



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 34 OF 2019

GEORGE DESMOND KWEYAMA.....PLAINTIFF

VERSUS

FRANCIS MBURU KIMANI.....1ST DEFENDANT

MASHIN CONSTRUCTION COMPANY LIMITED.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 16th April, 2019 brought pursuant to sections 3, 13(17) of the Environment and Land Court Act; Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act as well as Order 5 Rule 17; Order 40 Rules 1 and 10; and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff seeks for orders of temporary injunction against the Defendants jointly and severally whether by themselves, their employees, servants and or agents from selling, leasing, charging, mortgaging, encumbering, alienating, disposing off, transferring to 3rd parties or dealing with land parcel numbers Ngong/ Ngong/ 62064; 62065; 62066; 63806; 63807; 63808; 63809; 63810; 63811 and 63812 pending the outcome of the suit. The Application is premised on the summarized grounds that the Plaintiff is the registered proprietor of land parcel number Ngong/ Ngong/ 13885 and the 1st Defendant fraudulently as well as unprocedurally obtained registration of the said land in his name and proceeded to subdivide it into four portions namely Ngong/ Ngong/ 62064; 62065; 62066 and 62067 and got the said titles in his name. Further, the 1st Defendant has further illegally and through a corrupt scheme purported to transfer a portion of the subdivided suit property known as Ngong/ Ngong/ 62067 to the 2nd Defendant that thereafter obtained title and subdivided the said land into Ngong/ Ngong/ 63806; 63807; 63808; 63809; 63810; 63811 and 63812 respectively, which are registered in its name. The 1st and 2nd Defendants are in possession of the illegal subdivisions of the suit property hereof through their agents or persons claiming under them. The Plaintiff will suffer irreparable loss unless interim orders are granted to preserve the subject matter. The 2nd Defendant opposed the application and filed a replying affidavit sworn by ABDINASIR MOHAMUD NUR, one of its directors' where he sought for the application to be dismissed. He deposes that the application offends the rules of natural justice and specifically the principles of bona fide purchaser for value without notice. He explains that in 2014 while looking for land, they were approached by the 1st Defendant who was willing to sell to them a parcel of land. He contends that as an innocent buyer back in 2013, they conducted due diligence through a Search in the Lands Office. Further, that the 1st Defendant was advised to apply for consent to transfer before they entered into a Sale Agreement. He claims the Kajiado Land Control Board issued a Consent in favour of the 2nd Defendant. He states that they formally drew a Sale Agreement on 10th December, 2013 and on the said date, the 1st Defendant signed a Transfer Form in favour of the 2nd Defendant after payment of the purchase price. Further, the 1st Defendant issued the 2nd Defendant with the Mutation Form for the subdivision of the two parcels of land; Completion Documents including the Original Title Deeds. He avers that after completing the transaction legally, they proceeded to develop the property and subdivided it into Ngong/ Ngong/ 63806; 63807; 63808; 63809; 63810; 63811 and 63812 respectively. He reiterates that all along the 2nd Defendant has acted with trust and has fully adhered to the Law of Contract to purchase the lands. Further, that the Plaintiff is trying to evict the 2nd Defendant from its legally acquired lands to unlawfully benefit on the proceeds of the land after appreciation of value.

The 1st Defendant never enter appearance nor opposed the application.

The Plaintiff and 2nd Defendant filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 16th April, 2019 including the Plaintiff and 2nd Defendant's respective affidavits as well as submissions, at this juncture the only issue for determination is whether the interim injunction sought by the Plaintiff ought to be granted pending the determination of the main suit.

