



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO 54 OF 2019

DR. EDWARD KUNGU.....1ST PLAINTIFF/APPLICANT

GRACE WAMBUI KUNGU (Suing as the legal representative of the Estate of Janet R.

Kungu (deceased).....2nd PLAINTIFF/APPLICANT

VERSUS

DAVID NDUNG’U NJIHIA.....1ST DEFENDANT/RESPONDENT

GABRIEL MURIRA MUTHIORA.....2ND DEFENDANT/RESPONDENT

PATRICK MACHARIA MWANGI.....3RD DEFENDANT/RESPONDENT

MARGARET WANGECHI MACHARIA.....4TH DEFENDANT/RESPONDENT

SAMWUEL NGUGI KARIUKI.....5TH DEFENDANT/RESPONDENT

HEZRON KAMAU WANGARI.....6TH DEFENDANT/RESPONDENT

LAND REGISTRAR, NYANDARUA.....7TH DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....8TH DEFENDANT/RESPONDENT

AND

JESSY KARANJA MUCHEKE.....PROPOSED INTERESTED PARTY

RULING

1. Before me for determination is the Notice of Motion dated 4th November 2019 in which the Applicant seeks the following orders:

i. spent

ii. spent

iii. That the Defendants be restrained by themselves, their agents or servants from interfering in any manner whatsoever with the Plaintiffs possession and enjoyment of the suit property LR No. Nyandarua/Kahuru/143 or any of the illegal subdivisions known as LR No Nyandarua/Kahuru/10002-10014 until further orders of the Court pending the hearing and determination of this Application.

iv. That the Defendants be restrained by themselves, their agents or servants from entering into alienating, subdividing, selling, mortgaging, charging or dealing in whatever manner with LR No. Nyandarua/Kahuru/143 or in any of the illegal subdivisions known as LR No Nyandarua/Kahuru/10002-10014 or any portion of the same until further orders of this honorable Court.

v. That the Defendants be restrained by themselves, their agents or servants from alienating, subdividing, selling, mortgaging, charging or dealing in whatever manner with LR No. Nyandarua/Kahuru/143 or any of the illegal subdivisions known as LR No Nyandarua/Kahuru/10002-10014 pending the hearing and determination of this Application.

vi. That the cost of this Application be provided for.

2. The Application was supported on the grounds on the face of it as well as on the affidavits sworn by the 1st Applicant Dr. Edward C. Kungu on the 4th November 2019 and a further affidavit filed on the 18th November 2019.

3. The said Application was argued orally on the 19th November 2019 wherein Counsel for the 7th and 8th Respondents submitted that save for the main suit, they would not be participating in the Application. Counsel for the proposed interested parties, though having not filed a formal application for joinder, submitted that they had no objection to the maintenance of status quo by parties.

4. Counsel for the Applicant addressed himself to the Application which had been filed under Order 40 Rule (1) (2) (7) and 10 and under Order 51 Rules 1-3 of the Civil Procedure Rule and under Section 1A, 1B and 3A of the Civil Procedure Act to the effect that the said Application sought for an injunction order as against the 1st – 6th Defendants restraining them from dealing with the suit property being Nyandarua/Kahuru/143 and illegal sub-divisions of the same being Nyandarua/Kahuru/10002 – 10014.

5. In so submitting, Counsel relied on the grounds on the face of the Application, the 2 (two) affidavits sworn by the 1st Plaintiff on the 4th November 2019 and 18th November 2019 respectively as well as on the list of authorities filed on the 18th November 2019.

6. He gave the background of the case to the effect that the Plaintiffs were victims of fraud. That the Plaintiffs sought to sell their land but upon performing a search in preparation of the sale, they had discovered that the same had its title closed upon sub-divisions created by the 1st Defendant. They also discovered that the 1st Defendant had already transferred some sub-divisions of the land to himself and the 2nd-6th Defendants herein.

8. Counsel submitted that they had satisfied the principles set down in the case of **Giella vs Cassman Brown & Co Ltd [1973] EA 358** to the effect that on the 1st ground, they had described how they had bought the suit property in February 1993 from the estate of Stephen Mwangi Chege as per their annexed copies of receipts and correspondence between themselves and lawyers for the bank which had held the title at that time.

9. That although the 1st Defendant claimed to have held a good title, on the face of two competing titles, the Plaintiffs relied on the judgment in **Kamau James Njendu vs Serah Wanjiru & Another [2018] eKLR** to submit that where there are two competing titles, the first in time will prevail.

9. On the 2nd limb, it was their submission that they would suffer irreparable harm because their properties which already had illegal subdivisions had been transferred to the 1st – 6th Defendants. That without orders to preserve the suit property the same could be put out of reach of the Plaintiffs and the Court thus rendering the Application and the suit nugatory.

10. It was further their submission on the 3rd ground, that the balance of inconvenience favored the granting of the injunction because they were fearful that the persons to whom the subdivisions had been transferred to would evict them from the property. That indeed the 1st Plaintiff's sister had been living and cultivating on the said property when some unknown persons entered therein and put up a semi-permanent structure.

11. That in so doing, the Defendants were trying to defeat this limb of **Gielle vs Cassman Brown** by creating a presence on the suit property yet they had not been there from February 1993 when the Plaintiffs became registered as the owners of that property. They thus sought for orders in prayers 3-5 of their Application to be granted.

12. In opposition of the Application, Counsel for the 1st -6th Defendants while relying on the Replying affidavit sworn by the 1st Defendant on the 14th November 2019, submitted that the Plaintiffs' Application did not meet the test laid down in the case of **Gielle vs Cassman Brown**. That an injunction could not issue as the land had been allocated to one David Mucheke Njenia, a step brother to the 1st Defendant, in the year 1963 by the Settlement Fund Trustee as per the green cards and a letter of confirmation they had annexed.

