



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC No. E4 OF 2020

ZEPHANIA GITAU MBUGUA.....PLAINTIFF

VERSUS

CHEGE NGANGA KARIHA.....1ST DEFENDANT

SILVALINE INVESTMENT LIMITED.....2ND DEFENDANT

THE CHIEF LANDS REGISTRAR.....3RD DEFENDANT

JOHN KARIUKI TUMBU.....4TH DEFENDANT

FRANCIS KOIGU KIRAGURI.....5TH DEFENDANT

FRANCIS KARIUKI MWANGI.....6TH DEFENDANT

MARY WANJIKU MUREU.....7TH DEFENDANT

DOMINIC KINGA MWANGI.....8TH DEFENDANT

JOHN HARRY THUKU.....9TH DEFENDANT

JOHN MWANGI THUKU.....10TH DEFENDANT

SHIPHIRA WANJIKU MWANGI..... 11TH DEFENDANT

STEPHEN NJENGA MUREITHI..... 12TH DEFENDANT

WILSON NDERITU BACIA.....13TH DEFENDANT

HEZRON KAMAU GICHURU.....14TH DEFENDANT

LUCAS BOSIRE MAROKO..... 15TH DEFENDANT

RUTH NJERI MATIRU.....16TH DEFENDANT

MAURICE MBEJA OCHOLI..... 17TH DEFENDANT

JOHN NGANGA GITHIL.....18TH DEFENDANT

JOY NASAMBU KIMAKWA..... 19TH DEFENDANT

TERESIA NJERI NJOGU.....20TH DEFENDANT

WILFRED NYAKUNDI MWAMBI.....21ST DEFENDANT

REGINA WANGARI.....22ND DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 6th October 2020 and Notice of Preliminary Objection dated 20th November 2020, filed by the 1st, 2nd, 18th, 19th and 20th defendants.

2. Notice of Motion dated 4th March 2020 seeks the following orders:

1. [Spent]

2. [Spent]

3. [Spent]

4. THAT pending the hearing and determination of this suit, the 1st, 2nd and 4th to 22nd Defendants/Respondents be and are hereby restrained whether by themselves, employees, servants and/or agents from trespassing, encroaching on, alienating, disposing of, selling, interfering with and/or dealing in any manner whatsoever and howsoever with the Plaintiff/ Applicant's parcels of land known as Naivasha/Mwichiringiri Block 4/964 and Naivasha/Mwichiringiri Block 4/965 measuring approximately 1.2 Ha and 1.335 Ha respectively or any irregularly and unlawfully subdivided portions thereto including subdivision Titles

Naivasha/Mwichiringiri Block 4/29686 (Mirera), Naivasha/Mwichiringiri Block 4/29687 (Mirera), Naivasha/Mwichiringiri Block 4/29688 (Mirera),

Naivasha/Mwichiringiri Block 4/29689 (Mirera), Naivasha/Mwichiringiri Block 4/29690 (Mirera), Naivasha/Mwichiringiri Block 4/29691 (Mirera), Naivasha/Mwichiringiri Block 4/29692 (Mirera), Naivasha/Mwichiringiri Block 4/29693 (Mirera), Naivasha/Mwichiringiri Block 4/29695 (Mirera), Naivasha/Mwichiringiri Block 4/29699 (Mirera), Naivasha/Mwichiringiri Block 4/30370 (Mirera),

