



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ELC CASE NO. 40 OF 2020**

**BONIFACE MURIUKI NJAGI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**DOMINIC MUCHANGI NYAGA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**FAITH KARIMI MBOGO.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**ANGELICA ROSE KANYIVA NJAGI.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**RAURESIA WAMBOGO NJAGI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**TIMOTHY KARIUKI NJAGI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. I am called upon to determine the amended notice of motion dated 17<sup>th</sup> October 2020 filed by the Applicants on 18<sup>th</sup> February 2021. The Applicants had initially brought a notice of motion dated 9<sup>th</sup> October 2020 and filed on 12<sup>th</sup> October 2020, which they later amended to the present application. The Applicants have not expressed the provisions they have brought the application under. However, the court notes that the orders sought are of injunctive nature and the application must therefore meet the provisions of **Order 40 of the Civil Procedure Rules**.

**APPLICATION**

2. The Applicants **BONIFACE MURIUKI NJAGI, DOMINIC MUCHANGI NYAGA, FAITH KARIMI MBOGO** and **ANGELINA ROSE KANYIVA NJAGI** are the plaintiffs in the suit while the Respondents **RAURESIA WAMBOGO NJAGI** and **TIMOTHY KARIUKI NJAGI** are the Defendants.

The motion came with three (3) prayers but prayer 1 is moot now. The prayers for consideration are therefore two (2) – prayers 2 and 3 – and they are as follows:

**2. THAT the honourable court be pleased to issue an injunction order restraining the defendants/respondents, their agents/servants or anybody interfering with the land parcel No. NGANDORI/NGUVIO/6637, 6638, 6639 and 6640 pending the hearing and determination of the main suit.**

**3. THAT costs of the application be provided for.**

3. The application is premised on grounds, *inter alia*, that the Applicants entered into a sale agreement on 15<sup>th</sup> May 2019, and that from the time of the agreement to date, they have never occupied and or utilized the land as a result of which they have lost approximately Kenya Shillings Three Million (Kshs. 3,000,000/=). The Applicants allege that the Respondents or their agents have restrained them from entering, cultivating or picking tea from the suit parcel of land (NGANDORI/NGUVIO/6637, 6638, 6639 and 6640) consequent to which they continue to lose the produce of the suit land including tea bonuses and other benefits. On the grounds adduced above the Applicants thus seek an injunction to restrain the Respondents from interfering with the suit parcels of land.

4. In an amended supporting affidavit sworn by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, the Applicants deposed, *inter alia*, that the four (4) of them are the registered owners of suit parcel of land NGANGORI/NGUVIO/6637, 6638, 6639 and 6640, having bought the land for value. They subsequently have attached a sale agreement as proof of the sale. The Applicants reiterate the grounds on the application that prior to sale

agreement the Respondents who are alleged to be strangers to them invaded the land and have been using it by cultivating and interfering with the land. The Applicants further claim that they have never entered or utilized the land and their interest is threatened and they stand to be denied their constitutional right to property unless the court intervenes.

5. The Respondents filed both a replying affidavit and grounds of opposition in response to the application. The pleadings were all filed on 24<sup>th</sup> November 2020. In the Grounds of Opposition the Respondents averred, *inter alia*, that the application was misconceived, incompetent and an abuse of the court process. They also averred that the agreement for sale alluded to by the Applicants was void ab initio for reasons that Mary Rutere, the seller, lacked capacity to sell land parcel Ngandori/Nguvio/6410 as she never sought authority from the court which issued the grant in Embu High Court Succ. Cause No. 66 of 2004 before proceeding with the sale. The Respondents further allege that there is a consent in place recorded in the Succession Cause where both parties agreed that the parcel Number Ngandori/Nguvio/6410 do revert back to the seller to hold in trust for her children.

6. The Respondents further claim that the four titles which are subject of this suit were taken in May 2020 after the consent was recorded in the succession and the titles are null and void and in contravention of a court order. They denied being in occupation or utilizing the land and averred that the proper cause of action should be for recovery of the monies paid by the Applicants from Mary Gicuku Rutere.

