



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 42 OF 2020

GABRIEL MWAURA NJOROGÉ.....1ST PLAINTIFF

STELLA CHEROTICH SUM.....2ND PLAINTIFF

VERSUS

AGNES WAITHIRA KAMAU.....1ST DEFENDANT

JOSEPH ONYANGO.....2ND DEFENDANT

LAND REGISTRAR, KAJIADO NORTH.....3RD DEFENDANT

ESTATE OF MICHAEL NJOROGÉ.....4TH DEFENDANT

RULING

What is before Court for determination is the Plaintiffs Notice of Motion application dated the 15th July, 2020 where they seek for a declaration that the transfer of the suit properties namely NGONG/ NGONG/ 50574; 50577; 905595; 90596; 90507; 90598; 90599; 90600; 90601; 90602; 90603; 90604; and 90605 to the Defendants names from the 1st Plaintiff's name was fraudulent; the 3rd Defendant be directed to cancel the names of the Defendants from being registered as owners of the aforementioned suit properties and a permanent injunction be issued restraining the Defendants whether by themselves, their servants or agents from dealing with the suit properties or otherwise interfering with the Plaintiffs' ownership, title, occupation, use and enjoyment of the said properties.

The application is premised on the grounds on the face of it as well as the supporting affidavit of the 1st Plaintiff GABRIEL MWAURA NJOROGÉ where he deposes that he is the owner of land parcel numbers NGONG/ NGONG/ 50573; 50574; 50575; 50576; 50577 which he bought from Murani Murani in 1974 and the original title was registered as NGONG/ NGONG/ 4345. He confirms disposing of NGONG/ NGONG/ 50575 and 50576 to support his son. He contends that his son tricked him and forced him to sign loan documents and they illegally transferred NGONG/ NGONG/ 50573 and 50574 jointly to themselves and took a loan in their name with Cooperative Bank and Progressive Credit Kenya which they failed to service. He explains that his nephews Charles Karanja and George Karanja repaid the said loan and he agreed jointly with the 2nd Plaintiff and his late son to subdivide NGONG/ NGONG/ 50573 into eleven (11) plots and repay George Karanja with one plot. He avers that they agreed he puts up rental houses on NGONG/ NGONG/ 90600 and confirms disposing of NGONG/ NGONG/ 90604 to support this venture. He further states that he knew of the illegal transfers of NGONG/ NGONG/ 50573, 50574, 50575 and 50576 but not NGONG/ NGONG/ 50577. Further he conducted a search on 29th September, 2016 which confirmed the said NGONG/ NGONG/ 50577 was still in his name. He claims he was shocked to learn NGONG/ NGONG/ 50577 had been transferred to one Joseph Onyango and reported the matter to Ongata Rongai Police Station vide OB No. 40 on 3rd February, 2020 to investigate. Further, that the 1st Defendant charged NGONG/NGONG/ 50574 to secure a loan which she is not servicing. He reiterates that he gave them NGONG/ NGONG/ 90596 which the 1st Defendant used as security to take a loan that she refused to repay culminating in his repaying the said loan.

The 1st Defendant opposed the application and filed a replying affidavit where she deposes that the application lacks merit and tainted by concealment of material facts. She explains that the subject property was previously owned by the Plaintiff's deceased wife RACHEL WAHU MWAURA who died on 3rd October, 2002. Further, she paid the purchase price but the property was only registered in the 1st Plaintiff's name. She contends that prior to her demise, she expressed her wish that the said property belonged to her only son's MICHAEL NJOROGÉ's children. She insists the Plaintiff is falsely claiming the property, now that his son is deceased. Further, that the land was initially subdivided into five portions namely NGONG/ NGONG/ 50573 - 50577 in accordance with the number of her children. She states that the 1st Plaintiff hatched a plot to dispose of two portions of the aforementioned subdivisions for his own benefit, without their consent. Further, they confronted him and he admitted he had been involved in negotiations over NGONG/ NGONG/ 50575 and 50576 respectively and they resolved through advise of one lawyer Mr. Nzavi that the balance of the purchase price was to be deposited in the school account which they were running at that time. She reiterates that the Plaintiff is collecting rent for his upkeep over some properties her late husband constructed. She confirms she fully repaid the loan over NGONG/ NGONG/ 50574 which had been charged. Further, the Charge was discharged and she has the title.

The Plaintiff filed a further affidavit where he disputed the 1st Defendant's averments and reiterated his claim.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 15th July, 2020 including the rivaling affidavits and respective Submissions, at this juncture, the issue for determination is whether the interim and mandatory injunction sought by the Plaintiffs ought to be granted pending the hearing and determination of the main suit.

As to whether the interim and mandatory injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

The Plaintiff submitted that he had made out a case for an interim and mandatory injunction in respect to the suit lands. He relied on the cases of **Professor Washington Jalango Okumu Vs Bofar Limited (2005) eKLR; Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358; Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012; Pius Kipchirchir Kogo V Frank Kimeli Tenai (2018) eKLR; Kamau Mucuha V The Ripples Limited; Lolldaiga Hills Limited & 2 Others Vs Robert Wells & 3 Others; and Robert Mugo V Ecobank (Kenya) Limited & Another 3(2019) eKLR**, to support his averments.