Naivasha/Mwichiringiri Block 4/30371 (Mirera),

Naivasha/Mwichiringiri Block 4/30372 (Mirera),

Naivasha/Mwichiringiri Block 4/30373 (Mirera),

Naivasha/Mwichiringiri Block 4/30374 (Mirera), Naivasha/Mwichiringiri Block 4/30375 (Mirera), Naivasha/Mwichiringiri Block 4/30376 (Mirera), Naivasha/Mwichiringiri Block 4/30377 (Mirera), Naivasha/Mwichiringiri Block 4130588 (Mirera), Naivasha/Mwichiringiri Block 4/30589 (Mirera), Naivasha/Mwichiringiri Block 4/30590 (Mirera), Naivasha/Mwichiringiri Block 4/30591 (Mirera), Naivasha/Mwichiringiri Block 4/30931 (Mirera), Naivasha/Mwichiringiri Block 4/30932 (Mirera), Naivasha/Mwichiringiri Block 4/30933 (Mirera), Naivasha/Mwichiringiri Block 4/30935 (Mirera), Naivasha/Mwichiringiri Block 4/30936 (Mirera), Naivasha/Mwichiringiri Block 4/30937 (Mirera), Naivasha/Mwichiringiri Block 4/30940 (Mirera), Naivasha/Mwichiringiri Block 4/30941 (Mirera), Naivasha/Mwichiringiri Block 4/30942 (Mirera), Naivasha/Mwichiringiri Block 4/30943 (Mirera), Naivasha/Mwichiringiri Block 4/30946 (Mirera) and Naivasha/Mwichiringiri Block 4/30947 (Mirera).

5. THAT the OCS and OCPD Naivasha Sub-County be served with the Orders issued herein and be and are hereby ordered to ensure compliance with the Orders herein by ensuring that peace prevails on the ground as pertains the suit properties.

6. THAT this Honourable Court do issue any such other and/or further orders as it may deem fit and in the interests of justice.

7. THAT the costs of this Application be provided for.

3. The Notice of Preliminary objection dated 18th March 2020 seeks striking out of the suit on the ground that the suit "is time barred under sections 4 and 7 of the provisions of Limitation of Actions Act, Cap 22, Laws of Kenya."

4. The application is supported by an affidavit sworn by Zephania Gitau Mbugua, the plaintiff. He deposed that since 20th December 1988, he has been the registered owner of the parcels of land known as Naivasha/Mwichiringiri Block 4/964 and Naivasha/Mwichiringiri Block 4/965 measuring approximately 1.2 Ha and 1.335 Ha respectively (hereinafter "the suit properties"). That, sometime around 14th May 2003, the 1st Defendant/ Respondent fraudulently, irregularly and unlawfully caused the suit properties to be transferred to his name and that subsequently titles to the suit property were irregularly issued to him by the 3rd defendant/respondent. Further, that around 26th August 2005, the 1st defendant/respondent fraudulently, irregularly and unlawfully caused the suit properties to be transferred to the 2nd defendant and that the suit properties were then amalgamated into Naivasha/Mwichiringiri Block 4/29558 (Mirera) and a title issued in respect of the

amalgamated title to the 2nd defendant on 19th February 2019. That on various dates as indicated in the affidavit, the amalgamated property was irregularly and unlawfully subdivided, transferred and amalgamated further resulting in new subdivisions as listed at paragraph 12 of the supporting affidavit which were registered in favour of the 7th to 22nd defendants without his consent.

5. The 1st, 2nd, 18th, 19th and 20th defendants responded to the application through a replying affidavit sworn by John Nganga Githii, the 18th defendant. He deposed that the 1st defendant purchased Naivasha/Mwichiringiri Block 4/964 and Naivasha/Mwichiringiri Block 4/965 from the plaintiff in the year 2003 and that title deeds were duly issued to the 1st defendant on 14th May 2003. That subsequently, the 1st defendant sold the two parcels to the 2nd defendant vide an agreement for sale dated 20th July 2005 and that title documents were issued to the 2nd defendant on 26th August 2005.

6. Mr Githii further deposed that the 2nd defendant then amalgamated the two parcels into one and subdivided the resultant amalgamated parcel into 14 plots which were then purchased by the 1st, 2nd, 4th, 18th, 19th and 20th defendants. He added that they took possession of the land at the respective times of obtaining their title deeds and have proceeded to develop the property by farming, fencing around their respective parcels and that the plaintiff never disputed their ownership of the land until sometime in 2020, seventeen (17) years later.

