



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C CASE NO. E001 OF 2021

DOUGLAS MWAI MACHURU.....PLAINTIFF/APPLICANT

VERSUS

DANIEL KARIMI WANJOHI.....DEFENDANT/RESPONDENT

RULING

Introduction

The Applicant vide a Notice of Motion under certificate of urgency dated 23rd December 2020 sought the following orders:-

1. Spent

2. This Honorable court do grant temporary injunction against the defendant/respondent, his agent, his servants, employees or any other person from charging transferring, disposing, alienating or in any manner interfering with the title deed No. L.R. No. Mwerua/Baricho/1635 until determination of this application.

3. This Honorable court do grant temporary injunction against the defendant/respondent , his agent, his servants, employee or any person from charging transferring, disposing, alienating or in any manner interfering with the title deed L.R No. Mwerua/Baricho/1635 until determination of this suit.

4. Costs of this application be provided for.

The application is supported by the following grounds shown on the face of the application:-

1. The Respondent was the registered owner of L.R No. Mwerua/Baricho/1635 measuring about three(3) Acres which was a part of subdivision of L.R No. Mwerua/Baricho/224 owned by the Applicant herein and who was a client of the Respondent's Employer an advocate in Kagio market, Kirinyaga County albeit the registration was by proxy.
2. The Respondent did not pay the applicant any consideration towards the said land at all.
3. The Respondent had no funds and hence could not buy and/or purchase the said land from the Applicant and has in event tried to trick the Applicant an elderly person of 78 years to confirm he has received payment.
4. The Respondent has refused to revert the land back to the Applicant or pay consideration for the same.

When the application was placed before me for directions, I certified the same urgent and granted temporary injunction orders in terms of prayer No. 2 pending the interpartes hearing.

Applications summary of Facts

The Applicant filed an affidavit in support of the said application in which he deposed and stated that he was the registered owner of land parcel No. Mwerua/Baricho/1635 measuring 3 acres or thereabouts which is a sub-division of the main L.R No. Mwerua/Baricho/224. He stated that the Respondent used to work as a clerk for one Antony Kahuthu Advocate at his Kagio office Branch in Kirinyaga County when he met him. He further stated that sometimes in the year 2012, they entered into an agreement with the Respondent's employer Antony Kahuthu dated 23rd June 2012 whereby title number L.R No. Mwerua/Baricho/224 which had issues with a third party claimant who wanted 3 acres part of the land and the land was cautioned. He stated that the advocate removed the caution and had a subdivided into two (2) parcels namely Mwerua/Baricho/1634 and 1635 measuring 0.51 Ha and 3 acres or thereabouts respectively which were to be registered in his name

and the Respondent's employer or his principal or trustee respectively. The Applicant also deposed that among other expenses in lifting the caution on L.R No. Mwerua/Baricho/224 and protecting it from the third party claimant, his interests and other expenses would be met after selling the subdivision title of 3 acres for value. He argued that the caution placed on L.R No. Mwerua/Baricho/224 had lasted for over thirty (30) years and had to be removed to enable him pay the legal fee and also sell the same through the said advocate as he had no money and also get money for his upkeep from the said advocate after sale of part of the said parcel of land. The applicant stated that the Respondent after tricking him without the knowledge of his employer and without paying any consideration went ahead and illegally procured a transfer of L.R No. Mwerua/Baricho/1635 to his name by using the said Advocates documents without his knowledge instead of finding a purchaser as agreed earlier with his employer. The Applicant further contends that the Respondent was issued with a title in respect of the said land which registration was procured by fraudulent means without payment of any consideration and since time was of essence and he had no option, they agreed later that since some strangers had appeared and filed a case being ELC No. 786 of 2013 claiming ownership of the land part of original L.R No Mwerua/Baricho/224 now sub-divided to L.R No. Mwerua/Baricho/1634 and 1635, then the advocate acting for both parties would finance the filing of a joint defence and objection on the said case upto its logical conclusion and the costs incurred by the said advocate would be settled by him from the proceeds of sale of L.R No. Mwerua/Baricho/1635 that was in the defendant's name. He stated that it was agreed that cost of the High court proceedings would be approximately Ksh. 325,000/=. He said that the Respondent never gave him any money and/or consideration in respect of the said 3 acres of land which was meant partly to cater for costs used in office purposes which the Respondent as an employee was well aware but he later tricked him to change the advocate they were using in ELC Case No. 786 of 2013 to another advocate so that he can control him in his illegal process in an attempt to defraud him off the land by saying he paid him while he had not. The applicant also deposed that the Respondent further tricked his family members to sign an affidavit to the effect that they have no objection against him seeking and disposing off L.R No. Mwerua/Baricho/1635 to the Respondent and that the Respondent had paid him everything in full whereas the Respondent had told him that the agreement was needed in ELC Case No. 786 of 2013 to win the suit against a claimant after changing the advocate. In conclusion, the Applicant stated that he has been advised by his advocate which advice he verily believes to be true that *Section 26 of the Land Registration Act* provides for revocation of an illegal title and that *Section 80* of the same Act provides for rectification of the register by the Registrar where it is proved that such registration was obtained or made by fraud and/or mistake. The application was not opposed as the Respondent did not file any response.

