



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 29 OF 2019

ANTHONY NGARI KIURA.....PLAINTIFF

VERSUS

ANTHONY NGARI IRERI.....1ST DEFENDANT

ZIPPORAH RWAMBA KABIRUCHI.....2ND DEFENDANT

SARAH NJOKI KIURA.....3RD DEFENDANT

HARON NJERU KIURA.....4TH DEFENDANT

THE LAND ADJUDICATION OFFICER, MBEERE.....5TH DEFENDANT

THE LAND REGISTRAR, MBEERE.....6TH DEFENDANT

THE ATTORNEY GENERAL.....7TH DEFENDANT

RULING

A. Introduction

1. By a notice of motion dated 22nd July 2019 brought under **Sections 10 & 68** of the **Land Registration Act, 2012** and **Order 40 Rule 1 of the Civil Procedure Rules 2010**, the Plaintiff sought the following orders against the Defendants:

a. Spent

b. Spent

c. Spent

d. That the honourable court be pleased to issue a temporary injunction restraining the 1st and 2nd Defendants by themselves, their servants, agents, workmen and/or anyone claiming under them from entering, accessing, occupying or alienating parcel of land Nos. Embu/Gangara/3107 and 3108 or from anyway interfering with the Plaintiff's and other beneficiaries of the estate of Kiura Ndwiga alias Kiura Nduiga's peaceful use and enjoyment of the said property pending the hearing and determination of the suit herein.

e. That the 6th Defendant be directed to supply the Plaintiff with copies of R.L. 19 and 7, grant and certificate of confirmation of grant issued in Embu HC Succession Cause No. 490 of 1997 registered on 23rd February 2010 on parcel of land No. Embu/Gangara/2342 and partition documents for Embu/Gangara/2342 and copies of R.L. 19 and 7, grant, certificate of confirmation of grant issued in Embu HC Succession Cause No. 350 of 2014 registered on 19th May 2017 on parcel of land No. Embu/Gangara/3108.

f. That costs of the application be provided for.

B. The Plaintiff's case

2. The Plaintiff contended that his late father one, Kiura Ndwiga (*the deceased*) was the rightful owner of Title No. Embu/Gangara/2342

(parcel 2342) which was later on fraudulently and irregularly partitioned into *Title Nos. Embu/Gangara/3107 (parcel 3107) and Title No. Embu/Gangara/3108 (parcel 3108)*. The perpetrators of the alleged fraud were said to be Kiura Kathagana and Kabiruchi Kathagana who are both deceased.

3. The said application was supported by the Plaintiff's own affidavit sworn on 22nd July 2019 in which he reiterated and expounded upon the grounds set out in the notice of motion. The material on record revealed that the deceased discovered the alleged fraud around 2011 and died in 2013 whilst pursuing the matter through administrative means.

C. The 1st Defendant's response

4. The 1st Defendant filed a replying affidavit sworn on 19th November 2019 and a further affidavit sworn on 27th February 2020 in opposition to the said application. The 1st Defendant contended that he was a *bona fide* purchaser for value of parcel 3107 and that he followed due process in its acquisition. He stated that he bought parcel 3107 in 2012 and that at the material time neither the Plaintiff nor the deceased who were fully aware of the sale transaction ever objected thereto. He, therefore, urged the court to dismiss the Plaintiff's application with costs.

D. The 2nd Defendant's response

5. The 2nd Defendant filed a replying affidavit sworn on 5th September 2019 in opposition to the said application. She stated that she was the registered proprietor of parcel 3108 which she obtained through *Embu High Court Succession Cause No. 356 of 2014* upon the death of her husband Kabiruchi Kathagana. It was her case that her late husband and his brother Kiura Kathagana bought parcel 2342 from the deceased during the land adjudication process. It was her case that it was the deceased who showed the two brothers the boundaries of parcel 2342 in the presence of Peninah Kiura who is the Plaintiff's mother.

6. In further response to the application, the 2nd Defendant stated that no fraud whatsoever was involved in the acquisition of parcel 2342 from the deceased. She pointed out that the deceased died recently but he never challenged the sale of parcel 2342 during his lifetime. She further stated that the Plaintiff and his family were not, and have never been, in occupation of the parcels in dispute. She contended that the Plaintiff had failed to meet the requirements for the grant of an injunction and urged the court to dismiss his application with costs.

E. The 3rd Defendant's response

7. The 3rd Defendant did not file any response to the application and neither did she participate in the proceedings.

F. The 4th Defendant's response

8. The 4th Defendant filed a replying affidavit sworn on 26th February 2020 in opposition to the said application. He stated that he is the one who sold parcel 3107 to the 1st Defendant. It was his case that parcel 2342 was bought by his late uncle Kabiruchi Kathagana and his late father Kiura Kathagana from the deceased. He further stated that on 31st October 2009 the deceased took the family members of the purchasers to parcel 2342 whereby he marked out its boundaries in the presence of his wife and one of his sons known as Peter Ngari.