7. The 4th, 5th, 8th, 13th, 16th and 22nd defendants also responded to the application through a replying affidavit sworn by Francis Koigu Kiraguri, the 5th defendant. He deposed that vide an agreement dated 5th June 2019, he purchased land parcel No. Naivasha/Mwichiringiri Block 4/29692 and Naivasha/Mwichiringiri Block 4/29693 from the 2nd defendant at a consideration. That he also purchased land parcel No. Naivasha/Mwichiringiri Block 4/30587 (Mirera) from Francis Kariuki Mwangi the 6th Defendant through a sale agreement dated 9th January 2020 and that he was given possession. He deposed further that, upon the purchase and amalgamation he subdivided land parcel No. Naivasha/Mwichiringiri Block 4/30587 (Mirera) into 12 parcels of land and obtained titles. He then sold the resultant parcels of land as listed at paragraph 8 his affidavit to the defendants listed therein and that titles were issued to the said defendants. That he has constructed several rental houses as well as his family home on parcel No. Naivasha/Mwichiringiri Block 4/29692. That he and the defendants who he represents have been in quiet, exclusive occupation and possession of their respective parcels since purchase.

8. On his part, the 14th defendant filed a replying affidavit in which he deposed that he purchased the parcel of land known as Naivasha/Mwichiringiri Block 4/29695 from the 2nd defendant vide sale agreement dated 3rd April 2019. That he conducted an official search before the purchase which showed that there was no caution, caveat or restriction on the parent title which was Naivasha/Mwichiringiri Block 4/29558 and that he was later issued with title by the land registrar. He added that he is an innocent purchaser without any knowledge of the alleged fraud and that further, upon taking possession, he subdivided the land to 9 plots each measuring 50 by 100 feet and sold them to six (6) individuals who have also taken possession and obtained title deeds for their plots.

9. The 21st defendant also filed a replying affidavit in which he deposed that on 1st July, 2020 he purchased a piece of land measuring approximately 0.0424 hectares from the 5th defendant. That before the purchase he physically inspected the property and obtained a certificate of search dated 3rd July 2020. He deposed further that they agreed on a purchase price of KShs 520,000 pursuant to an agreement for sale dated 15th July 2020. That he paid the purchase price and that on 13th July 2020, a certificate of title was issued in his name for all that land known as Naivasha/Mwichiringiri Block 4/30935 (Mirera). That he is thus the lawful proprietor of the said land which he purchased through a proper sale.

10. The application and the preliminary objection were canvassed together through written submissions. The plaintiff/applicant in his submissions argued that he has been the lawful registered owner of the suit properties and that the defendants fraudulently, irregularly and unlawfully transferred and subdivided the properties without his consent. That he has established a prima facie case against the defendants and that he is bound to suffer irreparable damage. He placed reliance on the cases of **Mohamed Ahmed Noor & 3 Others v Bora Developers Limited & 2 others [2012] eKLR** and **Rift Valley Machinery Ltd v Kings Developers Limited & 6 others [2015] eKLR**.

11. In respect of the preliminary objection, he submitted that he became aware of the aforesaid fraudulent transactions in respect of his properties around August 2020 when his representatives and manager of his properties travelled from Nairobi to Naivasha in order to fence the suit properties only to be chased away by unknown parties who alleged to be the lawful owners.

12. The 1st, 2nd, 18th, 19th and 20th defendants submitted that the plaintiff's claim is for recovery of the suit property from the 1st defendant. That **Section 7 of the Limitation of Actions Act** provides a limitation period of 12 years for such a claim and that it is unthinkable for fifteen years he had not discovered the alleged fraud. They placed reliance on the case of **Margaret Wairimu Magugu v Karura Investment Limited & 4 Others [2019] eKLR**.

