



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E355 OF 2021

ANTONY CHEGE WANJIRU.....PLAINTIFF

(Suing in his capacity as the personal representative of the estate of

HARRISON WAWERU KAMENGERE)

=VERSUS=

ASUNTA WANGECI WACHIRA.....1ST DEFENDANT/RESPONDENT

KARAGITA AFRICA LTD.....2ND DEFENDANT/RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT/RESPONDENT

RULING

(Notice of motion dated 21st September 2021)

Background.

1. The Plaintiff Anthony Chege Wanjiru filed this suit in his capacity as the personal representative of the Estate of Harrison Waweru Kamengere Deceased. In the main suit he seeks for a declaration that the 1st Defendant, one Asunta Wangeci Wachira acquired the suit property Nairobi/Block 115/439, fraudulently. Consequently, the Plaintiff seeks for the cancellation of the title issued to the 1st Defendant and the issuance of a new one to himself, an eviction order and a restraining order against the 1st Defendant. He further prays for damages and mesne profits for loss of the suit property. The basis of the Plaintiff's case against the Defendant's is that the 1st Defendant fraudulently obtained the title for the suit property in collusion with the 2nd and 3rd Defendants.
2. Pending the hearing and determination of the main suit the Plaintiff brought the Notice of Motion application under certificate of urgency seeking a conservatory order against the 1st Defendant restraining her either by herself, her agent and/or servants from selling, transferring, charging, leasing, disposing, or in any manner adversely dealing with title No. Nairobi/Block 115/1439.
3. The Plaintiff's application is premised on the grounds on the face of the application and the supporting affidavit sworn on 21st September 2021. The gist of the application is that the title to the suit property which belongs to the Estate of Harrison Waweru Kamengere had fraudulently and unlawfully been transferred into the name of the 1st Defendant. The 1st defendant had further without authority entered into and occupied the suit property thereby denying the Plaintiff who is the sole beneficiary of the suit property his right to property and peaceful and quiet enjoyment of the same.
4. The Plaintiff is apprehensive that unless restrained by the court, the 1st Defendant may alienate, waste, or sell the suit property thereby causing the Plaintiff irreparable damage.

Responses by the Defendants.

5. Both the 1st and 2nd Defendants responded to the Plaintiffs Notice of Motion application. The 1st Defendant's response was by way of a replying affidavit sworn on 7th October 2021 filed in court on 22nd September 2021 through the Judiciary E-filing platform by the law firm of Swaka Advocates. This means that the replying affidavit was filed after the court had already given directions on the hearing of the

application and issued a ruling date. I note that the 1st Respondent filed written submissions as well alongside the replying affidavit. I will address the issue of late filing later in this ruling.

6. The 2nd Defendant's response was by way of grounds of opposition dated 5th October 2021 and the replying affidavit sworn on 18th October 2021 by one Charles Gikonyo Gitari.

Directions by the Court.

7. On 12th October 2021, the court gave directions that the Application by the Plaintiff be canvassed by way of written submissions. This was in the presence of the Advocate for the Plaintiff and the Advocate for the 2nd Defendant.

8. Again on 21st October 2021, when the matter came up for mention to confirm filing of submissions, the Court gave a date for Ruling. On both dates, the 1st Defendant was not represented and no documents had been filed yet on her behalf.

9. The Court then must at this juncture decide how to treat the replying affidavit and written submissions filed by the 1st Defendant.

1st Defendant's Replying Affidavit and Written Submissions Filed out of Time!

10. The case herein is essentially between the Plaintiff and the 1st Defendant. The 1st Defendant is at the moment the duly registered sole proprietor of the land subject matter of this suit; parcel of Land known as Nairobi/Block 115/1439 formerly known as plot number FD/388 (**hereinafter referred to as the Suit Property**). This information is in the Plaintiff's pleadings, the attached witness statement and the supporting affidavit in support of the application under consideration. The Plaintiff accuses the 1st Defendant of acquiring the title to the Suit Property through fraudulent means.

11. The Plaintiff claims beneficial ownership of the land. His claim is grounded on the fact that the Chief Magistrate's Court at Murang'a in succession cause No. 81 of 2019 confirmed the grant issued to him as the administrator of the estate of Harrison Waweru Kamengere – deceased, and awarded him the Suit Property wholly as the sole beneficiary of the same. How the Suit Property ended up in the name of the 1st Defendant is one of the issues to be determined by the Court.

12. In this kind of a protracted matter, it is essential that the court gets an opportunity to consider the case of each party in the dispute before making a determination even at this interim stage.