9. The 4th Defendant denied any fraud in the acquisition of parcel 2342 from the deceased or any irregularity in the subsequent sub-division thereof between the families of the two purchasers. He contended that the deceased was aware of the said transactions and never raised any issue during his lifetime. He, therefore, urged the court to dismiss the said application with costs.

G. The 5th, 6th & 7th Defendants' response

10. The Attorney General entered appearance for the 5th, 6th & 7th Defendants and filed grounds of opposition dated 25th September 2019 raising the following grounds:

a. That the 6th Defendant was not involved in any fraudulent transactions but followed due process in handling the impugned transactions.

b. That the 6th Defendant was not the custodian of the documents the Plaintiff was seeking relating to Embu Succession Cause Nos. 490 of 1997 and 350 of 2014.

c. That the Plaintiff's application was an attempt to seek prerogative orders without following the laid down statutory procedure.

d. That the application was frivolous, vexatious and an abuse of the court process.

H. Directions on the hearing of the application

11. When the application was listed for hearing on 4th February 2020 it was directed that the said application be canvassed through written submissions. The parties were directed to file and exchange their respective written submissions within 30 days. However, by the time of preparation of this ruling only the 2nd Defendant had filed his written submissions.

I. Questions for determination

12. The court has considered the Plaintiff's said application, the affidavits and grounds of opposition in response thereto as well as the submissions on record. The court is of the opinion that the following questions arise for determination:

- a. Whether the Plaintiff has made out a case for the grant of the temporary injunction sought.
- b. Whether the 6th Defendant is obligated to supply the Plaintiff with copies of the documents sought in the application.
- c. Whether the Plaintiff's application is frivolous, vexatious and an abuse of the court process.
- d. Who shall bear the costs of the application.

J. Analysis and determinations

13. The 1st question is whether the Plaintiff has satisfied the requirements for the grant of an interlocutory injunction as enunciated in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358**. In order to succeed in such application, an applicant must first demonstrate a *prima facie* case with a probability of success at the trial. Second, he must demonstrate that he might otherwise suffer irreparable loss or damage which cannot be adequately compensated by an award of damages. Third, if the court is in doubt as to the second principle, it may determine the application on a balance of convenience.

14. The court has considered the entire material on record in this matter. The material on record shows that parcel 2342 was transferred to Kiura Kathagana and Kabiruchi Kathagana on 19th April 1980 pursuant to some objection proceedings. That means that the deceased lost parcel 2342 to the two brothers about 40 years ago. The material on record further shows that the deceased became aware of the said deprivation of property around 2011 during his lifetime. There is no material on record to demonstrate whether the alleged fraud was reported to law enforcement agencies for investigation. There is no indication on record that the deceased ever caused any caution or restriction to be entered against parcel 3107 or parcel 3108 in order to protect his alleged interest therein. It is also evident from the material on record that the deceased never instituted any civil proceedings for recovery of the said parcels during his lifetime.

15. The court has noted that the 1st, 2nd & 4th Defendants all stated that it was the deceased who had sold parcel 2342 to the two brothers during the land adjudication process. It was further stated that it was the deceased who pointed out the boundaries of parcel 2342 to the family members of the two brothers in the presence of his own family members. The court has noted that the Plaintiff did not controvert or respond to those allegations by way of a further affidavit. He simply maintained studious silence to such grave allegations.

16. The court is thus far from satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial. In the premises, it shall not be necessary to consider whether or not the Plaintiff shall suffer any irreparable harm or damage if the injunction was denied. Equally, there is no need of considering the balance of convenience where the Plaintiff has not demonstrated a *prima facie* case with a probability of success at the trial. Accordingly, the 1st question is answered in the negative.

17. The court is of the opinion that the Plaintiff's application for injunction must fail for another reason. The Plaintiff has admitted in his pleadings and application that the deceased became aware of the alleged fraud in 2011. The instant suit and application for injunction were filed in 2019 which is about 8 years later. This lengthy delay was not satisfactorily explained by the Plaintiff.

18. It has been held that equity aids the diligent and not the indolent. In the case of **Ibrahim Mungara Kamau V Francis Ndegwa Mwangi [2014] eKLR** the court cited with approval the following passage from *Snell's Equity* by John McGhee, 31st Edition p.99;

“The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”

19. The 2nd question is whether the 6th Defendant is legally obligated to supply the Plaintiff with copies of the documents sought in the application. The Plaintiff wants to be furnished with copies of R.L. 19 and R.L. 9, the grant and confirmed grant on the basis of which the impugned entries were made in the land registers for parcel Nos. 3107 and 3108. In the court's understanding, the Plaintiff is seeking to be furnished with copies of the official documents on the basis of which the Land Registrar - Mbeere made certain entries in the relevant land registers which altered the ownership of the parcels of land in dispute.