13. That the Plaintiffs in this case allege to have bought the property from one Stephen Chege who did not appear anywhere in the records of the Ministry of Lands going by the green card or even by the letter from Settlement office. The basis upon which the Plaintiffs allege to have bought the property from the personal representatives of the said Stephen Mwangi Chege was a certificate of confirmation of grant allegedly issued to Tabitha Wanjiku Mwangi and John Chege Mwangi in Nairobi HC Succession Cause No. 51 of 1990. That the said certificate revealed that whereas the Succession Cause was before the High Court at Nairobi, yet it was dated at Nakuru. Secondly, the property in the schedule of properties of the deceased was shown as plot No. 111 Kahuru Scheme which was not the same property that which was before Court.

14. That no other document had been exhibited by the Plaintiffs/Applicants to demonstrate how Stephen Mwangi Chege acquired any interest in the suit property in order to transfer the same to the Plaintiffs.

15. That it was not sufficient to dangle a title without establishing its root which explained why the Defendants contended that the title held by the Plaintiffs was fake for it had no foundation thus the Plaintiffs had failed to demonstrate the 1st principle in **Gielle vs Cassman Brown**.

16. That this was not a case of two competing titles as what was before Court was the case of genuine titles held by the 1st-6th Defendant against an alleged fake title held by the Plaintiffs which is not reflected anywhere in the government records. That it was imperative to note that whereas the Plaintiffs allege to have bought the property from the legal representative of the late Stephen Mwangi Chege, the same had been charged to Nationwide Finance Co. Ltd to defray a loan of Ksh. 1.6 million owing to the said financial institution. That further, the letters which are exhibited on the alleged transaction, were exchanged with Consolidated Bank Finance Ltd. That there was no material before Court to show how the Plaintiffs acquired title. The searches annexed to the Application's supporting affidavit did not match the registered documents annexed by the Defendants in their supporting affidavit which was in contravention of the provisions of Section 7 of the Land Registration Act. Further, that there was no single letter of allotment exhibited to show that the land was allotted to Stephen Mwangi Chege. The Defendants relied on the decided case of **Kamau James Njendu (Supra)** to buttress their submissions.

17. On the second principle, Counsel submitted that the Plaintiffs had not demonstrated what loss they would suffer in the event of failure to get the injunction sought. They denied the allegation that the 1st Plaintiff's sister had been living and cultivating on the suit property. That there had been neither an affidavit nor witness statement by the alleged sister, placed before Court to show that she faced eminent danger of eviction. On the material placed before Court, there was no demonstrable case of any substantial cause that could not be compensated by an award of damages.

18. On the 3rd principle, the Defendants submitted that the balance of convenience tilted in favour of 1st – 6th Defendants pursuant to the provisions of Section 24 of the Land Registration Act as read with Section 25 and 26 on the rights of registered properties.

19. That the issues before Court have been investigated wherein the DCI had dismissed the 1st Plaintiff's allegation and the Office of the Director of Public prosecutions had also found that there was no fraud wherein the file had been closed. That on this material, it would not be in the interest of justice to issue an injunction against a proprietor on mere suspicion on the dealings of the land. The Defendant relied on the case of **Kibiro Wagoro Makumi vs Francis Nduati Macharia & Another (2018) eKLR** to urge that the Application be dismissed with costs.

Determination.

20. The often cited case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

21. In the present case there is no dispute going by the Plaintiff's averment in their supporting affidavit dated the 4th November at paragraph 33, as well as the annexures thereto marked as ECK 12 that the 1st Defendant/Respondent herein was the registered proprietor of the suit land being land parcel No. Nyandarua/Kahuru/143 who then subdivided it giving rise to Nyandarua/Kahuru/10002-10014 which land has been subsequently registered into the 1st -6th Respondents.

22. The suit land having been registered in 1993, was governed by the repealed **Registered Land Act, Cap 300 which has now been replaced with** current land regime being the Land Registration Act, Act No. 3 of 2012, and the Land Act, Act No. 6 of 2012.

23. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows.

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of Court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-

to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

24. The Applicants have argued and asserted that the 1st -6th Respondents' titles were illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence to the effect that the Government has recalled and/or revoked the title. Both the Land Registration Act section 26 (1) that provides for the indefeasibility of title and Article 40 (6) of the Constitution envisage that where a registered title is impugned on the grounds set out in the provisions, that due process would be followed to have such title revoked, cancelled and/or annulled. The Courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

25. The 1st -6th Respondents are entitled to observance of due process to have their titles cancelled, revoked and/or annulled. The 1st -6th Respondents having demonstrated that they were the registered owners of the suit properties having been issued with titles herein, prima facie their titles are indefeasible and the burden shifts to the Applicants to show or demonstrate that the titles are challengeable within the provisions of the law.

26. Section 26 of the land Registration Act obliges me to take the certificate of lease as conclusive evidence of proprietorship. It provides as follows :-

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and

the title of that proprietor shall not be subject to challenge, except

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

27. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 1st -6th Respondents' titles but the mere fact that they hold a duly registered certificates which on the face of it was properly acquired, is sufficient to lead the Court to hold that the Applicants have not established that there is a prima facie case.

28. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the Court can give an injunction unless the Court was entertaining a doubt as to whether or not a prima facie case had been established. The Court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

29. Consequently, I dismiss the Application dated 4th November 2019 with costs to the 1st -6th Respondents.

30. Parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days from the delivery of this ruling for the hearing of the main suit herein.

Dated and delivered at Nyahururu this 4th day of February 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE