



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

ELC CASE NO. 18 OF 2021

FORMERLY MOMBASA ELC NO.139 OF 2021

ROSEMARY O'BRYEN HOARSE RUSSELL (SUING ON CAPACITY AS ADMINISTRATOR
OF THE ESTATE OF NICHOLAS JAMES RUSSELL).....PLAINTIFF

VERSUS

HASSAN KASSIMU CHORO.....1ST DEFENDANT

OMAR SAID MWATAYARI.....2ND DEFENDANT

SALIM CHONDO HAMADI.....3RD DEFENDANT

SALEEM MOHAMED AFZAL BAGHA.....4TH DEFENDANT

LAND REGISTRAR KWALE COUNTY.....5TH DEFENDANT

HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

INTRODUCTION.

1. This suit is commenced by way of Complaint dated 16th July 2021. The Plaintiff suing as administrator of the Estate of Nicholas James Russell has filed the Notice of Motion dated 16th July 2021 under Article 159(2)(d) of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 rules 1,2 of the Civil Procedure Rules 2010; Section 3 and 13 of the ELC Act No. 19 of 2011 and Practice Directions on proceedings in the ELC 2014. It seeks the following orders; -

a. SPENT

b. SPENT

c. An order of injunction restraining the Defendants whether by themselves or through any person whatsoever from interfering with the land known as Kwale/Galu Kinondo/13 by surveying, sale, transfer, construction, wastage, sub-division, disposal, cultivation, taking occupation, leasing out or by any other means whatsoever and howsoever pending the hearing and determination of the suit filed together with this application.

d. SPENT

e. An order of inhibition be registered in respect of the land known as Kwale/Galu Kinondo/13 pending the hearing and determination of the suit filed together with this Application.

f. An order to issue compelling the DCI to produce to this Hon. Court the investigation file and report regarding all that property known as Kwale/Galu Kinondo/13.

g. An order for leave of this Honorable Court to serve the 1st, 2nd and 3rd Defendants via their registered Post Office Box Number.

h. Any further or other orders as the Honorable Court may deem fit.

i. Costs of the Application to be borne by the Defendants.

2. The Motion is supported by the Replying Affidavit of Rosemary O'bryen Hoarse Russell sworn on even date and the grounds set out on the face of the application. It is deposed that Nicholas James Rusell (deceased) bought the Plot Number Kwale/Galu Kinondo/13 (suit property) from Hamadi Salimu Kivwato in 2006 whereupon he was registered the proprietor.

3. It is also stated that the 1,2 and 3rd Defendant claiming to be the beneficiaries of Hamadi Salim Kivwato through Succession Cause no. 408 of 2019 in the Kadhis Court Kwale, included the suit property as part of the assets to be distributed. Pursuant to this in February 2020 the suit property was transmitted and registered under their names. They then sold the suit property to Saleem Mohamed Afzal Bagha the 4th Defendant and in March 2021 it was registered in the name of the 4th Defendant. Copies of transmission documents including Certificate of Confirmation of grant, title deed in the name 4th Defendant are annexed.

4. The Plaintiff states that she discovered through her own investigations as well as the Land Fraud Unit of the DCI that before transfer to the 4th Defendants, the 1st, 2nd and 3rd Defendants had also tried to sell the suit property to Riverhorse Limited. The transaction aborted for inability on the part of the buyer to conduct due diligence in the Kwale land registry. Copies of the purported blank sale agreement between the said Defendants and M/s Riverhorse Limited is provided.

The Defendant Response

5. The Application is opposed by the 4th Defendant through the Replying Affidavit of Saleem Mohamed Afzal Bagha sworn on the 15th September 2021. The Defendant has also filed Defence and Counterclaim. It is deposed that he purchased the suit property from the 1st, 2nd and 3rd Defendants at a consideration of Kshs. 10 million. Upon fulfilment of all legal requirements as to consent to transfer from the Land Control Board, valuation and payment of stamp duty and registration of transfer he was issued with a valid legal title. Further that it was his belief that the defendants had capacity to transfer title and that the transfer was valid, proper, and not in any way fraudulent or illegal.

Submissions

6. The application was heard by way of written submissions. Both The Plaintiffs and 4th Defendant's submissions are dated 1st October 2021.

Plaintiff's submissions

7. Learned Counsel for the Plaintiff reiterates the facts deponed in the Plaintiffs replying affidavit. He contends that curiously after 14 years of the Plaintiffs quiet possession, the 1st, 2nd and 3rd Defendants fraudulently, illegally and clandestinely caused the land to be transmitted to their names by misleading and misinforming the Kadhi's court that the suit property still belonged to their kin Hamadi Salim Kivwato. It was evident from the official land registry documents that as at 29th September 2005 the property belonged to Hamadi Salim Kivwato.

8. As against the Land Registrar Kwale, it is contended that he fraudulently, negligently despite knowing that the suit property was no longer registered in the name of Hamadi Salim Kivwato registered the defendants as proprietors.

