



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. E4 OF 2020

MARY GAKENIA NGUNYI.....PLAINTIFF/APPLICANT

VERSUS

JAMES MUNENE NDUMBI1ST DEFENDANT/RESPONDENT

MOSES KIREGA NJOGU.....2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 8th October 2020 and supported by an affidavit of even date, the Plaintiff herein has approached the court seeking the following orders:

i. Spent;

ii. That the Honourable court do, by an order of injunction bar the 1st Defendant from in any way taking occupation, entering upon, cultivating, selling alienating, charging or otherwise dealing in any way whatsoever with Title No. MUTIRA/KAGUYU/5014 or the derivative titles thereof, MUTIRA/KAGUYU/631, 6318 and 6319, until further orders of the court and or the determination of the suit;

iii. That the Honourable court do, by way of injunction directed against the Defendants herein, their agents, assigns or anybody claiming or working under them from selling, alienating, wasting, removing the Plaintiff from occupation, entering upon the land, interfering with the Plaintiff's peaceable occupation and utilization of Parcels MUTIRA/KAGUYU/631, 6318 and 6319 (Previously MUTIRA/KAGUYU/5014) until the determination of the suit;

iv. That the court be pleased to call for the physical file from the lower court vide Kerugoya CM ELC No. 191 of 2019, and to retain the said file until further orders of the court to prevent further abuse of the court process by the Respondents herein;

v. That costs be provided for.

2. The application is based on the following grounds:

a. That the Defendants in the matter abused court process by conniving to file Kerugoya Chief Magistrate's ELC Case No. 191 of 2019 with fraudulent intentions;

b. That the resultant connivance and collusion through filing of consents, the Defendant roped in the court to perpetrate a patently fraudulent transfer of land;

c. That no transfer, whether by court order or otherwise can be procured at Lands Registry without the requisite Land Board Consents and Duly executed transfers, either by the parties or by court;

d. That no transfer can be procured without the mother title which the Plaintiff herein still holds;

e. That the 2nd Respondent procured registration without paying any stamp duty by purportedly, again, abusing the registration of court orders obtained with fraudulent intent;

f. That the Honourable court has jurisdiction to declare all pleading procured with an illegal intention as null and consequently nullify all actions pursuant to the said fraudulent scheme;

g. That the court's reputation is at stake if fraudulent and conniving litigants can be allowed to enjoy fruits of such illegal schemes effectuated using the court as a Launchpad;

h. That if orders for injunction are not granted, the 2nd Respondent shall further alienate the land and the Applicant faces possible eviction.

3. The Respondents herein have strenuously opposed the Applicant's application. Vide a replying affidavit filed on 12th November 2020, the 1st Respondent herein avers that he is the registered proprietor of all that parcel of land originally known as MUTIRA/KAGUYU/5014. That he purchased the land from the 2nd Respondent by way of a sale agreement dated 14th August 2015. That prior to the purchase, he conducted a search on the property and was satisfied that the 2nd Respondent was registered as the sole absolute proprietor. That pursuant to the purchase and after paying the agreed upon consideration of Six Million Shillings (Ksh. 6,000,000), the 2nd Respondent became hesitant to effect the transfer. That he sought recourse by filing Suit ELC 191 of 2019 seeking orders of specific performance. That the 2nd Respondent consented to transferring the property to him, which consent was adopted in the courts judgement of 5th December 2019. That the court ordered the Land Registrar Kirinyaga, to register the property in the name of the 1st Respondent and title was issued in favour of the 1st Respondent on 8th July 2020. That the 1st Respondent was granted vacant possession of the land and he proceeded to occupy and fence the land. That vide a mutation form filed by the 1st Respondent, he caused the land to be subdivided on 21st July 2020 into three portions, being MUTIRA/KAGUYU/631, 6318 and 6319. He therefore argues that the Plaintiff's claim of living or being in occupation of the property is false. He further avers that during the pendency of the Suit, ELC 191 of 2019 in the lower court, the Applicant was admitted as an interested party. That the Applicant vide a notice of motion dated 7th August 2020 sought similar orders which were temporarily granted but which application was finally dismissed on 18th September 2020. The 1st Respondent thus concludes that the Applicant has failed to satisfy the requirements for an award of an injunction against him jointly with the 2nd Respondent.

