



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

CIVIL APPEAL NO. E002 OF 2020

PETER NGANGA MUIRURI..... APPELLANT

VERSUS

MARY WANGUI NJAGU.....1ST RESPONDENT

WINNIE WARWINU KURUMBU.....2ND RESPONDENT

PETER HIKA MAINA..... 3RD RESPONDENT

LEAH WATIRI MAINA.....4TH RESPONDENT

MARY WANJIRU MURAYA.....5TH RESPONDENT

TERESIA WANJIKU KIRAGU.....6TH RESPONDENT

DAVID NDUNGU NGANGA & FAITH NJERU MWANGI.....7TH RESPONDENT

AGNES MUTHONI MURIITHI.....8TH RESPONDENT

CAROLINE WAMUYU MOILO.....9TH RESPONDENT

AGNES WANJIRU RUGURU.....10TH RESPONDENT

BETH WANGARI MWAURA.....11TH RESPONDENT

ELIUD KIARIE NJENGA t/a PINK PROPERTIES DEVELOPERS....12TH RESPONDENT

JUDGMENT

The 1st to 11th Respondents were the Plaintiffs in **Ruiru ELC 100 of 2020**. The Appellant was the 1st Defendant, while the 12th Respondent was the 2nd Defendant. Vide a Plaint dated **1st September 2020**, the Plaintiffs (1st to 11th Respondents) had filed a suit against the Appellant and the 12th Respondents. Concurrently the Plaintiffs (1st to 11th Respondents) filed an Application vide a Notice of Motion Application dated **1st September 2020**, the Respondents(Plaintiffs) sought for orders that;

1. THAT a temporary injunction be issued restraining the Defendants/ Respondents, their servants, employees and or agents from alienating, occupying, selling, charging erecting structures and or fencing off or in any manner whatsoever interfering with plot Numbers, 1, 6, 7, 15,24, 25,26, 27, 29,20,31,32,35 and 36 being part of Land Parcel Number Ruiru East/Juja East/Block 2/254 pending the hearing and determination of this suit.

2. THAT the OCS Ruiru Police Station do ensure compliance of thus Court order.

3. THAT Costs be provided for.

The Application was premised on the grounds that on diverse dates, the Plaintiffs purchased the suit properties from the 2nd Defendant (12th Respondent). That the Defendants (Appellant) have trespassed onto the said plots and started subdividing and selling the Applicants respective plots on **L.R 2/254**, to 3rd parties without any lawful right and or excuse. That the subdividing and selling of the Applicant's plot to 3rd parties have subjected them to great loss and damage. Further, that the Applicant (Respondents) are entitled to quiet use, occupation and possession of their respective plots, since they lawfully and legally purchased the same. That their respective plots were in danger of being wasted, damaged or alienated by the Defendants/Respondents and other third parties, unless the Honourable Court grants the orders sought.

In her Supporting Affidavit, **Mary Wangui Njagu**, averred that on **15th September 2006**, she entered into a sale agreement with the 12th Respondent (2nd Defendant) for the sale of plots 26 and 27 to be excised off **L.R 2/254** for a consideration of **Kshs. 600,000/=** and she was issued with a receipts. That the 12th Respondent represented to her that he had fully purchased the said property from the Appellant (1st Defendant) who was the registered owner of **L.R 2/254** and he was thus at liberty to subdivide and sell. Further that on **26th July 2020**, she visited her plot and found third parties subdividing and selling her plot and upon making inquiries, she was informed that the Appellant has purported to sell her plot. Further, that on **27th July 2020**, they conducted a search and confirmed that the Appellant had been re issued with a **title deed** in respect of **L.R 2/254**. That by the time she purchased her property, the 12th Respondent had the original title in his possession and she genuinely believed him and finalized making the payments. That the Defendants (Appellant & 12th Respondent) had unlawfully and illegally colluded and conspired to deprive her of the use and possession and ownership of her property by purporting to sell and dispose off the same. Further, that she is an innocent purchaser for value and therefore entitled to quiet possession. That the purported sale to third parties is **null and void**, and she would suffer irreparable injury if the orders sought are not granted.