7. In their Replying affidavit the respondents relied on the averments in their Grounds of Opposition and further reiterated that the vendor Mary Gicuku Rutere held the land in trust for her children pursuant to Embu Succession Cause No. 66 of 2004 and that she had not sought authority from the court to dispose of the land, as such the purported sale was in contravention of the law. The Respondents further said that the parties had recorded consent where it was agreed that the land be reverted back to the vendor Mary Gicuku Rutere and be registered as per the confirmed grant. The Respondents have attached copy of the said consent to their application. It is the Respondent's claim that the disputed titles were processed in contravention of the court order recorded by the parties. The Respondents therefore aver that the Applicants cause of action, if any, lies on recovery of money paid to the vendor and not on the Respondents eviction as they are not in occupation or utilization of the land. It is on these grounds that the Respondents call upon the court to dismiss the Applicants application with costs.

### SUBMISSIONS

8. The application was canvassed by way of oral arguments on diverse dates. The 2<sup>nd</sup> Applicant with authority from the other Applicants submitted that they exchanged their parcel of land Ngandori/Nguvio/4161 with the vendor in exchange for parcel number Ngandori/Nguvio/6410 and a consideration of Kshs. 1,475,000/=. It is their submission that they attended land control board together with the vendor and her children and the board granted consent for the transfer of the land which they then subdivided into the present portions. It is the Applicants case that they tried to occupy the land but were prevented by the Respondents. They submitted, *inter alia*, that the court should issue a restraining order against the Respondents for reason that they, the Applicants, have title to the suit parcels of land.

9. The Respondents made their oral arguments in response to the Applicants arguments. The 2<sup>nd</sup> Respondent argued on behalf and with authority of the 1<sup>st</sup> Respondent. He gave a chronology of how the suit parcel of land was vested in the Vendor to hold in trust for herself and her children in Embu Succession Cause No. 66 of 2004. According to the Respondents the Vendor had no grant to enable her to sell the land to the Applicants and instead the Succession court had advised the Applicant to sue the vendor who sold and exchanged the land with them for recovery of their money. The Respondents oppose the Application and aver that the land was not obtained lawfully. They deny knowledge of any exchange of money between the parties and the assertion that the Vendor was given ¼ acre in exchange for 1 ½ acre to the Applicants.

10. The 2<sup>nd</sup> Applicant in response asserted that they followed the law in transferring and acquiring the land and prayed that their application be allowed.

### ANALYSIS AND DETERMINATION

11. I have had a look at the entire court record generally. I have also considered the application, the response made, and the rival submissions. The Applicants have filed this application seeking temporary injunction pending hearing and determination of this suit. As earlier stated in the ruling neither of the parties has relied on case law or statute in support or opposition of the application. That notwithstanding, the conditions to be met for granting of an order of an injunctive nature are well set out in **GIELLA VS. CASSMAN BROWN & CO., LTD. [1973] E.A. 358** at p. 360 where it was stated:-

***“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 (E.A. INDUSTRIES VS. TRUFOODS [1972] E.A. 420.)”***

What amounts to a prima facie case, was explained in **Mrao Ltd v. First American Bank of Kenya Ltd & 2 ors Civil Appeal No. 39 of 2002**, where the court described prima facie case as follows:

***“In civil case, it is 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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter”***

12. It is the duty of the Applicants to establish that they have a *prima-facie* case. The Applicants have presented before the court titles to the land as evidence that they are the rightful owners of the land having purchased the land from the vendor Mary Gicuku Rutere. There is no doubt whatsoever that the Applicants have titles to the respective parcels of land. However, the Respondents have also annexed documents which show the genesis of the acquisition of the subject parcels of land by the Applicants. The Defendants have annexed a certificate of confirmation of grant that shows that the land was vested in the Vendor to hold in trust for herself and her children. Also annexed is a

consent signed by both parties on 22<sup>nd</sup> March 2019 to the effect that the Applicants had agreed to revert the land to the vendor (Mary Gicuku Rutere) in compliance with the distribution in the grant issued on 24<sup>th</sup> July 2014. The Applicants on the other hand, have done little to rebut this evidence. If anything, the court order is still valid and has not been set aside.

13. The court acknowledges that at this juncture it only has a duty to establish whether the parties have established a case to warrant grant of an injunction and not to determine the merits of the case or deal with the substantive issues.