4. The 2nd Respondent filed his response to the present application on 9th December 2020. He avers that the Applicant is his estranged wife, having married her in 2005 but later separated sometimes between 2008 and 2009. He further avers that the land in dispute, MUTIRA/KAGUYU/5014, was given to him as an inheritance by his father on 4th November 2011. He stresses that the land was never a matrimonial home. He admits that he entered into a sale agreement with the 1st Respondent and admits his reluctance at transferring the property, precipitating Suit No. ELC 191 of 2019 in which he was sued by the 1st Respondent. He also admits that he voluntarily entered into a consent for the transfer of the land, which consent was adopted as a judgment of the court. He stated that the Applicant has never resided on the land and currently lives on Plot Number 1178 Gitura in Kenol.

5. The parties herein by mutual consent agreed to dispose of the application by way of written submissions.

6. The Plaintiff/Applicant filed her submissions on 19th January 2021. She adopted the averments contained in the supporting affidavit to the 08th October 2020 application. She maintains that the court has jurisdiction to entertain the application on the basis that fraud is alleged in the conduct of proceedings in the lower court. She cited the decision in **Kahiga Kamau Vs Lorien Ranching Company Limited & 4 Others (Nyeri Civil Appeal No. 234 of 2003)** in support. She further submits that she has ably satisfied the requirements in **Giella Vs Cassman Brown** on the issuance of injunctions. She cites the lack of a Land Control Board Consent, spousal consent, Stamp Duty payment receipts and original title deed in the transaction involving the transfer of land from the 2nd Respondent to the 1st Respondent to justify the allegation of fraud. She further submits that the land in question is a matrimonial home as well as an ancestral home and that she, together with her children stand to suffer irreparable harm should the land be further alienated.

7. The 2nd Defendant filed his submissions on 08th February 2021 and submitted that the requisite standard for the award of an injunction has not been satisfied. He cited the case of **Pius Kipchirchir Kago Vs Frank Kimeli Tena (2018) e KLR** to demonstrate that the defendants would be more inconvenienced should the orders sought be granted while the Plaintiff/Applicant had nothing to lose. He further noted that the orders sought are similar to the once sought in the lower court and thus that the matter is res judicata and the court cannot therefore call for the lower court file. The case of **Esther Ngundu Ndeti & Anor Vs Cecilia Situmai Ndeti & 4 Others (2020) e KLR** is cited in support.

8. The 1st Respondent filed his submissions on 15th February 2021. He adopted the averments in his replying affidavit and further submitted that the matter was res judicata, being that similar orders had been sought in the lower court, with the eventuality being a dismissal of the Applicant's application. The decision in **Christopher Orina Vs Salama Beach Hotel Limited & 3 Others (2017) e KLR** and **Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others (Nairobi CA Civil Appeal No. 105 of 2017)** were cited. In support of the position that the Applicant had failed to satisfy the necessary ingredients set out in the case of **Giella Vs Cassman Brown**, the case of **Films Rover International 1986 3 ALL ER 772** was cited. In addition, the 1st Respondent submitted that he was the registered proprietor of the disputed land and the injunctive orders sought ought to be awarded very sparingly in light of the indefeasibility of title afforded by the law. He cited **Erick Gakuya Mwathaita Vs Maganjo Joshua Kago (ELC No. 61 of 2013 (Kerugoya))**.

9. The Court has considered the Plaintiff's application, the parties' affidavits and the rival submission. The issue in contention in the present case is the legality or otherwise of the sale and transfer of MUTIRA/KAGUYU/5014 by the 2nd Respondent to the 1st Respondent. At this juncture however, the court is not called upon to make a determination as to the legality of the transaction, but is merely invited to apply its mind to the Plaintiff's application (and the Respondent's submissions thereon) and to evaluate, whether or not the orders sought ought to be granted.

10. By way of recapitulation, the orders sought by the Applicant are as follows:

i. That the Honourable court do, by an order of injunction bar the 1st Defendant from in any way taking occupation, entering upon, cultivating, selling alienating, charging or otherwise dealing in any way whatsoever with Title No. MUTIRA/KAGUYU/5014 or the derivative titles thereof, MUTIRA/KAGUYU/631, 6318 and 6319, until further orders of the court and or the determination of the suit;

ii. That the Honourable court do, by way of injunction directed against the Defendants herein, their agents, assigns or anybody claiming or working under them from selling, alienating, wasting, removing the Plaintiff from occupation, entering upon the land, interfering with the Plaintiff's peaceable occupation and utilization of Parcels MUTIRA/KAGUYU/631, 6318 and 6319 (Previously MUTIRA/KAGUYU/5014) until the determination of the suit;

iii. That the court be pleased to call for the physical file from the lower court vide Kerugoya CM ELC No. 191 of 2019, and to retain the said file until further orders of the court to prevent further abuse of the court process by the Respondents herein;

iv. That costs be provided for.

