



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. E011 OF 2021

TERESIA WANJIKU KAMAU.....1ST PLAINTIFF/APPLICANT

ACK WAHUNDURA TRUST.....2ND PLAINTIFF/APPLICANT

VERSUS

JOHN NGUGI KABOGO1ST DEFENDANT/RESPONDENT

LAND REGISTRAR, MURANGA2ND DEFENDANT/RESPONDENT

LAND SURVEYOR, MURANGA.....3RD DEFENDANT/RESPONDENT

THE HON ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

RULING

1. The ruling is with respect to the Notice of motion dated the 30/4/2021 filed by the Applicants against the Respondents seeking inter alia the following orders;

a. That this application be certified as urgent and service thereof be dispensed with it in the first instance.

b. An order of declaration that the subdivision of and issuance of a title deed number LOC.5/GITURA/2317 to the 1st Defendant was fraudulent and that the said land is a road reserve and the only access to the Plaintiffs parcels of land and that the District Land Registrar Murang'a, the 2nd Defendant herein be directed to revoke and cancel the said registration and title deed issued to the 1st Defendant and this portion of land do remain as a road reserve and access to the Plaintiff's parcels of

a. Land numbers MAKUYU/KIMORORI/BLOCK 3/4788, MAKUYU/KIMORORI/

b. BLOCK 111/4789, MAKUYU/KIMORORI/BLOCK 111/4790 & MAKUYU/KIMORO-

c. RI/BLOCK 111/4791.

c. An order of declaration that the subdivision of and approval of mutation forms for land parcel number LOC.5/GITURA/2317 to the 1st Defendant was fraudulent and that the said land is a road reserve and the only access to the Plaintiff's parcels of land and that the District Land Surveyor Murang'a, the 3rd Defendant herein be directed to revoke and cancel the said survey documents, mutations and any map for land parcel number LOC.5/GITURA/2317 and this portion of land do remain as a road reserve and access to the Plaintiff's parcel of land numbers MAKUYU/KIMORORI/BLOCK 3/4788, MAKUYU/KIMORORI/BLOCK 111/4789, MAKUYU/KIMORORI/BLOCK 111/4790 & MAKUYU/KIMORORI/BLOCK 111/4791.

d. THAT a temporary injunction be issued restraining all the Defendants herein either by themselves, agents, employees, proxies and or servants from entering, evicting, demolishing, selling, encroaching, dispossessing, wasting, alienation and or dealing in any way with parcel number LOC.5/GITURA/2317 in Kenol area pending the hearing and determination of this application.

e. That a temporary injunction be issued restraining all the Defendants herein either by themselves, agents, employees, proxies and or servants from entering, evicting, demolishing, selling, encroaching, dispossessing, wasting, alienation and or dealing in any way with parcel number LOC.5/GITURA/2317 in Kenol area pending the hearing and determination of this suit.

f. That the O.C.S Murang'a Police Station to serve and supervise these orders accordingly.

g. That the costs of this application be provided.

2. The application is supported by the grounds annexed thereto and the supporting affidavit of the Applicants. The 1st Applicant avers that she subdivided parcel MAKUYU/KIMORORI/BLOCK 111/257 in 1988 into parcels 4788, 4789, 4790 and 4791. That the sub-parcels borders the road reserve which provides access of the parcels to the Muranga –Kenol road. That the subdivision was carried out with the approval of the Lands office at Muranga.

3. She avers that in 2013 she sold parcel 4791 to the 2nd Applicant and that it was not until 2020 that she was charged with a criminal offence with charges of forcible detainer of parcel No LOC.5/GITURA/2317 belonging to the 1st Respondent. She believes that her property bordered a road reserve as shown on RIM sheet No 6 and that there has never been any road reserve between her parcel MAKUYU/KIMORORI/BLOCK 111/257 and the Muranga –Kenol road. That she is apprehensive that her properties will be rendered inaccessible by the 1st Defendants property.

4. The 2nd Applicant through Hon Maina Wanjigi deponed that he is a trustee of the 2nd Applicant and is duly authorized to swear the affidavit on behalf of the 2nd Applicant. That the 2nd Applicant purchased plot No 4891 from the 1st Applicant upon undertaking due diligence as to the authenticity of the said parcel that bordered Muranga – Kenol road and shown on RIM Sheet No 6.

5. That in 2020 they were notified by the 1st Applicant about the 1st Respondent complaint that the suit land was part of parcel LOC.5/GITURA /2317 registered in the name of the 1st Respondent. That parcel LOC.5/GITURA /2317 was not in existence in 2013 when the 2nd Applicant purchased the suit land.

6. The application is opposed by the Respondents. The 1st Respondent argued that he is the owner of parcel 2317 having purchased the same from Esther Wairimu Kariuki in 2015 upon undertaking due diligence. That the 1st Applicant entered into the parcel in 2019 illegally fenced it and commenced a car wash business. That upon reporting the matter to the local administration and despite the 1st Applicant being warned to desist, she was adamant leading to her arrest.

7. That upon the resurvey of the two parcels by the surveyors from KENHA and District Surveyor Muranga, it was found that parcel LOC.5/GITURA /2317 borders parcel MAKUYU/KIMORORI/BLOCK 111/257 and 888 and neither does LOC.5/GITURA /2317 lie on a road reserve.

8. Finally, that the orders sought by the Applicants cannot issue at the first instance as they are mandatory in nature. That the issues raised by the suit require proof by way of adduction of evidence and are incapable of being issued at the interlocutory stage.

9. The 2nd – 4th Respondents agree with the 1st Respondent that the prayers sought in the Notice of Motion are substantive prayers that cannot be issued at interlocutory stage.

10. The parties argued the application orally before me in Court. They all reiterated the contents of their affidavit evidence highlighted above.

11. To begin with, the nature of prayers 2 and 3 touch on the validity of the titles in their respective acquisition by the parties. To the extent that the said orders seek to revoke the titles, it is trite that such claim must be proved in evidence and it is best left to the trial Court to determine.

12. The principles on which Courts will grant an injunction are well known. This Court restated those principles in **Giella v. Cassman Brown and Co. Ltd (1973) EA 358**, together with the mode of their application as follows:

“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, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience”.

13. In an interlocutory injunction application, the Applicant has to satisfy the triple requirements, that is to say;

(a) establish a prima facie case,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) show that the balance of convenience is in his favour”.

14. A Prima facie case was defined by the Court of Appeal in the case of **Mrao Vs First American Bank (K) Limited** as where an Applicant establishes that his legal right has been infringed by a defendant thereby calling for a rebuttal by the latter.

15. Applying the said principles to the case at hand, the issue is whether or not parcel 4891 and parcel LOC.5/GITURA/2317 are overlapping on the ground and whether parcel LOC.5/GITURA/2317 is a road reserve. The preliminary survey reports produced by the 1st Respondent shows otherwise. I must state that on the onset that this issue will be clearer when evidence is taken. I am persuaded that the Applicants have not shown any primafacie case as to the position or otherwise of the suit land on the ground at this stage.

16. On the second limb of **Giella Vs Cassman Brown** that the Applicant must demonstrate that damages will not be an adequate remedy and

it suffices to state that none of the parties addressed me on this issue.

17. The balance of convenience tilts in the refusal of the temporary injunction for the reasons given above.

18. In the end the application is without merit. It is dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 3RD DAY OF JUNE 2021.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Muthoni for the Plaintiff/Applicant

Gichuki for the 1st Defendant

2nd – 4th Defendants – Absent

Court Assistant: Alexs