13. As regards the pre-requisites for grant of an injunction, they submitted that the question to be asked always is whether the plaintiff has demonstrated that the defendants have threatened to violate or have in fact violated a legal right and intends to perpetuate the violation. They placed reliance on **Giella vs Casman Brown [1973] EA 358**. They therefore urged the court to uphold the preliminary objection and strike out the plaintiff's application and the entire suit with costs.

14. The 4th, 5th, 8th, 13th, 16th and 22nd defendants submitted that they are in occupation, use and possession of their respective parcels. They cited **Mrao Ltd vs First American Bank of Kenya & 2 Others [2003] KLR 215** and argued that the applicant is required to prove that the property in dispute is in danger of being wasted, damaged or alienated by any party to this suit or that the respondents threatened to dispose the suit property. They further argued that they are innocent purchasers for value and that since they are in actual use, possession and occupation of their respective parcels, they will suffer inconvenience the most if the orders are granted. They thus urged the court to dismiss the application with costs.

15. The 21st defendant on his part submitted that there has been no proof that there was information within his knowledge which he concealed and/or misrepresented with the result that another person was induced to act to his/her detriment. He further submitted that having

acquired land parcel number Naivasha/Mwichiringi Block 4/30935 (Mirera) in good faith, for value and without notice of irregularities attendant to that sale, he deserves protection of his title. He added that the applicant has not established a prima facie case with probability of success and that the suit is time barred having been lodged after a period of twelve (12) years.

16. I have carefully considered the preliminary objection, the application, the affidavits filed, the submissions and the authorities cited by the parties. I will deal with the preliminary objection first since it raises a jurisdictional issue.

17. The preliminary objection seeks striking out of the suit on the ground that the suit is barred under **sections 4 and 7 of the Limitation of Actions Act**, Cap 22, Laws of Kenya. Of significance is **section 7** since this suit concerns title to land. The section provides:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

18. The law relating to preliminary objections is settled. A preliminary objection is a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**.

19. The preliminary objection herein was filed on 24th November 2020. Subsequently, the plaintiff filed an amended plaint on 7th December 2020. The initial plaint was filed on 7th October 2020. A perusal of both the initial plaint and the amended plaint leaves no doubt that the plaintiff contends that sometime around 14th May 2003, the 1st defendant irregularly and unlawfully caused the parcels of land known as Naivasha/Mwichiringiri Block 4/964 and Naivasha/Mwichiringiri Block 4/965 to be transferred to his name and subsequently titles in respect thereof were irregularly issued to him. There then followed further transfers and other transactions. The plaintiff essentially seeks cancellation of the transaction of 14th May 2003 and the ensuing transactions.

20. This suit having been filed on 7th October 2020, a period of 17 years had lapsed since the transfer to the 1st defendant. The provisions of **section 7** of the **Limitation of Actions Act** do not however operate in a vacuum. Indeed, the section makes it clear that the twelve years is to be calculated from the date on which the right of action accrued. The Act further dedicates quite some time and space to the issue of how to determine when causes actions accrue. It will be noted that the plaintiff states in the amended plaint that he became aware of the transactions on his properties in August 2020. If that be the case then time would only start running after August 2020. Either way, the question of when the cause of action accrued is one of fact which requires to be ascertained through taking evidence. There is no scope for reception of evidence to prop a preliminary objection. As raised, the present objection does not meet the basic criteria for a valid preliminary objection. I dismiss it.

21. I turn now to the application for injunction. An applicant seeking an interlocutory injunction must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

22. There is no dispute that the applicant was the proprietor of the parcels of land known as Naivasha/Mwichiringiri Block 4/964 and Naivasha/Mwichiringiri Block 4/965 and that the two parcels were transferred to the 1st defendant on 14th May 2003. There is equally no dispute that the rest of the parcels listed in the plaint and the application trace their roots to Naivasha/Mwichiringiri Block 4/964 and Naivasha/Mwichiringiri Block 4/965.