11. The parties to the case have correctly traced the legal standard governing the issuance of temporary injunctions to the seminal decision of *Giella Vs Cassman Brown [1973] EA 358*. The wording of *Spry VP* in that case is reproduced hereunder:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.”

The Civil Procedure Rules 2010, legislate this position.

“[Order 40. Rule 1] Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise -

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.” (Underline, mine)

The three-part test set out in the *Giella* case has been held to be all inclusive, meaning that where there is a positive finding for less than the three factors, the injunctive relief ought not to be given.

See the Court of Appeal decision in *Hassan Huri & another Vs Japhet Mwakala [2015] e KLR* which cited with approval the case of *Kenya Commercial Finance Co. Ltd Vs Afraha Education Society [2001] 1 EA 86*, where the court pronounced itself as follows:

“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

The first limb of the test, that of *whether or not the applicant has demonstrated a prima facie case with a probability of success*, was further enunciated in the Court of Appeal case of *Mrao Ltd vs. First American Bank of Kenya and 2 Others {2003} e KLR* as follows:

“... a case in 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 to call for an explanation or rebuttal from the latter.”

It is not contested that the land in dispute, MUTIRA/KAGUYU/5014, was transferred to the 2nd Respondent by his father sometime in 2002 although the resultant title was issued to him in 2011. It is also agreed that the 2nd Respondent entered into a sale agreement with the 1st Respondent for the sale of MUTIRA/KAGUYU/5014 for a consideration of Six Million Shillings (Ksh. 6,000,000). Prior to executing the sale agreement, the 1st Respondent carried out an official search of the land on 5th February 2014, which search revealed the 2nd Respondent as the absolute proprietor of the land. The 2nd Respondent acknowledges receipt of the purchase price from the 1st Respondent and further agrees that he voluntarily executed the consent dated 28th November 2019 adopted as judgement on 5th December 2019 for the transfer of the land to the 1st Respondent. On the strength of the court order, and with a further confirmation on the validity of the order via correspondence dated 15th January 2020 and referenced LND/KIR/CON/CG/I/4 the land registrar Kirinyaga County proceeded to register the transfer of land in favour of the 1st Respondent. **Section 31 of the Land Registration Act (No. 3 of 2012)** permits a land registrar to dispense with the production of the original title deed and thus, the fact that the Applicant has the original title in her custody does not impute fraud on the

registration of the transfer. Although the Applicant and the 2nd Respondent are husband and wife, having gotten married in 2005, both concede that they are now separated, with divorce proceedings underway. The 2nd Respondent submits that they separated sometime between 2008-2009, while the Applicant notes that they were still together as at 2011. Be that as it may, it is correct to infer that at the time when the 1st Respondent purchased the land, the two were not together. The 1st Respondent avers, and the 2nd Respondent agrees, that he was given vacant possession of the land upon purchase.

The question as to whether or not the land was a matrimonial home will be an issue to be determined at the main hearing.

Onto the second prong, the Applicant, is next required to prove that the injury to be suffered, absent the injunction, would be irreparable, incapable of adequate compensation by an award of damages. The Court takes notice of the fact that the 1st Respondent is registered as proprietor of Parcels MUTIRA/KAGUYU/631, 6318 and 6319 (Previously MUTIRA/KAGUYU/5014) and is the one in actual occupation of the parcel of land. The orders sought in the injunction including a prohibitory order against the entry, occupation and cultivation of the land cannot be granted in light of the 1st Respondent's occupation of the land. As already pointed out, the imputation of fraud against the 1st Respondent in the acquisition of the land is tenuous. On the premises, the Court finds that no injury would be occasioned if the orders are not granted.

The last prong suggests that when the court is in doubt, it should decide the application on a balance of probabilities. In *Nguruman Limited Vs Jan Bonde Nielsen & 2 Others [2014] e KLR; Civil Appeal No. 77 of 2012 (Nairobi)*, the court unpacked this requirement as follows:

“...The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

I agree with the reasoning of the Court in the above decision. The upshot of my analysis is that the applicant's application dated 8th October 2020 lack merit and the same is hereby dismissed with costs to the respondents. It is so ordered.

RULING READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 7TH DAY OF MAY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Wandia Murimi holding brief for Karweru for Plaintiff
2. Mr. Muchiri holding brief for Muriuki Muriithi for 2nd Defendant
3. 1st Defendant in person – present
4. Kabuta – Court Assistant.