



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 210 of 2019

MARY WAITHIRA NJOROGHE.....PLAINTIFF

VERSUS

THE CHIEF LAND REGISTRAR.....1ST DEFENDANT

BENSON MAINGI MUTAHL.....2ND DEFENDANT

HELLEN WANJIKU MAINGI.....3RD DEFENDANT

MICHAEL WAGUNDA.....4TH DEFENDANT

GRACE WAIRIMU MUIGAI.....5TH DEFENDANT

RULING

1. Coming up for determination is Notice of Motion application dated 24th June 2019 by the Plaintiff seeking the following orders:

i. Spent

ii. That pending the hearing and determination of this application, the 2nd and 3rd defendants, their servants, agents, proxies or other persons acting or purporting to act on their behalf, be restrained by way of an injunction from dealing with, subdividing, selling, charging or otherwise interfering with the Land Parcels L.R. No. 13330/194.

iii. Spent.

iv. That pending the hearing and determination of this suit, the applicant be allowed to put a caution on Land Parcels L.R. No. 13330/194.

v. Cost of the Application be provided for.

2. The application which is supported by the sworn affidavit of the Mary Waithira (Plaintiff) dated 24th June 2019 is premised on grounds that the Plaintiff being the registered owner of LR No. 13330/194 (the suit parcel) in Nairobi entered into a sale agreement with the 5th Defendant in the year 2017. The 5th defendant then introduced her to her advocate the 4th Defendant herein and the Applicant consented to the 4th Defendant acting for her in this particular agreement. In order to effect the sale, the Applicant submitted the following documents to the 4th Defendant: 3 copies of her passport size photographs, a copy of her National Identification Card and a copy of her Kenya Revenue Authority Personal Identification Number (KRA PIN) and also appended her signature on 3 copies of the sale agreement. After several months of following up with the 4th Defendant on the progress of the sale, the 4th Defendant informed her that he had filed a case against the 5th Defendant for compensation. Soon thereafter, even the advocate (4th Defendant) vanished, never to be found.

3. The Applicant then conducted a search at lands offices where she discovered that her land had been fraudulently transferred to the 2nd and 3rd Defendants herein using transfer documents that she had allegedly signed and witnessed by the 4th Defendant. The Applicant proceeded to report the alleged illegal transfer to the Department of Criminal Investigations(DCI), Kiambu. She also attempted to place a caveat on the said land awaiting completion of investigations, but the Lands Registry Officer asked her to get a court order to that effect.

4. The application was opposed by the 2nd and 3rd Respondents vide their Replying affidavit dated 28th October 2019. They aver that Applicant is not truthful when she says she does not know them. That they were introduced to each other by property agents and the sale

initiated after the meeting and to affirm their knowledge of each other added that they even sent her money to her phone. They indicated that they were aware that the 4th Respondent was the Plaintiff's advocate acting on her behalf and they sent her a total of Kshs. 17,400,000 towards the purchase of the suit property and the property was then transferred to them. Thus, the suit was an abuse of the court process and should be dismissed.

5. This application was canvassed by way of written submissions.

Plaintiff's submissions

6. The Plaintiff in the (undated) written submissions outlined that the issue for determination was whether she had transferred the suit property to the 2nd and 3rd Respondents. She submitted that the ownership of the telephone line that made the M-pesa payments adduced by the 2nd and 3rd allegedly to the Applicant amounting to Kshs. 87,060 could not be ascertained noting that the Plaintiff's telephone number was +254700xxxx. As such, the said Mary Njoroge who received the money was not the plaintiff. It was further submitted that the 2nd to 5th Respondents were trying to defraud her whereby the 4th Respondent ensured he got the necessary documents from the Plaintiff so as to effect a transfer. However, the Plaintiff indicated that since she had not released the original title certificate to the 4th Defendant, the transfer was effected by a fraudulently acquired title.