23. Whereas the defendants claim that the 1st defendant purchased the two parcels from the plaintiff, no sale agreement has been put before the court to support that contention. All that is waved are the title deeds in the name of the 1st defendant. On top of that, the rest of the defendants contend that they are bona fide purchasers. In the absence of clear evidence of a valid sale and transfer, I am persuaded that the applicant has demonstrated a *prima facie* case. There is need to preserve the suit properties to enable the court to conclusively determine the dispute. Since the dispute revolves around ownership of land, I do not think that damages will be an adequate remedy.

24. I am alive to the contention of many of the defendants that they are bona fide purchasers and that they are in possession and have developed the properties. All those are matters that will need to be established at trial. I will however endeavour to craft such orders as will attain the objective of preserving the suit properties pending determination of the suit while not resulting in dispossessing or curtailing the defendants beyond that which is necessary. I will thus grant prayer 4 in a modified form.

25. Regarding prayer 5, I note that there are ample provisions for enforcement of an interlocutory injunction within the Civil Procedure Act and rules. I see no room for the police in enforcing an injunction. Needless to state, the police have their statutory mandate for involvement in the event of threat to life and property. I will therefore not grant prayer 5 of the application.

26. In the result, I make the following orders:

a) Notice of Preliminary Objection dated 18th March 2020 is dismissed.

b) Pending the hearing and determination of this suit, an injunction is hereby issued restraining the 1st, 2nd, 4th to 22nd defendants whether by themselves, employees, servants and/or agents from alienating, disposing of, selling and/or transferring in any manner whatsoever and howsoever the parcels of land known as Naivasha/Mwichiringiri

Block 4/964 and Naivasha/Mwichiringiri Block 4/965 or any subdivided portions thereof including:

| | | | |
|--|---|--|---|
| Naivasha/Mwichiringiri Naivasha/Mwichiringiri | Block 4/29686 (Mirera), Block 4/29688 (Mirera), | Naivasha/Mwichiringiri (Mirera), | Block 4/29687 (Mirera), |
| Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri | Block 4/29689 (Mirera), Block 4/29691 (Mirera), Block 4/29693 (Mirera), Block 4/29699 (Mirera), | Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri | Block 4/29690 (Mirera), Block 4/29692 (Mirera), Block 4/29695 (Mirera), Block 4/30370 (Mirera), |
| Naivasha/Mwichiringiri | Block 4/30371 | (Mirera), | |
| Naivasha/Mwichiringiri | Block 4/30372 | (Mirera), | |
| Naivasha/Mwichiringiri | Block 4/30373 | (Mirera), | |
| Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri | Block 4/30374 (Mirera), Block 4/30376 (Mirera), Block 4130588 (Mirera), Block 4/30590 (Mirera), Block 4/30931 (Mirera), Block 4/30933 (Mirera), Block 4/30936 (Mirera), Block 4/30940 (Mirera), Block 4/30942 (Mirera), Block 4/30946 (Mirera) and | Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri Naivasha/Mwichiringiri | Block 4/30375 (Mirera), Block 4/30377 (Mirera), Block 4/30589 (Mirera), Block 4/30591 (Mirera), Block 4/30932 (Mirera), Block 4/30935 (Mirera), Block 4/30937 (Mirera), Block 4/30941 (Mirera), Block 4/30943 (Mirera), |
| Naivasha/Mwichiringiri | Block 4/30947 | (Mirera). | |

c) Costs of the application and the preliminary objection are awarded to the plaintiff.

Dated, signed and delivered at Nakuru this 4th day of May 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Nyaga holding brief for Mr Nyachoti for the plaintiff/applicant

Ms Gathoni for the 1st, 2nd, 18th, 19th and 20th defendants

Mr Mukira for the 4th, 5th, 8th, 13th, 16th and 22nd defendants

Mr Mukira holding brief for Mr Njogu for the 14th defendant

No appearance for the 21st defendant

No appearance for the 3rd, 6th, 7th, 9th to 12th and 15th defendants

Court Assistants: B. Jelimo & J. Lotkomoi