In her Supporting Affidavit, **Winnie Warwinu Kurumbu** averred that on **21st April 2011**, she entered into a sale agreement for the sale of plots **No. 31 and 30** for a consideration of **Kshs.170,000.000/=** and she fully paid for the same and was issued with plots **Certificates No. 069 and 070**, both dated **9th August 2011**, and she was issued with receipts.

In his Supporting Affidavit **Peter Hika Mwangi**, averred that on **4th April 2016**, he entered into a sale agreement with the 2nd Defendant (12th Respondent) for the sale of **plot No. 35**, for a consideration of **Kshs. 4000,000/=** which he paid in full and was issued with receipts.

Leah Watiri Maina, averred that vide a sale agreement dated **10th October 2016**, she purchased plot **No. 24 and 25**, from the 12th Respondent, for a consideration of **Kshs. 500,000/=** and she was issued with a receipt and plot Certificate **No. 592**. Further **Mary Wanjiru Muraya** averred that vide a sale agreement dated **26th May 2016**, she purchased **plot No. 31**, for a consideration of **kshs. 400,000/=**, which she fully paid on **8th December 2016**, and was issued with receipts. **Teresiah Wanjiru Kiragu** entered into a sale agreement dated **16th April 2016** for purchase of **plot No. 32**, for consideration of **Kshs. 430,000/=** and she as issued with receipts upon payment of the agreed amount. **Caroline Wamuyu Moilo**, averred that she entered into a sale agreement dated **11th December 2015**, for **plot 6 & 7** for a consideration of **Kshs.250,000/=** and was issued with plot certificate **No. 579**. **David Ndungu Nganga** and his wife **Faith Njeri Mwangi** bought **Plot No. 15** vide sale agreement dated **29th September 2016**, for a consideration of **kshs.380,000/=**. **Agnes Muthoni Muriithi** vide a sale agreement dated **6th April 2016** bought Plot No. 1 for **Kshs.250,000/=** and was issued with **Plot Certificate No. 304**. **Agnes Wanjiru Ruguru**, vide a sale agreement dated **15th March 2016**, bought **plot No. 36** for a consideration of **Kshs.430,000/=** and was issued with plot **certificate No. 305** and receipts. **Beth Wangari Mwaura** entered into a sale agreement on **21st April 2011**, for the purchase of **plot No. 29** for a consideration of **Kshs. 170,000/=**, she paid the full agreed amount and was issued with plot **certificate no 107**.

The 1st Defendant (Appellant) filed grounds of opposition dated **24th September 2020**, and opposed the Application on the grounds that;

- 1. That the Plaintiffs joint suit and claims thereof as against the 1st Defendant premised on alleged fraudulent conspiracy and or alleged collusion upon the Plaintiffs by the 1st Defendant in concert with the 2nd Defendant without any particulars and without any evidence of the alleged fraud or alleged collusions by the 1st Defendant smirks of bad faith, and is fatally incompetent and unsustainable in law.*
- 2. That the Plaintiffs joint suit and the Application thereupon dated 1st September 2020, and collectively is misconceived, bad in law and incompetent.*
- 3. That the Plaintiffs claims in Contract premised on a forged Title No. Ruiru East/Juja East Block 2/254, are unsustainable against the 1st Defendant not privy to the alleged Contract.*
- 4. That the Plaintiffs claims based on forged Title for the suit Plot No. Ruiru East/Juja east Block 2/254 is in any event neither competent nor sustainable against the 1st Defendant nor privy to the alleged Contract nor to the alleged frauds upon the Plaintiffs.*
- 5. That the Plaintiffs joint suit and the Application therewith do not disclose any prima facie case with probability of success against the 1st Defendant and ought to be dismissed and struck out as against the 1st Defendant.*

The 1st Defendant (Appellant) **Peter Nganga Muiruri** further swore a Replying Affidavit on **24th September 2020**, and averred that he is a stranger to all the Plaintiffs (Respondents) and thus not privy to any subdivision or sale of the suit property **L.R 254**. He denied selling the suit property to the 2nd Defendant (12th Respondent) nor authorizing him to sell the same. That the alleged title deed annexed to the Plaintiffs (Respondents) Application is a clumsy forgery. He annexed a copy of his original title deed and a Duplicate title deed that had

been reissued on the loss of the original title deed. That as per the original title deed, the same was issued on **21st July 1995**, and his Address is noted as **P.O Box 75969**, while in the forged title deed, it purports to have been issued on **16th November 1989**, and has an omission of his Postal Address. That the forged title deed does not have a 2nd page and further has his particulars of his Identity Card.

