



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 902 OF 2014

PENNINAH NJERI THIONGO.....PLAINTIFF

VERSUS

LUCY NDUTA THIONGO.....1ST DEFENDANT

ROSE NJOKI KENJU.....2ND DEFENDANT

EQUITY BANK LIMITED.....3RD DEFENDANT

THE LAND REGISTRAR, KIAMBU COUNTY.....4TH DEFENDANT

SUSAN CAROLINE GATHIGIA WERU.....5TH DEFENDANT

RULING

The Plaintiff filed an application dated **4th November 2014** seeking the following orders:

1. *Spent*
2. *An injunctive order does issue restraining the Defendants and/or their agents from interfering in any way with the property known as Kiambaa/Thimbigua/5317.*
3. *Spent.*
4. *The Court does compel the 4th Defendant to cancel the 5th Defendant's title in respect to the suit property being Kiambaa/Thimbigua/5317 and have the same resorted to title number Kiambaa/Thimbigua/5144 and Kiambaa/Thimbigua/5145 all being the property of the Plaintiff.*
5. *The Court does issue an order nullifying the transfer of the suit property to the 1st, 2nd and 5th Defendants as fraudulent, unlawful and illegal.*
6. *The Court be pleased to issue a declaratory order to the effect that the Plaintiff is the lawful owner to the suit property being Kiambaa/Thimbigua/5317.*
7. *The Court be pleased to issue a declaratory statement to the effect that all encumbrances placed by the 3rd Defendant as fraudulent, illegal and unlawful.*

8. *The Court does issue orders compelling the 3rd Defendant to remove all forms of encumbrances placed on the suit property.*
9. *The Court be pleased to issue an order compelling the 3rd Defendant to surrender the original title in respect to the suit property being Kiambaa/Thimbigua/5317 alongside an executed discharge of charges to the 4th Defendant for the purpose of discharge of charges and nullification and/or cancellation of title deed in the name of the 5th Defendant.*
10. *Costs of the application be provided for.*

The application is premised on grounds outlined on the face of the application and supported by an affidavit sworn by the Plaintiff. Thereunder, the Plaintiff outlines her case as follows. She was the owner of **Kiambaa/Thimbigua/4662**, which she caused to be sub-divided into four parcels - **Kiambaa/Thimbigua/5144, 5145, 5146** and **5147**. Sometime in 2009, the 1st and 2nd Defendants (the Plaintiff's daughter and niece, respectively) approached the Plaintiff with the idea of constructing a shop for her on the property. However, that unbeknown to her, the said Defendants transferred **Parcels No. 5144** and **5145** to themselves.

The Plaintiff denies transferring the said parcels to the 1st and 2nd Defendants and further denies ever appearing before the Land Control Board to consent to the transfer of any of her portions to the said Defendants. The Plaintiff referred to Official Search documents dated **29th May 2014** and **29th October 2014**, annexed to the affidavit and deposed that through the searches, she learnt that the property known as **Kiambaa/Thimbigua/5317** was registered in the name of the 2nd Defendant, charged to the 3rd Defendant and subsequently transferred to the 5th Defendant. The Plaintiff contends that the transfer to the 1st and 2nd Defendants was without her knowledge and consent and thus fraudulent. Fearing that the Defendants may dispose of the property during the pendency of the suit hence occasioning her irreparable loss, the Plaintiff prayed that the orders sought be granted.

This application was opposed. The 1st Defendant swore a Replying Affidavit on **22nd May 2015**, on her on behalf and that of the 2nd Defendant. According to the 1st Defendant, the Plaintiff gifted her and the 2nd Defendant **Parcels No. 5144** and **5145** which parcels were legally transferred to them and titles issued on **16th April 2009** and **16th May 2009**, respectively. The deponent transferred her portion to the 2nd Defendant who amalgamated the two parcels into **Kiambaa/Thimbigua/5317**, and title issued in her name. Subsequently, the 2nd Defendant obtained loan facilities from the 3rd Defendant on the strength of the suit property, **Kiambaa/Thimbigua/5317**. She later disposed off the property to the 5th Defendant proceeds of which settled the outstanding loan. The deponent denied the fraudulent activity alleged by the Plaintiff maintaining that the Plaintiff was at all times aware of the activities conducted on the property in dispute.

Gerald Gakiri, the Credit Manager of the 3rd Defendant ("the bank") swore a Replying Affidavit on **8th December 2014**, wherein he deposed that the 2nd Defendant approached the bank for a loan facility. Before the first charge over the suit property was registered on **7th June 2010**, the bank exercised due diligence and confirmed that the 2nd Defendant was the absolute registered owner of **Kiambaa/Thimbigua/5317**. Being in possession of the original title of the suit property, the bank advanced two further loan facilities. On **3rd February 2014**, the 2nd Defendant notified the bank of her intention to dispose off the suit property to the 5th Defendant. The bank consented to the transaction on condition that the purchase price would be utilized to settle the outstanding loan facilities.