The 1st Defendant filed her submissions where she insists the Plaintiff has not established a prima facie case to warrant the orders sought. She submits that the suit properties are registered jointly in the name of her late husband and herself. Further, that the Plaintiff waited for the demise of her husband who is his son to commence harassing her. To support her averments, she relied on the following cases : **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358; Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125; J. M Gichanga V Cooperative Bank of Kenya Ltd (2005) eKLR and Daniel Kamau Mugambi V Housing Finance Company Limited (2006) eKLR.**

The Plaintiffs' claim the 1st and 4th Defendants fraudulently transferred the suit properties into their names. In line with the principles on injunction as enshrined in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** the Court will proceed to interrogate whether the Plaintiffs' have made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the Plaintiffs have demonstrated a prima facie case with probability of success, I wish to refer to the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** where the Court defined a prima facie case. In line with this definition, I will proceed to decipher whether the Plaintiffs have established a prima facie case as against the Defendants. The 1st Plaintiff in his supporting affidavit confirms disposing of NGONG/ NGONG/ 50575 and 50576 respectively. He claims the son tricked him to sign loan documents and they illegally transferred NGONG/ NGONG/ 50573 and 50574 jointly to themselves and took a loan in their name with Cooperative Bank and Progressive Credit Kenya which they failed to service. He explained that they had jointly agreed with his son to subdivide NGONG/ NGONG/ 50573 into eleven (11) plots and repay George Karanja with one plot. Further, that they agreed he puts up rental houses on NGONG/ NGONG/ 90600 and disposed of NGONG/ NGONG/ 90604 to support this venture. He knew of the illegal transfers of NGONG/ NGONG/ 50573, 50574, 50575 and 50576 but not NGONG/ NGONG/ 50577, and was shocked to learn NGONG/ NGONG/ 50577 had been transferred to one Joseph Onyango. He further claims the 1st had Defendant charged NGONG/NGONG/ 50574 to secure a loan which she is not servicing. He also confirmed giving NGONG/ NGONG/ 90596 which the 1st Defendant used as security to take a loan that she refused to repay culminating in his repaying the said loan.

The 1st Defendant in her replying affidavit explained that the subject property was previously owned by the 1st Plaintiff's deceased wife RACHEL WAHU MWAURA who died on 3rd October, 2002. Further, that the said property was only registered in the name of the 1st Plaintiff. She contends that prior to the demise of RACHEL WAHU MWAURA, she expressed her wish that the said property belonged to her only son's MICHAEL NJOROGI's children. She averred that the suit land was initially subdivided into five portions namely NGONG/ NGONG/ 50573 - 50577 in accordance with the number of her children. She contends that the 1st Plaintiff hatched a plot to dispose of two portions from the resultant subdivisions for his own benefit without their consent. Further, upon confronting him, he admitted he had been involved in negotiations over NGONG/ NGONG/ 50575 and 50576 and they resolved through advise of a lawyer Nzavi that the balance of the purchase price would be deposited in the school account which they were running at that time. She reiterates that the Plaintiff is collecting rent for his upkeep over some properties her late husband constructed. She produced a copy of the title to NGONG/ NGONG/ 50574 and confirmed she had fully repaid the loan over it and the title discharged. From the respective parties' averments herein, I note the 1st Plaintiff was actually willingly transacting with his late son. Further, he has not indicated why he failed to take action against his son when he was alive if he indeed tricked him. He actually confirms disposing of various parcels of land during the son's lifetime. Further, I note the said properties were transferred to the son and the wife's name prior to the son's demise. To my mind, he seems to have been comfortable in disposing of the said properties but upon the son's demise, he has made a turn around to blame them. I opine that the issues being raised by the Plaintiffs' especially the averments of the 1st Plaintiff in respect to transactions over the various parcels of land would require viva voce evidence to enable the court make a proper determination of this suit. Be that as it may, based on the facts as presented by the Plaintiffs and 1st Defendant while relying on the two cited decisions, I find that the Plaintiffs' have failed to establish a prima facie case to warrant the grant of orders sought. In referring to the **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where the Court of Appeal held that if one party fails to prove a prima facie case, the Court need not proceed to deal with the remaining two limbs. I will hence decline to do so.

On the issue of a mandatory injunction sought by the Plaintiffs, I wish to make reference to the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** where the Court of-----Appeal held that, ' **a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.**'

In the current scenario, the Plaintiffs seek a mandatory injunction as against the Defendants by themselves, their agents, servants, employees or whomsoever claiming through them from trespassing into, claiming and/or interfering with the Plaintiffs' possession, enjoyment or utilization of the suit properties. From the evidence before Court, the 1st Plaintiff actually admitted transferring various properties to his late son and his wife and has only filed this suit after his demise. He has even confirmed disposing of various parcels of land to support the son. He claims the son tricked him to sign loan forms but does not state what action he took after learning he was tricked. I opine that since the suit properties are in the hands of the 1st and 4th Defendants, it would be pertinent for viva voce evidence to be adduced to enable the Court arrive at a proper determination of the dispute at hand. It is my considered view that there are no special circumstances to warrant the orders sought. Further, from the facts as presented by the 1st Plaintiff, this is not a clear case meeting threshold set in granting a mandatory injunction. It is in these circumstances and in relying on the above cited judicial authority that I decline to grant the mandatory injunction at this juncture.

In the circumstances, I find the Notice of Motion dated the 15th July, 2020 unmerited and will proceed to dismiss it.

Costs will be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF MAY, 2020.

CHRISTINE OCHIENG

JUDGE