He averred that on the loss of his title deed, he reported the said loss to Kenya Police Service on **14th February 2019**, and he placed an advertisement of the loss in the Nation News Paper issued on **15th February 2019**, and consequently he lodged a **Caveat** against the suit property. Further, that he reported the loss of the title deed to the District **Land Registrar Ruiru**, who published the said loss in the Kenya Gazette and after the expiry of the Gazette Notice, he was reissued with a duplicate title deed. He averred that he has been advised by his Advocates, which advice he believe to be true that the joint suits and claims against him premised on alleged fraudulent conspiracy or alleged collusion between him and the 2nd Defendant (12th Respondent) without any evidence is in bad faith and fatally defective. That the suit is based on a forged title and the same is therefore incompetent.

The 2nd Defendant (12th Respondent) filed a Replying Affidavit sworn on **8th October 2020**, and averred that on **28th March 2011**, he entered into a Memorandum of Understanding with the 1st Defendant (Appellant) for the sale of the suit property at a consideration of **Kshs.5,200,000/=**. That pursuant to clause 2 of the Memorandum of Understanding, the suit property was to be subdivided into 40 plots and the sell price for each was **Kshs.130,000/=**. Further that he was to cater for all the subdivision and marketing and his commission was to be anything above the sell price.

Further, that it was agreed to make a deposit of **Kshs.1000,000/=** upon execution of the agreement and a further **Kshs.1000,000/=** two weeks after. That he embarked on selling the subdivided plots to the Plaintiffs and others and he sold the suit property with the express authority of the Appellant. That during the said period, the 1st Defendant (Appellant) had a case with Barclays Bank over the suit property and had undertaken that once the case was concluded, he was to transfer the suit property to **Pink Properties Developers**. He further averred that he had made various deposits into the 1st Defendant's (Appellant's) account to clear the agreed purchase price, both in cash and into his Family Bank Account.

That he was shocked to learn that the 1st Defendant (Appellant) had reported to the Police the loss of his title deed and subsequently applied to be issued with another one. That he paid the full purchase price in respect of the suit property and he sold the subdivided properties to various purchasers. He averred that he agreed with the Plaintiffs (Respondents) that they had demonstrated a **prima facie** case and how they will suffer irreparable loss.

Mary Wangui Njagu the 1st Plaintiff (Respondent) filed a Supplementary Affidavit sworn on **21st October 2020**, and averred that it is clear that the 1st Defendant (Appellant) after having received the entire purchase price from the 2nd Defendant has no proprietary interest in the suit property. That the 1st Defendant (Appellant) was always aware that he allowed the 2nd Defendant to sell the whole of the suit property and the Applicants having been shown by the 2nd Defendant (12th Respondent) a Memorandum of Understanding, entered into various agreements with the 12th Respondent. Further, that it is clear from the 2nd Defendant's (12th Respondent's) Replying Affidavit that the 1st Defendant (Appellant) intends to defraud the 2nd Defendant (12th Respondent) and the Applicant and the annexures to the Appellant's Replying Affidavit were meant to defraud them. That the Plaintiffs (Respondents) are innocent purchasers for value and entitled to the orders sought.

The 1st Defendant (Appellant) swore a Further Affidavit on **27th October 2020**, and averred that the claims by the 1st Plaintiff (Respondent) that he authorized the 2nd Defendant (12th Respondent) to sell and or subdivide the suit property are untrue. That the deposit slips collectively marked **EKN3** annexed to **Eliuds K Njenga's** Affidavit were proceeds of sale for his property **Title No. Ruiru East/Juja East/Block 2/255**, lawfully due to him and paid to his Family Bank account. He denied signing the forged agreement annexed to the 2nd Defendant's Affidavit nor participating in the sale or subdivision of the same as alleged.

