



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO. E024 OF 2021

SIMON NJUGUNA MBOGO.....PLAINTIFF

VERSUS

KAREGA MUTAHI.....1ST DEFENDANT

ANTHONY WAITITU IGANJO.....2ND DEFENDANT

JORETH LIMITED.....3RD DEFENDANT

NAIROBI LAND REGISTRAR.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

This dispute relates to ownership of the parcel of land known as land reference number (L.R. No.) 13330/401 (“the Suit Property”) which the Plaintiff claims he bought from the 3rd Defendant in 2018. The Plaintiff filed suit in January 2021 seeking to restrain the 1st and 2nd Defendants from trespassing, claiming or interfering with the Suit Property. He also seeks a declaration that he is the legal owner of the Suit Property and cancellation of the title issued to the 1st and 2nd Defendants.

Contemporaneously with the filing of the suit, the Plaintiff brought the application dated 25/1/2021 seeking a temporary injunction to restrain the Defendants from dealing with the Suit Property until the suit is heard and determined. He swore the affidavit in support of the application to which he attached copies of the sale agreement dated 25/6/2018 between him and the 3rd Defendant as well as the title showing that he was registered as the owner of the Suit Property on 31/7/2018. He averred that the Suit Property was charged to Equity Bank Limited on 28/10/2019 to secure payment of the sum of Kshs. 12,000,000/= . A further charge for Kshs. 17,000,000/= was registered on 17/2/2020 in favour of the same bank.

The Plaintiff deponed that he did not have any issues or claims over the Suit Property until the 1st and 2nd Defendants falsified a certificate of lease over the land and were purporting to be the registered owners. He averred that the title issued to the 1st and 2nd Defendants was issued illegally and fraudulently in a well-orchestrated deal between the 1st and 2nd Defendants, who were working in cahoots with the 4th Defendant on 29/4/2016.

Peter Mungai, a director of the 3rd Defendant swore the affidavit opposing that application. He deponed that at all material times the 3rd Defendant was the registered owner of the Suit Property. That in 2011 the 1st and 2nd Defendant instituted **ELC Case No. 403 of 2011** at Nairobi against the 3rd Defendant claiming ownership of the Suit Property by virtue of being shareholders of Thome Farmers No. V which had allotted shares to them over the Suit Property. He added that the 1st, 2nd and 3rd Defendants entered into a consent vide which the 3rd Defendant transferred the Suit Property to him and the 2nd Defendant. The consent was adopted as an order of the court on 21/11/2013. He explained that the consent did not capture the additional payment which the 1st and 2nd Defendants were to make hence the 3rd Defendant declined to sign the transfer documents. The 1st and 2nd Defendant successfully applied to have the Deputy Registrar execute the transfer of the Suit Property on behalf of the 3rd Defendant’s directors in fulfilment of the consent.

Mr. Mungai averred that on perusal of the documents in support of the Plaintiff’s case he noted that the sale agreement and transfer were drawn by the firm of Morara Ngisa Advocate who were never retained by the 3rd Defendant to act for it. Further, that the signatures purported to be those of the 3rd Defendant’s directors, Duncan Ndegwa and Margaret Magugu, were outright forgeries. He added that the Plaintiff had not established to whom he paid the purchase price of Kshs. 18,000,000/= and was emphatic that that amount was not paid to the 3rd Defendant. He regretted that the Suit Property appeared to be charged to Equity Bank Limited yet the Plaintiff did not have a clean title to charge to the bank. He reiterated that the 3rd Defendant did not sell or transfer the Suit Property to the Plaintiff or any third party, save for the transfer through a court order to the 1st and 2nd Defendants. He annexed copies of the originating summons filed in **Nairobi HCC No.**

403 of 2011, the replying affidavit filed in that case, the court order issued on 21/11/2013 and the correspondence exchanged on 8/1/2014 and 20/2/2014 regarding the originating summons.

The 1st Defendant swore the affidavit dated 3/3/2021 in opposition to the application brought by the Plaintiff. He denied that the Plaintiff was the *bona fide* owner of the Suit Property and stated that the copy of the title exhibited by the Plaintiff was fraudulently obtained. He deponed that he purchased a share in Thome Farmers No. V Limited in 1975 with his brother Francis Mutahi. The share represented plot number 482 on the ground and on completion of the survey work, it became the Suit Property. He produced a copy of the share certificate issued on 10/7/1975. He averred that upon purchasing the land, they took possession, fenced it and started cultivating and generally occupying the land. He corroborated the averments made by the 3rd Defendant on the case which he filed against it and the consent that was subsequently entered into pursuant to which the 3rd Defendant transferred the Suit Property to him and the 2nd Defendant. He produced a copy of the title which was issued to him and the 2nd Defendant on 29/4/2016. Another entry was registered against the land transferring it to his name on 10/9/2019. He maintained that he had been in possession of the Suit Property until 18/2/2021 when the Plaintiff tried to trespass onto the land and attempted to erect a *mabati* structure on the land. The Plaintiff was stopped when a complaint was made to the police and he was directed to stop interfering with the suit land. He relied on various correspondence exchanged by the advocates on the Suit Property.

The Plaintiff filed a supplementary affidavit in which he maintained that he bought the Suit Property from the 3rd Defendant through a sale agreement dated 8/5/2018, which he claimed was executed by both parties. He produced a search conducted on the Suit Property dated 9/2/2021 which showed that the Suit Property was transferred to the Plaintiff on 31/7/2018 and that it was charged to Equity Bank on 28/10/2019 and a further charge was registered on 17/2/2020.

The Plaintiff and the 3rd Defendant filed submissions. The Plaintiff argued that he had established the ingredients for the grant of an injunction and that the orders sought were merited to preserve the suit land and maintain the status quo until the case is heard. He argued that if the injunction were not granted then he stood to suffer harm, loss and damage which cannot adequately be compensated by a pecuniary award. He urged that the balance of convenience tilted in his favour and sought the costs of the application.

The 3rd Defendant submitted that the first title in time issued by the Land Registrar should be taken to be the superior title. It submitted that it transferred its interest in the Suit Property to the 1st and 2nd Defendants and that it was inconceivable for Plaintiff to seek orders of injunction against the 1st to 3rd Defendants. It denied entering into any agreement or transaction with the Plaintiff. It maintained that the Plaintiff would not suffer any irreparable loss and that he had not shown the consideration which he claimed he paid for the Suit Property.

The issue for determination is whether the court should grant an injunction to restrain the 1st, 2nd and 3rd Defendants from dealing with the Suit Property. It is not in dispute that the 3rd Defendant owned Suit Property. The 3rd Defendant denied that it transferred the Suit Property to the Plaintiff and instead confirmed that the land was transferred to the 1st and 2nd Defendants following a consent which they reached in **Nairobi HCC No. 403 of 2011**. On the face of it, it would appear that the Plaintiff charged the Suit Property to Equity Bank Limited to secure a loan advanced to him.

In light of the facts of this case, is in the interest of justice to have the *status quo* prevailing on the Suit Property today maintained until this suit is heard and determined. In this court's view, it is necessary for the Plaintiff to add Equity Bank Limited as a party to these proceedings because as chargee of the Suit Property, it will be affected by whatever orders the court may ultimately make regarding ownership of the Suit Property.

The costs of the application shall be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF JULY 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Stanley Kingara for the 1st and 2nd Defendants

Mrs. B. Olembo holding brief for Mrs. W. Koech for the 3rd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff and 4th Defendant