



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT

ELC. NO. 1052 OF 2013

DANIEL NJOROGE MATHAI

(AS THE ADMINISTRATOR OF THE ESTATE OF)

PRISCILA WANJIKU NJOROGE.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

DANCAN NDEGWA MUNENE.....2ND DEFENDANT

RULING

Coming up before me for determination is the Plaintiff's Notice of Motion dated 29th August 2013 in which he seeks orders of a temporary injunction restraining the 2nd Respondent from trespassing or transferring or in any other way interfering with the Plaintiff's rights over parcel of land identified as Nairobi/Block 115/112 (hereinafter referred to as the "suit property") pending the hearing and determination of this suit. The Plaintiff also prays for the costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff sworn on 29th August 2013 in which he averred that he is the Administrator ad litem over the estate of his late mother, Priscilla Wanjiku Njoroge, who is the legal owner of the suit property. He further averred that sometimes in September 2012, he visited the suit property and found a construction project going on and that upon conducting a search thereon, the records revealed that the suit property changed hands on 15th August 2012 from his late mother to the 2nd Defendant who is unknown to him. He further added that at the time the suit property changed hands, his mother was already deceased. He then stated that he proceeded to register a caution against the title but that the District Land Registrar later removed it. He concluded by stating that the 2nd Defendant/Respondent is still in the process of constructing on the suit property and that his interests thereon are being prejudiced by this.

The Application is contested. The 2nd Defendant/Respondent filed his Replying Affidavit sworn on 24th September 2013 in which he averred that he purchased the suit property from the Plaintiff's late mother, Priscilla Wanjiku Njoroge, after following all the necessary due process of doing so. He confirmed having conducted a search on the suit property prior to purchasing it upon which he confirmed that indeed

Priscilla Wanjiku Njoroge was the duly registered proprietor thereof. He further confirmed having entered into an Agreement for Sale dated 10th September 2010, a copy of which he exhibited. He further stated that he paid the said Priscilla Wanjiku Njoroge the agreed consideration for the suit property being Kshs. 600,000/- in two equal installments. He produced evidence in support of that. He further indicated that he paid off the stamp duty, outstanding land rent and rates after which the completion documents were lodged for registration on 10th December 2010. He further stated that the completion documents got misplaced at the Lands Registry which delayed the transfer of the suit property into his name. He confirmed that the completion documents were only traced on or about July 2011 and were eventually registered in his name and a title deed was issued to him. He exhibited a copy of his Certificate of Lease. He then averred that in November 2012, upon seeking a loan facility from Co-operative Bank, he was informed that a caution had been placed on the suit property and that upon further enquiry, he was informed that the caution was placed by the Plaintiff. He averred that the said caution was eventually removed after the Plaintiff failed to show the Lands Registrar the legal basis for the same. He concluded by stating that the Application is, in the circumstances, of no merit and should be dismissed with costs.

In response to that, the Plaintiff filed his Supplementary Affidavit sworn on 9th October 2013 in which he averred that the Agreement for Sale being relied upon by the 2nd Defendant/Respondent has not been stamped and that he obtained the title document through fraudulent means.

Both the Plaintiff and the Defendant filed their written submissions which have been read and taken into account in this ruling.

The issue that I must determine is whether or not to grant the Plaintiff/Applicant the temporary injunction he seeks. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In this case, it is an uncontested fact that the suit property initially belonged to the late Priscilla Wanjiku Njoroge, the late mother of the Plaintiff. The point of departure between the Plaintiff and the 2nd Defendant/Respondent is the current owner thereof. The Plaintiff has asserted that the suit property belongs to him as a beneficiary of the estate of his late mother. The 2nd Defendant/Respondent on the other hand contends that he purchased the suit property from the late Priscilla Wanjiku Njoroge before she died. In support of his assertion, the 2nd Defendant/Respondent has produced to this court a Certificate of Lease in his name in respect of the suit property. The 2nd Defendant/Respondent further outlined the entire process which he underwent in order to obtain the title document to the suit property. He produced various documents in support of his assertion that he followed the due process to become the owner of the suit property. The Plaintiff has, however, discounted the 2nd Defendant/Respondents title document on the ground that they were obtained through fraud. **Section 26(1) of the Land Registration**

Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... 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.”**

This provision requires the court to take the produced Certificate of Lease as prima facie evidence of ownership unless it is challenged, inter alia, on the ground of fraud or misrepresentation to which the person is proved to be a party. While the Plaintiff/Applicant has alleged that there was fraud or misrepresentation in the issuance of the Certificate of Lease, he has not been able to demonstrate to this court that the 2nd Defendant/Respondent was party to such fraud or misrepresentation at this interlocutory stage. On that count therefore, the Plaintiff has failed to establish that he has a prima facie case with high chances of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** 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...”

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 6TH DAY OF FEBRUARY 2015.

MARY M. GITUMBI

JUDGE