7. The Applicant also submitted that investigations into the alleged fraud showed that the Plaintiff's signature on the transfer form was an attempted forgery and so was the title held by the 2nd and 3rd Defendants. Adding that the entry into the register had also been undertaken fraudulently and should be expunged.

8. In support of her case, the Applicant relied on the following cases; **Martha Chelal & Another v Elijah Kipkemoi & 2 others (2019) eKLR**, **Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another (2013)eKLR**, **Dr. Joseph Arap Ngok v Justice Moyo Ole Keiuwa & sons , and Arthi Highway Developers Ltd v West End Butchery Ltd & 6 others (2015) eKLR**. The Applicant also relied on the provisions of Section 26 and 80 of the Land Registration Act.

2nd and 3rd Defendants' submissions

9. In the undated written submissions of the Respondents, they reiterated that they are *bona fide* purchasers of the suit property. They framed the issues for determination as follows; i. whether the Plaintiff had satisfied elements required for grant of an injunction; ii. Whether the 2nd and 3rd Defendants were entitled to quiet and peaceful enjoyment of their land. It was submitted that the Respondents had availed a sale agreement between the Applicants and the Respondents as well as copies of payment for the purchase of the suit property and upon payment of the final instalment, the Plaintiff's advocate released the original title to them and a transfer was duly effected on 19th September 2017. It was submitted that had the title been forged as claimed by the Applicant, it would have been rejected at the registry upon presentation. The Respondents added that they have been in possession of the suit property from 2017 when it was transferred to them.

10. In support of their case, these Respondents relied on the cases of **Giella vs Cassman Brown Co. Ltd (1973) EA** ,**Mrao vs First American Bank Limited and 2 Others [2003] eKLR** and **Kenya Commercial Finance Company Limited –vs- Afraha Education Society [2004] eKLR**.

Analysis and Determination

11. This court has considered the application, affidavits, rival submissions together with the relevant legal framework and the prevailing jurisprudence and finds that the issues for determination are: ***i. whether the injunctive and inhibition orders sought by the Applicant are merited.***

12. I find that the Applicant has given a detailed account of how she set out to sell the suit land to 5th Defendant through an advocate, the 4th Respondent. That is how she ended up giving out her documents like the passport photos, copies of ID and KRA PIN among other documents that were requisite in effecting the transfer. She stated that she did not give the 4th Defendant the original certificate of title of the suit property, which document is still in her custody. The 2nd and 3rd Respondents have controverted this allegation by asserting that they met the Plaintiff and even sent her money to her personal number and the purchase money was sent to her advocate's account (the 4th Defendant).

13. Without rehashing the submissions, this court wishes to restate that the principles for grant of interlocutory injunctions were comprehensively set out in the case of **Giella v Cassman Brown Co Ltd [1973] EA 358** and reinforced by the Court of Appeal case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others (2014) eKLR**. As was set out in the above named cases, a party needs to show that they have a *prima facie* with a probability of success for the courts to grant injunctive orders. The Applicant contends that her land was fraudulently transferred to the 2nd and 3rd Defendants. Courts have often stated that fraud allegations are serious criminal accusations which cannot be taken lightly. In the Court of Appeal case of **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR** it was held:

“...the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land...”

14. The issue of fraud is at the centre stage of the dispute. Consequently, the issue ought to be canvassed in a full trial.

15. What is however not disputed is that the Applicant was the initial owner of the suit land. She contends that she still has her original title. To this end, and based on the material availed before this court, I find that the Applicant has presented a *prima facie* case. It is therefore crucial to put in place measures to preserve the suit land.

16. In conclusion, I find that the application dated 24th June 2019 is merited and gives the following disposal orders:

i. The 2nd and 3rd defendants are restrained from dealing with or interfering with Land LR No. 13330/194 pending the hearing and determination of this suit.

ii. That an order for inhibition be registered restricting further transfer, registration or any other dealings against LR No. 13330/194 until this suit is heard and determined.

iii. Costs shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Court Assistant: Eddel Barasa