9. In his submissions Counsel further argues that according to the documents availed by the Plaintiffs, the 4th Defendant failed to sell the suit property to Riverhorse Ltd and fearing that due diligence would reveal the improprieties, colluded with the 1st 2nd and 3rd Defendants to transfer the property to him. The 4th Defendant in his affidavit does not contend the legitimacy of the Plaintiffs title and only raise it in their submissions, against the Civil Procedure rules. The 4th Defendants failure to adduce any evidence on due diligence undertaken by either him or his advocates was a clear indication of complicity with the fraudulent transactions.

10. It is the Plaintiffs submission that they have met the threshold for granting of an interlocutory injunction as set out in the **Giella Versus Cassman Brown**; - The Plaintiff contends that; -

a. Based on the definition of prima facie case in the **Case of Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 Others**, the Plaintiff had given overwhelming evidence of the Defendants fraudulent activities. These had not been controverted except that the 4th Defendant seeks to assert rights of a bonafide purchaser for value without notice, which can only be proved during full hearing. The said activities had resulted into the infringement of her rights. The green card produced by the Plaintiff shows that the suit property solely belonged to Hamadi Salim Kivwato, and therefore the 1st, 2nd and 3rd Defendants could not pass legal or valid title.

b. Being the lawful title holder, after 14 years of peaceful quiet enjoyment she has suffered immense loss by the Defendants fraudulent activities. The Plaintiff worries that the Defendants will continue to sell off the property to 3rd parties, perpetuating the fraud and causing her irreparable harm that cannot be compensated by damages.

c. The Balance of convenience lies in the Plaintiffs favor since the legitimacy of her title is uncontroverted evidence, a case with high likelihood of success.

The Plaintiffs urges that the prayers sought in the Application should be granted with costs to the Defendants.

4th Defendants Submissions

11. Learned Counsel for the defendant citing the principles on granting an injunction as laid out in the case of *Giella Vs Cassman Brown*, argued that the Plaintiff claim is against the 1st to 3rd defendants whom it is claimed fraudulently dealt with the suit property. With regard to the 4th Defendant it was only the fear that the Defendant currently registered as the owner of the suit property will sell it to unsuspecting third parties.

12. The 4th Defendant also questions the validity of the sale of the suit property to the Plaintiffs deceased husband. This is on the basis that the sale did not involve all the owners of the suit property. It is contended that prior to transmission, records at lands office showed that the land was owned by 4 people including the said Hamad Salim Kivwato. Therefore, any purported claim should be against the estate of the said Hamad Salim Kivwato and not all the parties to this suit.

13. Learned counsel points that the 4th Defendant is a purchaser for value without notice from the Defendants who duly acquired the property by transmission, which has been admitted by the Plaintiff. He attached copies of order by the Kadhis court, Application to be registered as proprietor by transmission, Titles in the names of the 1st, 2nd and 3rd Defendant and separately in his name. According to the defendant there was no any claim of fraud/illegality raised as against the 4th Defendant and no prima facie case with likelihood of success as against the 4th Defendant. To the contrary it is urged that the 4th Defendants case has a high probability of success for the reasons earlier set out and he should not be constrained on usage of the property. No compensation will be adequate hereto. For the foregoing reasons, the interim orders should therefore be vacated.

14. It also urged that since the Plaintiffs ownership is based on an impugned sale that did not involve all the registered owners, the Plaintiff stands to suffer no risk that cannot be adequately compensated by the estate of the then vendor.

16. As to the balance of convenience, the 4th Defendants states that it tilts in his favor as the duly registered proprietor.

ANALYSIS AND DIPOSITION

16. I have considered the Application, supporting affidavits, the 4th Defendants response together with all the documents attached to the affidavits and the submissions of both parties.

17. I will go straight to the question whether the Plaintiff has met all the criteria for granting of an injunction as enunciated in the case of *Giella Vs Cassman* which has been cited by both parties participating in this application. I will then make a finding on whether the orders sought in the application should be granted.

Whether the Plaintiff/Applicant has demonstrated a prima facie case with a probability of success.

18. The court as guided by the case of *Murao* cited herein is to consider this limb based on the material placed before it. And further in accordance to ***Nguruman Ltd Versus Jan Bonde Nielsen & 2 Others (2014) eKLR*** the Applicant needs only show that they have a fair and bonafide question to raise as to the existence of the right which they allege. The Plaintiff has provided copies of Search demonstrating initial ownership by the vendor, sale agreement, forex receipts, funds transfer for the consideration, letter by vendor acknowledging receipt thereof and title deed in the name to Nicholas James Russell. From the facts and material placed before this court and without going into the merits of the case I find that this threshold has been met.

An interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

19. It is deposed that the Plaintiff has been in peaceful possession quiet enjoyment of the plot for 14 years since purchase and issuance of title. This coupled with the apprehension that the property will further be transferred to 3rd parties will occasion her immense loss causing her irreparable harm that cannot be compensated by damages. The Defendant urges that since the purported sale to the Plaintiffs was invalid, they can be adequately compensated by the estate of the deceased. This court is of the view that while the purchase price is known, the 14 years of attachment in my view could be the issue in terms of accuracy of compensation. I also find that there is genuine apprehension to further transfer of the property which will not only complicate issues but could lead to wastage of the suit property.