The Applicant in his submissions reiterated his claim and contended that it has established a prima facie case to warrant the orders sought. He

relied on the following cases: **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**; **Alice Chemutai Too V Nickson Kipkurui Too & 2 Others (2015) eKLR**; **Taib Ali Taib V Ahmed Faud Amir & 6 Others (2014) eKLR**; **Naftali Ruth Kinyua V Patrick Thuita Gachure & Another (2015) eKLR**; **Pius Kipchirchir Kogo V Frank Kimeli Tenai (2018) eKLR**; **Kitamaiyu Limited V County Government – Kiambu & Another (2018) eKLR**; and **Wachanga V Wakolakana Multipurpose Cooperative Society LLR No. 2408** to buttress his claim. The 2nd Defendant in his submissions contended that it is an innocent purchaser and the Plaintiff has not established a prima facie case to warrant the orders sought. To support these averments, it relied on the following cases: **Dr. Joseph Arap Ngok V Justice Moijo Ole Keiwua**; **Charles Karathe Kiarie & 2 Others V Administrators of the Estate of John Wallace Mathare (Deceased) & 3 Others (2015) eKLR**; **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**; **Eliud Mwendwa Ngui V Kavinya Ngui Mwetu & Josphat Muithi Kyanguu Civil Appeal No. 62 of 2009 at Kisumu (unreported)** and **Jasbir Singh Rai & 3 others V Tarlochan Singh Rai & 4 Others (2014) eKLR**.

In line with the principles established in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** I will proceed to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, it is the Plaintiff's contention that he is the registered proprietor of land parcel number Ngong/ Ngong/ 13885 and has produced a title deed to that effect. He claims the 1st Defendant fraudulently proceeded to subdivide the land into four portions namely Ngong/ Ngong/ 62064; 62065; 62066 and 62067 and got the said titles in his name. Further, the 1st Defendant has further illegally transferred land parcel number Ngong/ Ngong/ 62067 to the 2nd Defendant that has since subdivided the same to Ngong/ Ngong/ 63806; 63807; 63808; 63809; 63810; 63811 and 63812 respectively. The 1st Defendant never entered appearance to controvert the Plaintiff's averments. The 2nd Defendant confirmed having purchased its land from the 1st Defendant vide a Sale Agreement dated the 10th December, 2013. Further, that it has developed the same and proceeded to subdivide it into Ngong/ Ngong/ 63806; 63807; 63808; 63809; 63810; 63811 and 63812 respectively. It insisted it is a bona fide purchaser for value. Looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Plaintiff over the suit land is not baseless. Further, I note the Plaintiff still has a copy of his original title to the aforementioned parcel of land, despite the alleged transfer to the 1st Defendant. From the Plaintiff, I note the Plaintiff alleges fraud as against the Defendants and contends that he had reported the matter to the Land Registry in Kajiado who had conducted a hearing in 2016 and 2017 and found possibility of fraud. The 1st Defendant also produced documents to prove how it acquired its title. However, at this juncture I need not delve into the merits of the case but confirm whether the Plaintiff has established a prima facie case.

In the case of **UCB Vs Mukoome Agencies (1982) HCB22** the Court held that, **'where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'**.

Based on the facts as presented and in associating myself with the decisions cited above, I find that the Plaintiff has indeed established a prima facie case to warrant the orders of injunction.

On the second principle as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and 2nd Defendant claim ownership of the suit lands. It is not in dispute that the 2nd Defendant's title emanated from the Plaintiff's title, which he still holds. Further, that the 2nd Defendant has since proceeded to subdivide the land he had purchased from the 1st Defendant. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that **'...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.** '

In relying on the case cited above and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are not speculative as he has demonstrated the loss he will suffer if the orders sought are not granted.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the same tilts in favour of the Plaintiff and on preservation of the various titles resulting from the subdivision of the suit lands, pending the outcome of the suit.

Since both the Plaintiff and the 2nd Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and the 2nd Defendant claiming to have invested heavily thereon, the Court finds that these are issues best determined at a full trial. I will decline to grant the orders as sought but will proceed to make the following order:

The Land Registrar Kajiado North be and is hereby directed to register an inhibition against land parcel numbers Ngong/ Ngong/ 62064; 62065; 62066; 63806; 63807; 63808; 63809; 63810; 63811 and 63812 respectively of any dealings, lease, mortgage or charge pending the hearing and determination of the suit.

The costs of this application will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered via email this 23rd day of April, 2020

CHRISTINE OCHIENG

JUDGE