of **Order 51 Rules 1 and 3, Order 40 Rule 1, 3 and 4 of the Civil Procedure Rules, section 3 and 3A of the Civil Procedure Act (Cap 21)** and **all other enabling provisions of the Law**, the Plaintiff sought the following orders against the Defendants;

a. *Spent.*

b. *Spent.*

c. *That pending the hearing and determination of the main suit, the honourable court be pleased to issue a temporary injunction restraining the 1st and 2nd Defendants/Respondents and the interested party, jointly and severally, whether by themselves, their servants, agents employees, officials or any other person whomsoever from transferring, alienating, and or in any way dealing with the suit property known as Mbeere/Mbita/2092, registered in the names of the Plaintiff/Applicant.*

d. *That the honourable court be pleased to issue an order directing that the 1st Defendant/Respondent to deposit the title to all the parcel of land known as Mbeere/Mbita/2092 with this honourable court until the determination of the main suit.*

e. *That the costs of this application be provided for.*

2. The said application was based upon the grounds enumerated on the face of the motion and supported by the Plaintiff's supporting affidavit sworn on 15th February 2018 and the annexures thereto. The Plaintiff contended that he was the rightful owner of *Title No. Mbeere/Mbita/2092* (hereinafter the *suit property*) having acquired it from his late father. His late father, who was a member of Mbuya clan, had apparently acquired the suit property through *Land Adjudication Case No. 64 of 1973* and *Arbitration Board Case No. 61 of 1974*.

3. The Plaintiff's contention was that the 2nd Defendant was fraudulently registered as proprietor of the suit property after which he sold and transferred it to the 1st Defendant.

4. The 2nd Defendant filed grounds of opposition to the Plaintiff's said application dated and filed on 7th March 2018. Among the grounds, it was stated that the 1st Defendant was lawfully registered as proprietor after having bought the suit property from the 2nd Defendant who had acquired it pursuant to a judgement of the Land Adjudication Committee dated 10th July 1991 in *Objection Case No. 186 of 1980*. It was further contended that the earlier decisions in case *No. 64 of 1973* and *No. 64 of 1974* were overturned in *Objection Case No. 186 of 1980*.

5. The court record also shows that the 2nd Defendant filed a list of documents dated 14th September 2017 in which he annexed a copy of the

proceedings and judgement in various objection cases with respect to the suit property.

6. When the said application was listed for hearing on 7th March 2018, the advocates for the Plaintiff and the 2nd Defendant agreed to dispose of it through written submissions. It was further agreed that the parties were to file and exchange written submissions within 45 days.

7. The record shows that the Plaintiff filed his written submissions on 4th May 2018 whereas the 2nd Defendant filed his on 18th May 2018. The 1st Defendant did not file any response to the application nor written submissions.

8. The court has considered the Plaintiff's said application, the grounds of opposition and other documents on record as well as the written submissions on record. The main question for determination is whether or not the Plaintiff has satisfied the requirements for the grant of an order of interlocutory injunction as set out in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**.

9. The court is not satisfied that the Plaintiff has made out a *prima facie* case with a probability of success at the trial for two reasons. First, it would appear that there were further proceedings with respect to the suit property after *Adjudication Case No. 64/74* and *Arbitration Case No. 61/74*. These further proceedings were not disclosed by the Plaintiff. They appear to have been adverse to the Plaintiff. That is what appears from the subsequent objection proceedings at which the suit property appears to have been given to the 2nd Defendant. Second, even though the Plaintiff has pleaded particulars of fraud against the 2nd Defendant, no adverse allegations have been made against the 1st Defendant who is the current registered owner. It has not been alleged that it was privy to the alleged fraud or that it was aware of or contributed to any mistake, fraud or omission in terms of **section 80 of the Land Registration Act 2012**.

10. The court shall, however, not make any definitive findings on those two aspects as they may prejudice the fair trial of the action. It is only sufficient for the court to indicate that a *prima facie* case has not been established at this stage. The trial court shall be absolutely at liberty to make its own findings upon hearing the suit to conclusion.

11. The court is, therefore, of the view that it is not necessary to consider the 2nd and 3rd principles for the grant of an injunction since the Plaintiff's application has not overcome the first hurdle.

12. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion dated 15th February 2018 and the same is hereby dismissed with costs to the 2nd Defendant only.

13. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **4TH** day of **OCTOBER, 2018**.

In the presence Mr Njiru holding brief for Mr Kamunda for the Plaintiff, Mr Muriithi holding brief for Eddie Njiru for the 2nd Defendant and in the absence of the 1st Defendant.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

04.10.18