The Court directed the parties to canvass the Application by way of written submissions. The trial Court then delivered its Ruling and allowed the Application by the 1st to 11th Respondents and held that:-

“For the above reasons, the Court finds the Applicants are deserving of orders sought in prayer No.3 Consequently the Court allows the Applicant's notice of Motion Application dated 1st September 2020 in the following terms;

a. THAT a temporary injunction be issued restraining the Defendants/ Respondents their servants, employees and or agents from alienating, occupying, selling, charging erecting structures and or fencing off or in any manner whatsoever interfering with plot Numbers, 1, 6, 7, 15, 24, 25, 26, 27, 29, 30, 31,32,35 and 36 being part of Land parcel Number Ruiru East / Juja East / Block 2/254 pending the hearing and determination of this suit.

b. Costs of this Application shall be the cause.

The Appellant was aggrieved by the above determination of the Court and Order thereon and he has sought to challenge the said Ruling through the **Memorandum of Appeal** dated **14th December 2020**, the Appellant sought for the setting aside of the Ruling delivered on **2nd December 2020** by **Hon. J.A Agonda, Senior Resident Magistrate Ruiru**. The grounds upon which the Appellant sought for the Appeal to be allowed are;

1. THAT the Learned senior Resident Magistrate misdirected herself in law and in fact on an interlocutory Application by the 1st to 11th Respondents for temporary orders of injunction pending hearing and determination of the 1st to 11th Respondents claims by conclusively finding without any evidence that the 1st to 11th Respondents were the registered

proprietors or have legally acquired ownership of property title No. Ruiru East /Block 2/254.

2. THAT the learned Senior Resident Magistrate erred in Law and in fact in making conclusive findings on contested issues of legality of acquisition, registration and ownership of property Title L.R No. Ruiru East/Juja East / Block 2/254 before issuance and service of summons to appear and before delivery of the 1st Appellant's Defence to the Respondents Claims and without any evidence.

3. THAT the Learned Senior Resident Magistrate misdirected herself in Law and in fact in rejecting at the Interlocutory stage the Appellant's objections to fraudulent execution of the alleged agency agreement between the Appellant and the 12th Respondent for sale of property Title L.R No. Ruiru East/Juja East/ Block 2/254 the Exhibits annexed to the Affidavit sworn by the 12th Respondent.

4. THAT the Learned Senior Resident Magistrate misdirected herself in law and in fact in rejecting at the interlocutory stage the Appellant's objections to legality of alleged Title No. Ruiru east / Juja east / Block 2/254 Exhibit annexed to the Affidavit sworn on behalf of 1st to 11th Respondents.

5. THAT the Learned Senior Magistrate misdirected herself in law and in fact in finding at the interlocutory stage and without any evidence that the Appellant had received proceeds of sale of property Title Ruiru Title No. Ruiru east / Juja east / Block 2/254 from the 1st to 11th Respondents.

6. THAT the Learned Resident Magistrate erred in law and in fact at the interlocutory stage that the Appellant was under a legal obligation to the 1st to 12th Respondents to surrender property Title L.R No. Ruiru East / Juja east / Block 2/254 or that the Appellant had failed to do so.

7. The Learned Senior Resident Magistrate erred in Law and in fact in finding at the Interlocutory stage without any evidence that the 1st to 11th Respondents discovered on 27th July 2020 that the Appellant had been re issued with Title deed L.R No. Ruiru East/ Juja East/ Block 2/254 or that the 1st to 11th Respondents are or were the registered owners hereof or that the Appellant was in the process of disposing off the suit property to third parties.

8. The Learned Senior Resident Magistrate erred in Law and in fact in conclusively finding at the interlocutory stage that the 1st to 11th Respondents had been lawfully or otherwise in possession of property Title No. Ruiru east / Juja east / Block 2/254.

