



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 41 OF 2021**

**GEOFERY GUCHU KIMANI.....PLAINTIFF/ APPLICANT**

**VERSUS**

**WAMBUI KIMANI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**BELASI DEVELOPERS LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the Notice of Motion Application dated **13<sup>th</sup> April 2021**, by the Plaintiff/ Applicant seeking for orders that;

- 1. That the 2<sup>nd</sup> Defendant / Respondent be restrained by way of injunction by itself, its employees, agents and or any other person(s) claiming its authority from transferring, subdividing, committing acts, of waste, developing, constructing and or interfering in any way with Land Parcel No. Ngenda / Kimunyu/2492 pending the hearing and determination of this suit.***
- 2. That costs of this suit be in the cause.***

The Application is premised on the grounds that the 1<sup>st</sup> Defendant/Respondent was on **27<sup>th</sup> June 2018**, registered as the owner of **L.R Ngenda/Kimunyu**, which land was a subdivision of **Ngenda/ Kimunyu/587**. That the 1<sup>st</sup> Defendant/ Respondent held the said land in trust for herself and the children of Kimani Kanungi ( Deceased) and the Plaintiff/ Applicant being one of the beneficiaries by virtue of being one of the said children is entitled to a share of the said property. That the 1<sup>st</sup> Defendant/ Respondent in disregard of the trust bestowed upon her sold **L.R 2492**, to the 2<sup>nd</sup> Defendant/ Respondent on **18<sup>th</sup> June 2018**, without informing the beneficiaries of the trust. Further, that the 1<sup>st</sup> Defendant/ Respondent lacked the capacity to transact with the suit property, **solely** and as an absolute owner as the said land was **family land**, held **in trust** for the Plaintiff/ Applicant and the other beneficiaries. That the sale of **L.R 2492**, to the 2<sup>nd</sup> Defendant/Respondent was illegal and the Plaintiff/ Applicant stands to suffer great injustice.

In his Supporting Affidavit, **Geoffrey Guchu Kimani** averred that the 1<sup>st</sup> Defendant/Respondent gave him a portion of **60 by 100 of L.R 2492**, but the same was yet to be transferred to his name, but sold the whole land to the 2<sup>nd</sup> Defendant/Respondent . That he undertook an official search which showed that the 2<sup>nd</sup> Defendant/ Respondent is the registered owner of whole of the suit property. That the 1<sup>st</sup> Defendant / Respondent informed him upon inquiry that she had not sold the whole land, but had left out a portion of it, where she resides and his portion. That the title to the suit property should revert back to the 1<sup>st</sup> Defendant/Respondent and registration of the same effected at the Gatundu Land registry .

He further averred that the **trust** should be determined and subdivision done so that he is apportioned his share of **60 by 100** as had been earlier allocated to him by the 1<sup>st</sup> Defendant/ Respondent being a legal beneficiary of **Kimani Kanungi ( Deceased)** . That it is in the interest of Justice that the 2<sup>nd</sup> Defendant/ Respondent is restrained from interfering with the suit property, as he stands to suffer great injustice if the orders sought are not granted.

The Application is opposed and the 2<sup>nd</sup> Defendant/ Respondent filed a Replying Affidavit sworn on **4<sup>th</sup> May 2021** by **Martin Mwangi**, a Director of the 2<sup>nd</sup> Defendant . He averred that the 1<sup>st</sup> & 2<sup>nd</sup> Defendants/ Respondents entered into an agreement for sale and purchase of the suit property sometime in **June 2018**. That during negotiations for the sale of the suit property, the Plaintiff/ Applicant, 1<sup>st</sup> Defendant/Respondent and several other family members including the Plaintiff's uncles were involved on the negotiations. That consequently, the purchase price was shared between the Plaintiff/Applicant, the 1<sup>st</sup> Defendant/ Respondent and the Plaintiff's two brothers..