20. Whereas it is true that grants and certificates of confirmation were issued in succession proceedings by the respective succession courts, the Land Registrar could not have altered the proprietorship of the suit properties without the relevant certificates of confirmation of grant. So, the Attorney General cannot legitimately argue that the Plaintiff should obtain such documents from court or from the other Defendants. The Plaintiff is essentially interested in ascertaining whether the Registrar acted on the correct documents in making the impugned entries.

21. Although the Plaintiff is seeking copies of the grants in *HC Succession Cause No. 350 of 2014* and *HC Succession Cause No. 490 of 1997*, it would appear from the material on record that the correct particulars are *HC Succession Cause No. 356 of 2014* and *Embu SPMC Succession Cause No. 240 of 1997*. However, regardless of the authenticity of the succession case numbers appearing in the application, the court is of the opinion that the Plaintiff is entitled to obtain certified copies of whatever succession documents the 6th Defendant relied upon in making the changes on proprietorship of the properties in dispute. Accordingly, the court is satisfied that the Plaintiff has made out a case for the granting of the order relating to production of documents both under the **Land Registration Act, 2012** and the **Access to Information Act, 2016**.

22. The 3rd question is whether the Plaintiff's application is frivolous, vexatious and otherwise an abuse of the court process. This question was raised by the Attorney General for the 5th, 6th & 7th Defendants. However, no particulars were given specifying the manner in which the application was frivolous, vexatious or otherwise an abuse of the court process. The Attorney General did not file any submissions to elaborate on those general grounds which were raised in the grounds of opposition.

23. In the case of **Trust Bank Limited V Amin & Co. Ltd & Another [2000] KLR 168** the court made reference to **Bullen & Leake and Jacobs Precedents of Pleadings** (12th Edition) and described the said terminologies as follows:

“In Bullen & Leake and Jacobs Precedents of Pleadings (12th Edition) on chapter dealing with striking out pleadings at page 145 it states:

‘A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.’

and lastly a pleading which is an abuse of the court really means in brief a pleading which is a misuse of the court machinery or process.’

24. The court is not satisfied from the material on record that the application is groundless or fanciful. There is nothing on record to demonstrate that it is hopeless or offensive or that it is a misuse of the court machinery. The fact that the Plaintiff has not demonstrated a *prima facie* case with a probability of success at the interlocutory stage does not necessarily connote that his claim is frivolous, vexatious or otherwise an abuse of the court process. The findings and observations made at the interlocutory stage are merely provisional and they are not binding upon the trial court. The Plaintiff shall have a chance to persuade the trial court that he has a meritorious case upon a full hearing of the suit. Accordingly, the 3rd issue is answered in the negative.

25. The 4th and final issue is on costs of the application. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21)**. Accordingly, a successful litigant should normally be awarded the costs of an action or proceeding unless the court, for good reason, directs otherwise. See **Hussein Jannohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. In the instant application, the Plaintiff has partly succeeded and partly failed. The court is thus of the view that costs of the application should be in the cause.

K. Conclusion and disposal orders

26. The upshot of the foregoing is that the court finds that the Plaintiff has failed to demonstrate a case for the grant of a temporary injunction with respect to the suit properties. However, the court finds that the Plaintiff is entitled to have copies of the documents on the basis of which the impugned entries in the land register were made. Accordingly, the court makes the following disposal orders:

a) *The Plaintiff's application for a temporary injunction in terms of Order No. 4 of the notice of motion dated 22nd July 2019 is hereby declined.*

b) *The Plaintiff's application for Order No. 5 of the notice of motion dated 22nd July 2019 is hereby granted provided that the 6th Defendant shall supply copies of the grants and certificates of confirmation which were actually used for registration and not the erroneous case numbers cited on the face of the application.*

c) *Costs of the application shall be in the cause.*

Orders accordingly.

RULING DATED and SIGNED in Chambers at EMBU this 14TH DAY of MAY 2020 in the absence of the parties due to the prevailing Covid-19 situation. The ruling was transmitted to Rose W. Njeru Advocates for the Plaintiff, Njiru Mbogo & Co. Advocates for the 1st & 4th Defendant, Muthoni Ndeke & Co. Advocates for the 2nd Defendant, 3rd Defendant in person and Attorney General for 5th, 6th & 7th Defendants through the email addresses which they provided.

Y.M. ANGIMA

JUDGE

14.05.2020