13. The High Court in the case of **Benel Development Ltd Vs 1st Community Bank Ltd (2021) e KLR** was confronted with a scenario like this one. The Plaintiff/Respondent therein filed a reply to an application before the court a full ten (10) months after the application had been filed and way after the Applicant had filed and served their written submissions. It was out of time off course. The Court in considering the appropriate way to handle the replying affidavit stated that ***"Courts have an obligation to grant a hearing to each party to a suit. In order to determine the application fairly and on merit, the Court must consider the replying affidavit despite the same having been filed out of time."***

14. The court in the above cited case quoted with approval the observation of Hon. Justice Bosire JA (as he then was) in **Central Bank of Kenya Vs Uhuru Highway Development Ltd and another (1988) eKLR**

"I am therefore unable to subscribe to the view expressed by Mr. Rebelled that documents filed out of time in response to an application are necessarily invalid and should not be looked at. To my mind, a court is obliged to consider them unless for a reason other than lateness, it considers it undesirable to do so. Besides, the learned Judge in the Court below fell into error when he said that a failure to file grounds of opposition automatically entitles the Applicants to orders ex-parte."

15. I am guided by the above decisions. The replying affidavit of the 1st Defendant and the written submissions herein though filed out of time are now on record. I am obliged to give due consideration to them. I will proceed to do so.

The Response by 1st the Defendant

16. The Replying affidavit by the 1st Defendant was sworn on 7th October 2021. In a nutshell, the 1st Defendant response to the Plaintiff's application is that that Suit Land does not form part of the Estate of Harrison Waweru Kamengere – deceased. She states that it is matrimonial property. The 1st Defendant avers that she is the legal wife of the late Harrison Waweru Kamengere and a beneficiary of his estate as well, just like the Plaintiff. She transferred the title to the suit property lawfully to herself. Her position is that the Suit land ought not to have been included in the Murang'a Chief Magistrate's Court Succession Cause No. 81 of 2019 as it was not part of the Estate of the Deceased.

17. The 1st Defendant therefore states that the certificate of confirmation of grant issued by the Murang'a Principal Magistrate's Court to the Plaintiff herein was obtained through concealment of material facts. At paragraph 9 of her replying affidavit, the 1st Plaintiff deposes that she has indeed gone ahead and filed an application seeking to revoke the grant before the Murang'a Principal Magistrate's Court. She claims to be holding the original burial permit and death certificate of the deceased; Harrison Waweru Kamengere.

18. The 2nd Defendant on the other hand associates with the submissions by the 1st Defendant. It states that its company records reveal that the suit property belongs to the 1st Defendant and therefore does not form part of the estate of the deceased. It is matrimonial property. The

2nd Defendant further states that the 1st Defendant presented them with a letter from the chief confirming her as the lawful wife of the deceased. It was on that basis that they proceeded to amend their register and replaced the name of the deceased with that of the 1st Defendant. They deny any fraud either by them or by the 1st Defendant.

Submissions by the parties.

(A) The Plaintiff/Applicant

19. The Plaintiff/Applicant on his part submits that the title to the Suit Property was fraudulently transferred from the estate of the deceased to the 1st Defendant. He places the liability for the fraud on the shoulders of the 1st and 2nd Defendants. It's the Plaintiff's submissions that the transfer of the property to the 1st Defendant amounts to intermeddling with the estate of the deceased contrary to section 45 of the Law of Succession Act.

20. The Plaintiff/Applicant urges the court to grant an order of temporary injunction to preserve the property awaiting the hearing and determination of the case. He submits that he has satisfied the parameters for grant of an order of temporary injunction as expressed in the now well-known case of *Giella Vs Cassman Brown (1973) EA 358*. He cites the case of *Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2001) eKLR* on the definition of a prima facie cause. On the aspect of irreparable injury, the Plaintiff relies on *Alkman Vs Muchoki (1984) KLR 353* where the late Justice Madan stated that,

“Equity follows the law and where the law is flouted, then the party infringing it should be enjoined”.

(b) The Defendants/Respondents' Submissions

21. The 1st Defendant in her submissions reiterates that she is the wife of the deceased whereas the Plaintiff is her step son and the current administrator of the Estate of the late Harrison Waweru Kamengere through the grant issued by the Murang'a Chief Magistrate's Court in Succession Cause No. 81/2019. She states that she has filed an application to revoke the grant which has been slated for hearing on 29th November 2021.

22. The 1st Defendant submits that during the pendency of his marriage, the deceased consented to the transfer of the Suit Property to her. It is on the basis of that consent that she acquired the title to the land. She states that the transfer process was legal and adhered to the provisions of the Land Registration Act. She emphasizes that the transfer was effected when the deceased was still alive. On that basis, the 1st Defendant urges the court to declare the land matrimonial property and deny the Plaintiff the orders of injunction.