Section 26(1) of the **Land Registration Act** provides as follows:

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ,... and the title of that proprietor shall not be subject to challenge, except-***

***a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

14. It appears that going by the provisions of **Sec 26(1) of the Land Registration Act**, the court is duty bound to hold that the Title Deeds produced by the Applicants are *prima facie* evidence that the proprietors, are the absolute and indefeasible owners of the suit property and that the titles of such proprietors shall not be subject to challenge except on the grounds stated therein.

The court however notes, that the Respondents have annexed in their pleadings a confirmed grant and consent where parties appear to have agreed to exchange the respective parcels of land and to assume ownership of their initial parcels of land, this consent has not been set aside and is still valid.

15. The Applicants have further acknowledged that the land alluded to in the certificate of confirmation of grant is the same one that was subsequently subdivided into the various parcels of land now registered in the names of the Applicants.

16. It is worth noting that whereas, the issue of whether or not titles held by the Applicants fall under **Section 26(1)(a)(b) of the Land Registration Act**, whether the consent has an impact on the land, can only be determined at the substantive hearing of the suit. It is clear that there is a valid court order to the effect that the land held by the Applicants should be vested in the Vendor and not them. This court order was issued before transfer of the land in favour of the Applicants was effected. The court can therefore not be blind to the issues raised by the Respondents and which the Applicants have chosen not to respond to.

17. Further in the case of **Munyu Maina V Hiram Gathiha Maina [2013] eKLR** the court of Appeal Judges stated that **“... When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.”**

Based on the evidence presented in the supporting affidavit and oral arguments, the court is of the view that the Applicants have not established a prima facie case with a probability of success.

18. Having established that the Applicants have not established a *prima facie* case, it is then necessary to establish whether the Applicants would suffer irreparable loss if the injunction sought is not granted.

In the case of **Simon Kipngetich Bett vs. Richard C. Kandie (2012) eKLR, Munyao J.** stated what irreparable harm entailed as follows;

***“To me, the assessment of irreparable harm has to be done on a case by case basis. The court must assess whether the subject matter of the case will be so wasted as to make the final determination, if in favour of the applicant, a nullity. In my view, if the subject matter of the suit is capable of substantially being maintained in no worse a state at the conclusion of the suit as it is at the time of application for injunction, then there is no irreparable harm. Such harm must also be harm that cannot be adequately compensated by an award of damages. In other words it is the sort of harm which will render victory in the suit empty and devoid of any substance.***

19. The Applicants in this case have pleaded that they have never occupied and or utilized the land since they purchased it and as a result, they have lost approximately Kenya Shillings Three Million (Kshs. 3,000,000/=). The Applicants have not demonstrated how they have come about the figure of Kshs. 3,000,000/=. That notwithstanding, the land is registered in the name of the Applicants and is therefore not in danger of being disposed or sold to any third parties. The Applicants have not demonstrated how the land will go to waste. If anything since the amount is quantifiable the same can be compensated as damages in the event the suit is successful. In the circumstances the land is capable of being maintained in the same state during the pendency of the suit. It is the court’s finding that no irreparable damage or loss will be incurred by the Applicants if the orders sought are not granted.

20. The last requirement in Giella’s case is that when the court is in doubt, it should decide the application on a balance of probabilities. This is one of those cases where I have to decide this application on a balance of convenience. In **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi)** the court considered 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.”***

21. In light of this case, I am inclined to find that the balance of convenience tilts in favour of the Respondents. The Applicants though

registered owners have not been in occupation of the land since purchasing it. The Respondents on the other hand have alluded to the fact that they are not interested in the suit parcel of land but are only opposing the manner of acquisition of the parcel. But they appear to have an interest in the land on behalf of an estate which estate may suffer great inconvenience compared to that which may be suffered by the Applicants. The court finds that the circumstances of this case call for the *status quo ante* to be maintained pending the hearing and determination of this case. The status quo is to the effect that the Applicants are to remain as the registered owners but an injunction against the defendants is not granted.

22. The upshot of the foregoing is that the application is dismissed with costs and status quo be maintained.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 6<sup>TH</sup> DAY OF MAY 2021.**

**In the presence of the Applicants and the Defendants.**

**Court assistant: Leadys**

**A.K. KANIARU**

**JUDGE**

**6.5.2021**