



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. NO. 117 OF 2015.**

**MARTHA WANGUI THURURA**

**KOJAK NDEGWA GTICHIGI(Both suing as Legal Representative of  
CHRISTINE WANGECHI THURURA..... PLAINTIFF.**

**VERSUS**

**HENRY GITAHU THURURA .....1<sup>ST</sup> DEFENDANT.**

**STABEX INTERNATIONAL LIMITED.....2<sup>ND</sup> DEFENDANT**

**COUNTY LAND REGISTRAR BUSIA.....3<sup>RD</sup> DEFENDANT.**

**THE HON ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT.**

**RULING.**

1. The application under consideration is a Notice of Motion dated 28<sup>th</sup> April, 2016 filed here on the same date. It is brought under section 3A and 63 (e) of Civil Procedure Act (cap 21) and Order 40 Rules 1, 2 and 3 of Civil Procedure Rules. It is also expressed to be brought under all enabling provisions of law. In the application, the two plaintiffs – **MARTHA WANGUI THURURA** and **KOJAK NDEGWA GICHIGI** - want the defendants – **HENRY GITAHU THURURA** (1<sup>st</sup> defendant), **STABEX INTERNATIONAL LIMITED** (2<sup>nd</sup> defendant) **COUNTY LAND REGISTRAR – BUSIA** (3<sup>rd</sup> defendant) and **THE HON. ATTORNEY GENERAL** (4<sup>th</sup> defendant) – restrained in accordance with prayers set out on the face of the application.

2. The dispute between the parties revolves around land parcel NO. NORTH TESO/KAMURIAI/1002. The two plaintiffs and the 1<sup>st</sup> defendant are siblings and their late mother – **CHRISTINE WANGECHI THURURA** - is said to have owned the land. The 1<sup>st</sup> defendant however is alleged to have illegally appropriated the land to himself, charged it to a bank for a loan, and eventually sold it to the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> and 4<sup>th</sup> defendant are sued because of the role they are said to have played in facilitating the 1<sup>st</sup> defendant to achieve his nefarious schemes. The suit is actually seeking a reversal of what the 1<sup>st</sup> defendant did so that the two plaintiffs can get their entitlements of their late mother's land.

3. The application herein is meant to take care of the situation before the suit is determined. At this stage, only prayers (c) and (d) are for consideration, prayers (a) and (b) having been for consideration at an

earlier stage. The prayers for consideration are as follows;

Prayer (c) An order of injunction do issue to restrain the defendant/respondents, their agents, servants, or otherwise howsoever from trespassing on, remaining on, entering in or continuing in occupation or possession of the developed housing premises on land parcel NO. NORTH TESO/KAMURIAI/1002 pending the hearing and determination of the suit.

Prayer (d) That the costs of this application be provided for;

4. According to the plaintiffs, their late mother purchased land parcel NORTH TESO/KAMURIAI/1002 ("suit land" hereafter) but died intestate later. No succession proceedings have ever taken place. In spite of that however, the first defendant managed to get the suit land registered in his names. He then sold the land to the 2<sup>nd</sup> defendant. The plaintiffs say that their family and workers are threatened from using or accessing the suit land and there are also threats to tenants who live in houses on the suit land. The plaintiff say they have a prima facie case against the defendants and the defendants are said not to have locus to interfere with the plaintiffs' ownership of the suit land.

5. The first defendant responded by filing what he called grounds of opposition but which in reality is a Notice of preliminary objection. He alleged that the suit land was sold with full knowledge of the plaintiffs. He termed the application as incompetent and alleged it is an abuse of the court process. To the 1<sup>st</sup> defendant, the order sought are incapable of being granted.

6. The 2<sup>nd</sup> defendant filed a replying affidavit on 12/8/2016. The long and short of the 2<sup>nd</sup> defendants response is that it acquired the property through purchase from 1<sup>st</sup> defendant, was not privy to any illegal or underhand dealings with the property by 1<sup>st</sup> defendant before purchase' it followed due process in acquisition, and is therefore an innocent purchaser for value without notice of any defect in title. That being the case, the 2<sup>nd</sup> defendant urged that the application be dismissed.

7. The other parties to the suit – 3<sup>rd</sup> and 4<sup>th</sup> defendants – did not make a response and it is clear that the application is not affecting them in practical terms.