9. THAT the Learned Senior Resident Magistrate erred in Law and in fact at the interlocutory stage that the 12th Respondent Lawfully sold property Title No. Ruiru East / Juja East / Block 2/254 to the 1st to 11th Respondents or that the 12th Respondent was authorized by the Appellant to sell, subdivide and transfer the said property to the 1st to 11th Respondents.

10. The Learned Senior Resident Magistrate erred in Law and in fact in finding at the Interlocutory stage that the Appellant's Title L.R No. Title No. Ruiru east / Juja east / Block 2/254 was or ought to have been in the custody of Barclays without any evidence of a charge thereof by the Appellant to the said Bank.

11. THAT the Learned Senior Resident Magistrate erred in Law and in fact in concluding that the Appellant's Application to the Land Registrar was a fraud on the 1st to 12th Respondents and not on Barclays Bank she repetitively assert had custody of the original Title thereof.

12. THAT the Learned Senior Resident Magistrate erred at the interlocutory stage in Law and in fact in concluding that the evident process undertaken in the Appellant's Application to the Land registrar for re issue of Title No. Ruiru east / Juja east / Block 2/254 was fraudulent.

13. THAT the Learned Senior Resident Magistrate erred in Law and in fact in finding at the Interlocutory stage that when the Appellant applied for and obtained a re issue of Title No. Ruiru East/ Juja east / Block 2/254 he did so fraudulently by concealment from the Land Registrar of a Barclays Bank lien or charge or right of custody thereof with intent to defraud the 1st to 11th Respondents.

14. THAT the Learned Senior Resident Magistrate without any evidence of due process undertaken by the 1st to 12th Respondents leading to subdivision or re issue of the said Title Ruiru East/ Juja East/ Block 2/254 or registration of transfer the said title or of subdivisions thereof in favour of the 1st to 12th Respondents erroneously concluded that the 1st to 11th Respondents were registered proprietors of property Title Ruiru East/ Juja East/ Block 2/254.

15. THAT the Learned resident Magistrate erred in Law and in determining conclusively at the interlocutory stage that the 1st to 11th Respondents are the genuine and legitimate proprietors of the suit property without first hearing and determining the Appellant's claim of fraud and forgery by the 12th Respondent of eth Agency Agreement annexed to his Affidavit which Appellant claims of sustained would render the 1st to 11th Respondents suit against the Appellant not sustainable in law.

16. THAT the Learned Senior resident Magistrate erred in finding conclusively at the interlocutory stage and before close of pleadings that the Appellant has trespassed on the suit land and that therefore evidence must be called to confirm how the Appellant trespassed on the suit land.

17. THAT the Learned Senior resident Magistrate misdirected herself and reached conclusions not supported by facts manifest from evidence on record and failed to consider and make findings from facts in evidence.

18. The Learned Senior Resident Magistrate misdirected herself in Law and in fact in unfairly ordering parties compliance with pre trial documentation and directing mention of the case on 19th January 2021 to fix a hearing date limited to trial of the single issue of trespass by the Appellant upon the suit property framed unfairly by the Learned Senior Resident Magistrate before service of summons to appear and even so before close of pleadings.

In his Memorandum of Appeal, the Appellant sought for orders that the Ruling by the Learned Senior Resident Magistrate dated **2nd December 2020**, allowing the 1st to 11th Respondents Application dated **1st September 2020**, and orders and directions thereupon be set aside and that the Appellant do have costs of the said Application and Appeal.

The Court directed that the Appeal be canvassed by way of written submissions and the Appellant through the **Law Firm of F.N Wamalwa & Company Advocates**, filed his written submissions dated **15th April 2021**, and submitted that the Learned Senior Resident magistrate erroneously dismissed the Appellant's claim of fraud by the 12th Respondent and made final and conclusive facts from Affidavit evidence. That there was no evidence in support of the findings by the Learned Magistrate of the Registration of the 1st to 11th Respondents.