Balance of Convenience

20. Where it is in doubt as to adequacy of the respective remedies in damages to either party, the court is enjoined to decide on balance of convenience. Both the Plaintiff and the 4th Defendant claim title to the suit property. The titles showing different proprietors have been presented. A counterclaim has also been filed. Clearly there are two titles to the suit property and the balance of convenience tilts in favor of protecting the property until determination of the two rival claims.

Substituted Service

21. The application herein also seeks for an order for leave of the Court to serve the 1st, 2nd and 3rd Defendants via their registered Post Office Box Number. The grounds are set out in the Plaintiffs submissions. These are that unlike the 4th Defendant who has recently transacted with the 1st to 3rd Defendants, the Plaintiff has not met them and does not know their physical location. It is the Plaintiffs belief

that the 1st to 3rd Defendants were aware of this suit through the 4th Defendants and have merely refused to enter appearance. The Court is urged to deem the 1st to 3rd Defendants to be duly served and judgment in default of appearance be entered against them.

22. The prayer is opposed by the 4th Defendants on the basis that, from the nature of the dispute it would not be proper to merely serve by registered postal address which address has not been disclosed.

23. I have looked at the Replying Affidavit of Rosemary O'bryen Hoarse Russell and I have noted that the same does not address itself to the issue of service. I have however come across an Affidavit of service filed in this court on 22nd September 2021 sworn by Benson M. Muindi on 3rd September 202, wherein it appears the 1st, 2nd and 3rd Defendants were served by way of registered post. However, the address is not disclosed and the registered post receipts are not annexed. A look at the Summons in the court file reveals the address used is P.O.Box 558 Diani. There has been no reply from them.

24. Order 5 Rule 14 sets out the Procedure when a defendant cannot be found after all due and reasonable diligence has been deployed by the serving officer. This is '*affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain...*' Going by the Plaintiffs submissions, these options are clearly not available since they do not know the defendants.

25. Order 5, rule 17 sets out other modes of service (substituted service) which may be deployed where the court is satisfied that that the summons could not be served. This is by application, meaning leave of the Court must be sought. Registered mail is not one of the options available that does not require leave. Leave ought to have been sought first even at the point when the interim orders were being granted *ex parte*. The issues raised in this matter are weighty and a casual approach to service will not meet the ends of justice. Further efforts at service should be considered to accord the said defendants an opportunity to respond to the issues. It is not enough for one to allege they do not know the party and that the defendants have conveniently refused to respond to summons. I find that the service is not proper to warrant the grant of the orders sought.

26. I also hasten to state that while I have impugned the alleged service, I do not see any prejudice that will be occasioned to the 1st, 2nd and 3rd defendants in proceeding to dispose of this application. They will still have an opportunity to be heard substantively if they choose to respond upon service. Meanwhile I also note from the Affidavit of service sworn by Peter Ogweni Omogi on 19th July 2021 and filed on 22nd September, 2021 that the 5th and 6th Defendants were duly served and have failed to respond to the application.

As to whether the court ought to compel the DCI to produce their report before this Court,

27. Counsel for the Plaintiff discloses that there are ongoing investigations by the Land Fraud Unit of the Directorate of Criminal Investigations which are near completion. Further that the Officer in Charge had indicated that the report will not be produced in the absence of a court order. The 4th Defendant has not responded to this issue. No correspondence from the DCI has been placed before this court in this regard. I find this application premature at this stage. It is the Courts view that at the appropriate time the Plaintiffs could consider taking out summons to witness or apply to the court appropriately.

DETERMINATION

28. Following the foregoing analysis and findings, I hereby make the following orders;

1. THAT the 1st, 2nd and 3rd Defendants should be served by way of Advertisement in one local daily of wide circulation within 30 days. The advertisement shall not be placed in the classifieds pages. The advertisement should clearly state that it is in respect of the suit property Kwale/Galu Kinondo/13.
2. THAT an order of injunction be and is hereby issued restraining the Defendants whether by themselves or through any person whatsoever from interfering with the land known as Kwale/Galu Kinondo/13 by surveying, sale, transfer, construction, wastage, subdivision, disposal, cultivation, taking occupation, leasing out or by any other means whatsoever and howsoever pending the hearing and determination of the suit.
3. THAT an order of inhibition be registered in respect of the land known as Kwale/Galu Kinondo/13 pending the hearing and determination of this suit.
4. Prayer (f) and (g) of the application are declined.
5. Costs shall follow the event.

DELIVERED AND DATED AT KWALE THIS 6TH DAY OF DECEMBER, 2021

A. E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Shisaka for the 4th Defendant

Ndegwa for the Applicant

Court Assistant – Mr. Dennis Mwakina