That in early **2018**, when the 2<sup>nd</sup> Defendant/ Respondent identified the suit property, it discovered that it was still in the names of 2 brothers who were the Plaintiffs/ Applicant's uncles. That it was agreed that the 2<sup>nd</sup> Defendant/ Respondent would provide funds required to

regularize ownership of the land before the sale agreement were signed. Subsequently the funds were provided equivalent to **KShs.500,000/=** that were used solely for purposes of surveying the land, demarcating new boundaries and payment of levies required to process titles. That after the three titles were processed, the 2<sup>nd</sup> Defendant/ Respondent entered into an agreement with the 1<sup>st</sup> Defendant/Respondent for part of the land comprising **L.R 2492**. That the Plaintiff/ Applicant was involved as a witness in the original agreement and parties later entered into another agreement to cater for the Plaintiff's/ Applicant's interests and to apportion his share of the purchase price.

Further that the Plaintiff/Applicant received a total of **KShs.2,000,000/=** as his share of the purchase price for the suit land . That the title to the suit property was closed for subdivision on **31<sup>st</sup> December 2010**, and that the Plaintiff/ Applicant obtained copies of the search and abstract that conceal the true position of the parcel of land, especially entry No. 6 on the abstract of title. That **L.R 2492**, does not exist as the same having been mutated and subdivided into 15 plots being **L.R 2826 to L.R 2840**, and that the said subdivision now comprise a gated community known as **Summer Green 2**, with houses belong to third parties, erected thereupon. Further, that the smaller subdivisions of **L.R 2492**, have been sold to third parties and therefore any order in respect of the same would affect at least **14** other parties without affording them an opportunity to be heard.

That when the suit property was subdivided, the 1<sup>st</sup> Defendant and her family member agreed that the 1<sup>st</sup> Defendant/ Respondent would get a option of land known as **L.R 2840**, being a subdivision of the suit property . That on the ground, the land is well demarcated with the 1<sup>st</sup> Defendant/Respondent occupying a parcel of land and that is bigger than what the Plaintiff/ Applicants is demanding through this suit. He averred that he has been advised by his Advocates, which advice he believes to be true that by lying to the Court and concealing material facts, the Plaintiff/ Applicant has breached the principle that he who comes to equity must do so with clean hands. That the Plaintiff/Applicant is seeking the help of the Court in re writing the Contract on behalf of the parties . That there is no evidence that indicated that the land was trust land and that there is no legal requirement that entitles the Plaintiff / Applicant to demand that the 1<sup>st</sup> Defendant/ Respondent seek consent from him to transact with property that is in her name

The 1<sup>st</sup> Defendant/Respondent in opposing the Application filed grounds of opposition dated **21<sup>st</sup> May 2021**, and opposed the Application on the grounds that the Plaintiff/ Applicant has not established a **prima facie**, case with probability of success and therefore not entitled to the injunctive orders sought. Further, that the orders sought by the Plaintiff/ Applicant if granted at an interlocutory stage amount to final determination of the suit and further binding parties who are not subject to this suit

That the Plaintiff/ Applicant approached the Court by concealment of facts and is advancing the case against the 1<sup>st</sup> Defendant/ Respondent without any legal or factual basis. Further that he has not proved that he has suffered any damages that cannot adequately be compensated, and there is no immediate danger proven that would warrant grant of the injunctive orders sought and granting orders prohibiting subdivision would be granting orders in vain.

The Application was canvassed with by way of written submissions which the Court has carefully read and considered, together with the instant Application, the Affidavit, the annexures thereto and the relevant provisions of law and finds that the issue for determination is **whether the Plaintiff/ Applicant has established the threshold for grant of Injunctive orders as sought** .