It was further submitted that the Appellant would by the findings of fact by the trial Court be precluded from calling oral or documentary evidence including forensic evidence to impeach the claimed illegality. It was further submitted that any Judicial Officer called upon to hear and determine issues in the suit at the trial is bound by findings of fact, the impugned Ruling asserting the Plaintiffs are the registered owners of the suit property. It was further submitted that the Learned Magistrate cited to herself the dictum in **Edwin Kamau Muniu...Vs... Barclays Bank of Kenya HCCC 1118 of 2002** to the effect that;

“ In an interlocutory Application , the Court is not required to determine the very issues which will be canvassed at the trial with finality. All that the Court is entitled to decide at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria.....”

That regrettably the Court's conclusive determination of fact and by craft of expedited hearing excluding pleadings precipitated by Summons to appear and preceded by adequate time for case management is not in the wider Interests of Justice. The Court was therefore urged to allow the Appeal.

The 1st to 11th Respondents filed their written submissions dated **4th May 2021**, through the Law Firm of **M.M Uvyu & Company Advocates** and submitted that the Learned Magistrate did not err in granting the orders and that she directed herself properly . Further that the Learned Magistrate properly applied her mind to the issue of determination when she relied on the decision of **Edwin Kamau Muniu....Vs...Barclays bank of Kenya Ltd Nairobi HCCC No. 118 of 2002** when she held that ;

“ In an interlocutory Application , the Court is not required to determine the very issues which will be canvassed at the trial with finality . All the Court is entitled a that stage is whether the Applicant is entitled to an injunctive orders sought on the usual criteria.”

It was further submitted that the documents produced by the 1st to 11th Respondents were enough material presented to the Court to establish a right which had been infringed by the Appellant in trying to sell their respective plots to other parties which fact was not controverted by the Appellant in his Replying Affidavit and further Affidavit and therefore the Learned Magistrate properly granted the injunction pending the hearing and determination of the main suit.

It was further submitted that the Learned Magistrate exercised her discretion properly in the circumstances of the case as she took into consideration factors which ought to have been taken into consideration.

Further that the Magistrate did not conclusively determine the matter and that is why she granted interim injunction for a period of **90 days** and preserved the status quo. That the Court was fully within the law when the trial Magistrate made the order that the matter proceed for Pre trial Directions. They relied on various decided cases and provisions of law and submitted that the Appeal is premature , incompetent and an abuse of eth court process and urged the Court to dismiss the Appeal.

The 12th Respondent also filed his written submissions through the **Law Firm of S.N Chege & Associates Advocates** on **7th May 2021**, and submitted that the Appellant has not demonstrated that the trial Court did not properly exercise its discretion to enable the Appellate Court to set and or vary the injunctive orders and that the grounds of appeal as set out in the Memorandum of Appeal are made in bad faith. That the interlocutory injunction issued by the trial Court were concerned with the maintenance of a position that will enable justice to be done when its final order is made and an interim regulation of the acts of the parties that is the most just and convenient in all circumstances. It was submitted that the Appeal is devoid of merits , premature , incompetent and an abuse of the Court process and should therefore be dismissed.

The Court has now carefully read and considered the written submissions , the pleadings by the parties and the annexures thereto together with the provisions of law and renders itself as follows;

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the

matter as provided by Section 78 of the Civil Procedure Act. See the case of Selle ...Vs... Associated Motor Boat Co. [1968] EA 123 where the Court held that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of Mbogo vs Shah (1968) EA at Page 93 where the Court held that:-

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

It is not in doubt that the 1st to 11th Respondents sought for injunction order in the lower Courts. The Court could only deny and or grant the same. This Court sitting as an Appellate Court in the first instance, is required to re-assess the evidence on record and reach its own independent decision. The law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides:-

"Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

(b) That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

Further in deciding whether or not to grant interlocutory injunction orders pending the hearing and determination of the suit, the Court is guided by the locus classicus case of Giella ...Vs...Cassman Brown & Company Limited (1973) E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction:-

"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.”

It is thus not in doubt that the Court in determining whether or not the 1st to 11th Respondents were entitled to the grant of the interlocutory injunction, it must then determine whether or not they have satisfied the three principles as set out in the above case.