23. The 1st Defendant ends her submissions by stating that it is not within this court's jurisdiction to determine on issues matrimonial property.

24. The 2nd Defendant in its submissions reiterates the averments in the replying affidavit of Charles Gikonyo and the grounds of opposition discussed above.

Issues for determination

25. The only issue for determination at this point in time is whether the Plaintiff/Applicant is entitled to the interim orders sought.

Analysis and determination.

26. The principles to be considered by a court in granting or otherwise, an order of interim injunction are laid out in the case of *Giella Vs Cassman Brown (1973) EA 358*.

(a) Has the Plaintiff established a prima facie case?

27. In support of his application, the Plaintiff averred that he is the lawful beneficial owner of the parcel of Suit Land having been awarded the land wholly vide Murang'a Chief Magistrate's Court Succession Cause No. 81 of 2019. He exhibited the certificate of confirmation of grant issued by the Chief Magistrate's Court at Murang'a. The Plaintiff states that he, however, discovered that the 1st Defendant had through fraudulent means transferred the title to the Suit Property to herself without going through the Succession cause process as provided by the Law of succession Act. He submitted that the action by the 1st Defendant amounted to intermeddling with the property of a deceased person contrary to section 45 of the Law of Succession Act.

28. The 1st Defendant's rebuttal which is supported by the 2nd Defendant is that the suit property was matrimonial property and that it is excluded from the process of succession under the Law of Succession Act. She submits that the Succession Court was misled by the Plaintiff to include the suit property in the distribution list of the Estate of the late Harrison Waweru Kamengere. She proceeds to state that she has since initiated the process of revoking the grant issued to the Plaintiff by the Court that issued it upon learning of its existence.

29. It is not the business of this Court to enquire into the merits of the averments by the Plaintiff or the rebuttals by the Defendant at this stage of the proceedings. All that is required of the court is to decide whether a prima facie case has been established.

30. What is a prima facie case? The Court of Appeal in *Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) eKLR*

answered the question as follows:-

“I would say that 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 exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

31. The same court in **Nguruman Ltd Vs Ian Bonde Nielsen & 2 others (2014) eKLR**, agreed with the definition in Mrao case but went further to elaborate as follows:-

“We adopt the definition save to add the following conditions by way of explaining it. The party to whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established the court does not hold a mini-trial and must not determine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges”.

32. Guided by the above cited cases the court herein is satisfied that the Plaintiff has established a prima facie case with a probability of success.

33. The Plaintiff has submitted that he stands to suffer irreparable damage should the 1st defendant dispose off the Suit Property. The 1st Defendant on her part denies that she has no such intentions (to dispose off the Suit Property) since this is her matrimonial home where she lives. As noted earlier, the 1st Defendant states that she has filed an application seeking revocation of the grant issued to the Plaintiff at the Murang’a Chief Magistrate’s Court.

34. Obviously, disposition, alienation, or charging the title of the Suit Property would be prejudicial to the Plaintiff’s claim. I reiterate that this court will not go into the merit of the case by the Plaintiff at this stage. Interlocutory injunctions are meant to preserve the substratum of the suit pending the hearing and determination of the suit. The 1st Defendant has title to the suit property registered as the sole proprietor of the land. The Plaintiff alleges that the 1st Defendant was registered as the proprietor of the Suit Land after the death of the late Harrison Waweru Kamengere. The Plaintiff’s fears are not without basis.

35. Having considered the peculiar circumstances of this case, the balance of probabilities tilts in favour of the Plaintiff. Accordingly, the Plaintiff’s application dated 21st September 2021 is hereby allowed in terms of prayer 3 thereof, that a conservatory order is hereby issued restraining the 1st Defendant/Respondent either by herself, agent and/or servant from selling, transferring, charging, leasing, disposing or in any manner adversely dealing with title No. Nairobi/Block 115/1439 pending the hearing and determination of this suit or any other or further orders of this Court. The costs of this application shall be in the cause.

36. Further, this Court exercising its powers under section 3A, of the Civil Procedure Act, orders that this suit be stayed pending the outcome of the Application for revocation of grant filed by the 1st Defendant herein in Murang’a Chief Magistrate’s Court, Succession cause No. 81 of 2019. This is informed by the fact that, the outcome of the said Application will definitely determine the direction that this case will take.

37. The matter will be mentioned after ninety (90) days to confirm the position and for further directions.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mr Kahia for for the Plaintiff/Applicant

Ms Kamau holding brief for Ms Swaka for the 1st Defendant/Respondent

Mr Muriithi holding brief for Kingori for the 2nd Defendant/Respondent

Court Assistant: Hilda

M.D. MWANGI

JUDGE