Legal Analysis

I have carefully considered the Notice of Motion dated 23rd December 2020 and the supporting affidavit sworn by the Applicant the same date. I have also perused the annexures and the submissions by counsel for the Applicant. The Respondent did not file any response to the application. Even without any grounds of opposition or a replying affidavit being filed in opposition to the application, this Court is under obligation to ensure that the Applicant has made out his case on the required standard. On whether an injunction should issue against the Respondent as sought by the Applicant, this Court will bring into remembrance the principles of injunction as enunciated in the celebrated case of ***Giella Versus Cassman Brown Co. Ltd (1973) E.A 358*** and declared in the case of ***Nguruman Limited Versus Jan Bonde Nielsen & 2 Others C.A No. 77 of 2012 (2014) e KLR*** where the Court of appeal held thus:-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to (a) Establishes his case only at a prima facie level, (b) demonstrate irreparable injury if a temporary injunction is not granted and, (c) ally any doubts as to (b), by showing that the balance of convenience is in his favour. Those are the three pillars on which rests the foundation of any order of injunction whether interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

The term ***prima facie*** was defined in the case of ***Mrao Ltd Versus First American Bank of Kenya Ltd (2003) e KLR*** where the Court of Appeal observed as follows:-

“... In civil cases, it is a case in which, on the material presented to the court, a tribunal properly directing itself will conclude that there exist a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Applicant has deposed that he was the registered owner of land parcel number Mwerua/Baricho/224 before it was sub-divided into parcel number Mwerua/Baricho/1634 and 1635 respectively. According to him, a third party wanted to take away three (3) acres of the said parcel of land but he had no money to engage an advocate to file a case against the stranger. He then approached one advocate namely Antony Kahuthu where the Respondent herein was working as a court clerk. After discussing with the said advocate they entered into an agreement on 23rd June 2012 whereby the lawyer was to remove a caution which had been lodged on the said parcel of land and thereafter sub-divide the land into two portions namely Mwerua/Baricho/1634 and 1635 measuring 0.51 Ha. And 3 acres respectively.

He also stated that it was a term of the said agreement that the two parcels were to be registered in his name and the advocates name or his agent or trustee, and that the charges and other expenses incurred would be met after selling the sub-division title of 3 acres for value. The Applicant further deposed that despite their agreement with the advocate, the Respondent illegally procured a transfer from him through fraud and without the knowledge of the advocate caused land parcel number Mwerua/Baricho/1635 to be registered in his name.

These averments on oath have not been controverted as the Respondent did not file any response despite having been duly served. The Applicant has also challenged the Respondent's title in the plaint

dated 23rd December 2020 where he has set out particulars of fraud and is seeking to have the same cancelled. This application is therefore seeking to stop the Respondent by himself or any person working under him from charging, transferring, disposing, alienating or in any manner interfering with the said property pending the hearing of the main suit.

Having carefully evaluated the affidavit evidence and the depositions an oath, I am satisfied that the Applicant has establishes a prima facie case. The Applicant has also demonstrated that he will suffer irreparable injury which cannot be compensated by an award of damages if the suit property is disposed of before the matter is heard on merits. Having established the first two principles for the grant of an injunction as set out in the case of ***Giella*** (supra), there is therefore no doubt in the mind of the Court to apply the third and last ground.

The upshot of my finding is that the Notice of Motion dated 23rd December, 2020 which is not opposed has merit and the same is allowed as prayed. The Respondent shall bear the costs of the application. It is so ordered.

RULING READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 23RD DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Kabuta – Court clerk.