Did the 1st to 11th Respondents then establish that they have a prima facie case. In Mrao Ltd vs Ltd vs First American Bank of Kenya and 2 others, (2003) KLR 125 which was cited with approval in Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR, the Court of Appeal defined a prima facie case as:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

Have the Respondents then established that they have a genuine and an arguable case. It is the 1st to 11th Respondent's contention that they bought the suit property from the 12th Respondent, the 12th Respondent has acknowledged the said allegations and further averred that he had entered into a Memorandum of Understanding with the Appellant and he had paid the whole amount that was required of him and therefore the sale to the 1st to 11th Respondents was well in order. He has produced in evidence a Memorandum of Understanding and further bank statements that evidences his contention that he paid the amounts to the Appellant. The Appellant has however refuted the said claims and averred that the title deed produced in evidence is a forgery and that he did not sign the said Memorandum of Understanding. He has further contended that the monies paid to him by the 12th Respondent are in relation to a different property and not the instant suit property.

All these are disputed averments that must be put into test and the same can only be done at the full trial wherein the parties would be allowed to call evidence and produced the said evidence and not by way of affidavit evidence, nor can the Court determine the same with finality at the interlocutory stage.. See the case of Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002,

the court held that:-

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria”

It is thus not in doubt that the 1st to 11th Respondents having produced Certificates of plots that indicate that they bought the suit property and the 12th Respondent acknowledging the same, then they have an interest and a right over the said property. Whether the said allegation is genuine or not, cannot be determined at this stage. However, prima facie they have a right. Their contention that the Appellant has sought to sell the said property to third parties has not been refuted in any way and if the same is happening, it follows that their right over the suit property is in threat of being violated and as per the definition of what prima facie case is in the case of **Mrao**, they have indeed established a prima facie case.

As the three principles are sequential in nature, the 1st to 11th Respondents also needed to prove that they ***might otherwise suffer irreparable injury***. In the case of **Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR**, where the Court held that:-

“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction.”

The Respondents have alleged that the Appellant has sought to sell the suit property to third parties, allegations which have not been refuted by the Appellant. Therefore, it is not in doubt that the suit property is in danger of being alienated. It is not in doubt that land is an emotive issue, and a unique commodity that cannot be replaced and therefore damages cannot be sufficient in this case while the Court is a position to preserve the same until the suit is heard and determined.

Further the third limb is that the court is required to determine the matter On the balance of convenience. This Court is not in doubt as the provisions of order **40(1) (a) and (b) of the Civil Procedure Rules 2010** provides:-

“Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

Further there are serious conflicts of facts in this matter and the same requires that the Court maintains the status quo, and that in the act that existed before the alleged wrongful act. In this instance, the status quo is that no party should interfere with the suit property. See the case of **Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

“The general principle which has been applied by this court is where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”

Therefore, this Court finds and holds that the 1st to 11th Respondents have established the threshold required for the Court to exercise its discretion and grant the orders of interlocutory injunction sought so as to preserve the suit property until the matter is heard and determined.

The Court has gone through the Ruling delivered by trial Court and while in the train of thought by the Court it may be misconstrued as having made final findings, the Court notes that in the said Ruling, the Court stated;

“ Further , the Court is cautious that at this interlocutory stage it is not supposed to decide the disputed issues. All that the Court is supposed to do is to determine whether the Applicant is deserving of the injunctive orders sought based on the usual criteria.....”

The trial Court then went ahead to make determination on the said criteria and further made orders that only related to the injunctive orders thereby only granting interlocutory injunction, pending the hearing and determination of the suit. In making its own reassessment, this Court finds and holds that the trial Court **did not err** in exercise of its discretion and further it did not put into consideration irrelevant facts as it considered the three Principles of Interlocutory Injunction to arrive at its decision.

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the same.

The upshot of the foregoing is that the Appellant’s Appeal herein is found **not merited** and consequently the said Appeal is dismissed entirely and the Ruling and Order of the trial court is upheld.

On the issue of costs, the Court finds the same is granted at the discretion of the court. The Appellant chose to file this Appeal instead of pursuing the main suit before the trial Court. The Appellant will therefore bear the costs of this Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant – Lucy