8. The application was canvassed by way of written submissions. The plaintiffs first set of submissions was filed on 16/9/2016. There was a second set filed mainly as a response to 2<sup>nd</sup> defendants submissions, on 28/11/2016. The 2<sup>nd</sup> defendants submissions were filed on 27/10/2016 while those of the 1<sup>st</sup> defendant were filed on 13/2/2016.

9. The plaintiff submitted, inter alia, that they have established a prima facie case with overwhelming chances of success. According to the plaintiffs, the defendants have failed to answer pertinent factual matters raised in the application. And the matters generally concern the illegal and fraudulent nature of the transactions initiated by the 1<sup>st</sup> defendant regarding the suit property. The allegation by the 2<sup>nd</sup> defendant that it was an innocent purchaser for value was said not to hold against the plaintiffs' claim that the transactions by 1<sup>st</sup> defendant were fraudulent.

10. The plaintiffs were also said to be likely to suffer irreparable loss as the defendants have disrupted their petrol retail business and are intent on taking over rental premises. This is said to pose the risk of exposing the plaintiffs to possible suits from tenants. The tenants are said to be apprehensive of abrupt and/or arbitrary removal. They are looking up to the plaintiffs for an effective solution.

11. The balance of convenience was said to lie in plaintiffs favour as a restraining order would alleviate the suffering occasioned by the respondents.

12. As I pointed out, the plaintiffs filed a second set of submission to counter some of the averments made in the 2<sup>nd</sup> defendants submissions. The 2<sup>nd</sup> defendant had emphasized their innocence in the whole

transaction. The plaintiffs countered this by submitting that the coming into force of the Land Registration Act rendered obsolete the principle of innocent purchaser in instances where fraud has taken place. In other words, the Land Registration Act is construed to have neutered or ousted the legal protection of an innocent purchaser for value without notice of defect of title.

13. The first defendant submitted that the requisite principles required to meet the threshold for granting temporary restraining orders have not been met. According to the 1<sup>st</sup> defendant, no prima facie case was made. The plaintiffs did not also demonstrate irreparable loss. Moreover, the plaintiff's can adequately be compensated with damages as the respondents are capable of doing so.

14. In the submissions of the second defendant, fraud was said to have been alleged against 1<sup>st</sup> defendant without evidence to support it. And even if such fraud were to be found, the 2<sup>nd</sup> defendant averred that it was not part of it. The second defendant said it was a bonafide purchaser. It exercised due diligence and it therefore acquired an absolute and indefeasible title. The plaintiffs were said to have failed to establish a prima facie case. It was also submitted that the plaintiffs can be compensated in damages should they ultimately win the case. The balance of convenience was also said to be in favour of 2<sup>nd</sup> defendant given that the land is registered in its name.

15. Some decided authorities were availed. The plaintiffs, for instance, availed the cases of **PETER NDERITU JULIUS VS HUMPREY WANGOMBE KAHARIRI & Another : ELC.NO. 80/2012, KERUGOYA** and **ELIJAH MAKERI NYAGW'RA VS STEPHEN MUNGAI NJUNGUNA & Another: ELC. NO. 609 B/2012, ELDORET**. Some of the cases availed by the 2<sup>nd</sup> defendant were: **JANET FLORA MUNA VS JOHN KARANU IKINU & 2 OTHERS [2015]eKLR, SHIMONI RESORT VS REGISTRAR OF TITLES & FIVE OTHERS: [2016] e KLR, CHARLES KARATHE KIARIE & 2 OTHERS VS Administrators of the estate of JOHN WALLACE MATHARE (deceased) and 5 others: [2013] eKLR and ZEBAK LIMITED VS NADEM ENTERPRISES [2016] e KLR**. I have read these authorities .

16. I have considered the application, the responses made, the rival submissions, and the pleadings in the suit as filed. For all practical and legal purposes the application is essentially between the plaintiffs and the 2<sup>nd</sup> defendant. The other defendants basically loose nothing whether or not the application is granted. And this is so because they neither possess nor operate on the suit land. Both the plaintiffs and 2<sup>nd</sup> defendant seem to realize this and the submissions against each other are therefore lengthy and detailed. In fact., I need to point out that if I become equally detailed in addressing the issues raised, I will end up determining some of the issues for trial prematurely.

17. To avoid a scenario like that, my approach must be circumspect. I bear in mind the holding of the court in **SHITAKHA VS MWAMODO & 4 OTHERS [1986] KLR 445** where it was emphasized that the court should not decide substantive issues at the interlocutory stage. This ought to be left for the trial. There is also the case of **MBUTHIA VS JIMBA CREDIT FINANCE CORPORATION & Another [1988] KLR 1**, where the court held, inter alia, that the correct approach in dealing with an application for injunction is not to decide issues of fact, but rather to weigh up the relevant strengths of each sides proposition. The lower court judge in that case was found to have gone far beyond his proper duties by making final findings of fact.