As the Plaintiff/ Applicant has sought for injunctive orders, he is either entitled to grant or denial of the same. For injunctive orders to be granted, the Applicant needed to establish the principles set out in the case of **Giella...Vs...Cassman Brown Co. Ltd 1973 EA 358**. These are:-

- a) **The Applicant must establish that he has a prima facie case with probability of success.**
- b) **That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c) **When the Court is in doubt, to decide the case on a balance of convenience.**

A *prima-facie* case was described in the **Mrao Ltd... Vs... First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, to mean:-

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

Has the Plaintiff/ Applicant therefore established a prima facie case? The Plaintiff/ Applicant has contended that the 1<sup>st</sup> Defendant/ Respondent was registered as the owner of **L.R Ngenda /Kimunyu / 2492**, which was a subdivision of **L.R 587** . That the said property was ancestral land and the same was to be held **in trust** for herself and the beneficiaries of the **late Kimani Kanungi**. Though the Defendants / Respondents have contended that the suit property was registered in the name of the 1<sup>st</sup> Defendant/ Respondent, and therefore she is the absolute indefeasible owner of the same, the Court is cautious enough not to make final determination on the said issue. On the surface, the fact that in his Replying Affidavit sworn on **4<sup>th</sup> May 2021**, the Defendant/Respondent averred that there were negotiation for the suit property between the Plaintiff, 1<sup>st</sup> Defendant and other family members and the purchase price was shared between the brothers, further the fact that the **mother title** was shared between brothers, the Court would not hesitates to note that prima facie the suit property was trust land.

Therefore, the Plaintiff/ Applicant being a beneficiary of the suit land had a right over the suit property. For a party to establish a prima facie case, the party must show that there is a right that has apparently been infringed so as to call for a rebuttal. The Plaintiff/ Applicant has averred that the 1<sup>st</sup> Defendant/ Respondent sold the suit property without his knowledge and he has produced in evidence a Sale agreement.

To controvert the said allegations, the Defendants/ Respondents through an Addendum to the sale agreement dated 2019, in which the Plaintiff/ Applicant was to receive **Kshs. 2,000,000/=** to his bank details. In the said agreement, the Plaintiff/ Applicant has been listed as a witness and his Identity Card Number indicated and he has further signed the same.

After the Defendants/ Respondents had filed the Replying Affidavit annexing the addendum to the sale agreement and copies of statement indicating payments, the Plaintiff/ Applicant did not controvert the same. He has neither denied being a party to the said agreement nor has he denied receiving the said monies. As noted above, for a prima facie case to be established, there is need for evidence to be availed of the alleged breach of right. While the Plaintiff/ Applicant claims to not have been aware of the sale, there is evidence that has been availed, which evidence failed to controvert and this evidence was placed before Court to show that he was aware of the sale. There is no right that was allegedly breached as the Plaintiff/ Applicant seems to have been aware of the sale of the land which is allegedly a trust land. In the case of **Kenleb Cons Ltd vs New Gatitu Service Station Ltd another, (1990) eKLR** the court stated that;

***“to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application, but must also show he has a right legal or equitable, which requires protection by injunction.”***

The Court finds and holds that apart from failing to make full and frank disclosure of relevant facts, the Plaintiff/ Applicant has also failed to show that there is a right that has apparently been infringed. Consequently, the Court finds and holds that the Plaintiff/ Applicant has failed to establish a prima facie case.

Having failed to prove a prima facie case, the Court is thus not satisfied that the Plaintiff/ Applicant has established the threshold for grant of injunctive orders. This is so as for the Court to grant Injunctive Orders, the Applicant must establish all the three principles as the three principles are sequential in nature and failure to satisfy one automatically collapses the others. See the case of **Kenya Commercial Finance & Co. Ltd...Vs. Afraha Education Society (2001) 1EA 86**, where the Court held that:-

***“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt, it will decide the application on a balance of convenience. See Giella..vs..Cassman Brown & Co. Ltd 1973 EA pg 360 Letter E. The conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”***

The Upshot of the foregoing is that the Court finds and holds that the Plaintiff/ Applicant has not established the threshold for grant of the injunctive reliefs sought. Consequently the Application dated 13<sup>th</sup> April 2021, is **not** merited and the same is dismissed with costs to the Defendants/ Respondents.

**It is so ordered.**

**DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021.**

**L. GACHERU**

**JUDGE**

**Court Assistant – Lucy**