18. I have pointed out that I have read the authorities availed. In view of the approach I have chosen in handling the application, the authorities are largely unhelpful. In fact, the authorities would be useful for the main trial, not in the interlocutory stage. I need to explain: The principle of an innocent purchaser for value without notice of defect of title is a major plank in the 2<sup>nd</sup> defendants defence. The plaintiffs noticed that and opposed it strenuously. Their position is that that principle does not apply in view of the relevant provisions of Land Registration Act. They even availed a case –**ELIJAH MAKERI NYANGWA'RA VS STEPHEN NJUGUNA & ANOTHER [2013] e KLR** – where the court expressed an opinion similar to that. To counter that, or probably to even out scores, the second defendant availed a case - **SHIMONI RESORT VS REGISTRAR OF TITLES & 5 Others [2016]e KLR** – where the court expressed a contrary view. If I now start considering the import of these two

cases, I would prematurely be determining an issue that is essentially for determination at the main trial. In other words, I would unwittingly be giving a pointer as to the outcome of the main trial.

19. In this matter, it seems clear that the 2<sup>nd</sup> defendant came to the scene after the 1<sup>st</sup> defendant had already transferred the land to himself. It is plain that the 1<sup>st</sup> defendant had done so and even secured a loan from a bank. The fraud alleged by the plaintiffs seems to largely belong to the period before the 2<sup>nd</sup> defendant came to the scene. That fraud seems to have taken place in the process of transferring title from the deceased mother of the plaintiffs to the 1<sup>st</sup> defendant.

20. The 2<sup>nd</sup> defendant then came to the scene and purchased the property from 1<sup>st</sup> defendant much like any other purchaser would do. As things stand, the 2<sup>nd</sup> defendant has the title to the land. The plaintiffs are not the title holders and the presumption of the rights and privileges that go with such ownership cannot be construed in their favour at this stage.

21. In a scenario like that, the plaintiffs needed to give an undertaking to pay damages, in the event that the 2<sup>nd</sup> defendant turns out to be successful in the end. They have not given such undertaking. Instead, it is the 2<sup>nd</sup> defendant who has undertaken to pay damages to the plaintiffs. This omission by the plaintiff is an obvious disadvantage to them. In **GATI VS BARCLAYS BANK (K) LTD [2001] KLR 525** the court held, inter alia, that an undertaking as to damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue.

22. It needs to be borne in mind too that the plaintiffs are trying to restrain a title holder. Being not title holders themselves, this puts them in a somewhat disadvantaged position. It becomes rather difficult for them to convince anybody that they have established a prima facie case. In **JAMIN KIOMBE LIDODO VS EMILY JERONO KIOMBE & Another : HCC. NO. 81/2005 (unreported) GACHCHE J**, (as she then was) held that where an applicant has not shown title to the suit land, it is unsafe to hold that a prima facie case is made.

23. In **KENYA HOTELS LIMITED VS KENYA COMMERCIAL BANK LTD & Another: [2004] 1 KLR 80** the court held, inter alia, that while remaining guided by the principles spelt out in **GIELA VS CASSMAN BROWN & CO. LTD [1973] EA 358**, it is also necessary to consider all the other circumstances of the case. From the pleadings in this particular case, the central player seems to be the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant seems to be a late comer to the scene. But the injunction sought is mainly targeted at the 2<sup>nd</sup> defendant, not the first defendant. This is another consideration that disinclines me from granting the injunction sought.

24. The upshot therefore is this: The plaintiffs application is found unmeritorious and the same is hereby dismissed with costs.

**A.K. KANIARU,**

**JUDGE.**

**DATED AND DELIVERED ON 15<sup>TH</sup> DAY OF FEBRUARY, 2017.**

**IN THE PRESENCE OF;**

**1<sup>ST</sup> PLAINTIFF.....**

**2<sup>ND</sup> PLAINTIFF.....**

**1<sup>ST</sup> DEFENDANT.....**

**2<sup>ND</sup> DEFENDANT.....**

**3<sup>RD</sup> DEFENDANT.....**

**4<sup>TH</sup> DEFENDANT.....**

**COUNSEL.....**

**J U D G E.**