Since the 5th Defendant was being financed by the 3rd Defendant, it was agreed amongst the 2nd, 3rd and 5th Defendants that the transfer from the 2nd to the 5th Defendant, the discharges relating to the charges between the 2nd and 3rd Defendants and the charge between the 3rd and 5th Defendants would be registered contemporaneously. On **3rd July 2014**, the bank and 5th Defendant executed the charge over

the suit property which was registered and stamped on **4th July 2014**. On the said date they executed a Deed of Assignment of Rental Income as well as a Guarantee and Indemnity after which the bank remitted the loan proceeds to the 5th Defendant.

On the foregoing, the deponent stated that the bank had established legitimate interest over the property after conducting due diligence. It was deposed that the bank had no knowledge nor was party to the dealings between the Plaintiff and the 1st and 2nd Defendants. Therefore, the title deed issued to the 5th Defendant and subsequently encumbered by the 3rd Defendant cannot be defeated by reason of fraud. Moreover, that the charge between the bank and 5th Defendant was registered on **4th July 2014**, before the suit was filed on **8th July 2014**. The deponent referred the Court to a letter addressed to the 1st and 2nd Defendants dated **5th November 2012**, annexed to the Plaintiff's affidavit and marked "PNT5" and deposed that the Plaintiff had not offered any reasons why she allowed the status quo to remain for a period of 2 years despite having knowledge of the fraud.

There has been no appearance made by the 4th and 5th Defendants from the commencement of the suit. No responses to the application have been filed by either of the said Defendants.

The Plaintiff swore a Further Affidavit on **9th February 2015**, in reply to the 3rd Defendant's response. She deposed that the Defendant did not obtain a perfect security, the same having been tainted by illegality and that a further charge could not cure the illegality. Further that the bank being unaware of the dealings of the 1st and 2nd Defendants does not in any way perfect a title that has been fraudulently acquired. With respect to the demand letter dated **5th November 2012**, the parties agreed that the fraud committed by the 1st Defendant would be reversed. However, that the illegal transfers continued during the negotiations without the Plaintiff's knowledge and therefore the doctrine of laches does not come into play.

The Plaintiff and 3rd Defendant filed submissions in further support of the case, which I have carefully read and considered the authorities cited. The Plaintiff seeks injunction and declaratory orders against the Defendants. Notably, some of the prayers sought, namely, No. 4, 5, 6, 7, 8 and 9 are couched in mandatory terms. The matter being at the interlocutory stage, it is imperative to determine whether the Plaintiff's case has met the threshold for the grant of mandatory orders of injunction. The case of **Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901** laid down the principle governing the grant of mandatory injunction, as follows:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction."

Are there special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue? Secondly, is the case clear and straightforward where the court thinks that the matter ought to be decided at once? The undisputed fact is that the Plaintiff caused her property to be subdivided into four parcels. It is also not in contention that **Parcels No. 5144** and **5145** were amalgamated to form the **Parcel No. 5317**, the subject matter of the suit property now registered in the name of the 5th Defendant subject a charge in favour of the 3rd Defendant. The dispute is in respect to ownership of the suit property. The 1st and 2nd Defendants claim to have been bequeathed/gifted the two parcels by the Plaintiff which they later amalgamated, charged and disposed off to the 5th Defendant. These averments were vehemently denied by the Plaintiff who contends that the transfers of the parcels to the 1st and 2nd Defendants were fraudulent.

In the first instance, there are no special circumstances presented by the Plaintiff in this case. Secondly, the case is not clear and straightforward as there is a dispute as to ownership. In that regard, mandatory injunction orders and declaratory orders cannot issue at this stage, because doing so will be determining the case summarily whereas the issue of ownership and allegations of fraud are yet to be adjudicated over. Consequently, Prayers 4, 5, 6, 7, 8 and 9 of the application are declined.

The residual prayer is that of a temporary order of injunction restraining the Defendants from interfering in any way with the subject property. I am required to make a determine based on the requirements stated the celebrated case of **Giella v Cassman Brown & Co Ltd, (1973) EA 358**. As stated hereinabove, the dispute between the parties is as to ownership of the suit property. The Plaintiff has made allegations of fraud against the 1st and 2nd Defendants. Imperatively, fraud is amongst the grounds upon which a title can be challenged as provided under **Section 26 of the Land Registration Act**. It is common that the property is now registered in the name of the 5th Defendant and charged to the 3rd Defendant. The question as to whether the title to an innocent purchaser is impeachable was discussed by Munyao J. in the case of **Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another Eldoret E&L Case 609 (B) of 2012 [2013] eKLR** where the Court observed as follows:

“As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.... Is the title impeachable by virtue of Section 26(1) (b)? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

I agree with the interpretation of my brother Justice Munyao that a third party need not have been part of the vitiating factors spelt out in **Section 26 of the Land Registration Act**, however, a title obtained through fraud cannot be sanctified through a subsequent transaction. Whether or not the 1st and 2nd Defendants obtained title to the suit property illegally or through fraud is an issue that can only be determined at the trial upon further evidence. This court finds that it would be in the interest of justice that the suit property be preserved pending the hearing and determination of the suit.

In the circumstances I enter orders as follows:

Having now considered the pleadings, the written submissions and the circumstances of the case, the court orders as follows

- 1. An order of status quo be entered to the effect that neither the 3rd nor 5th Defendant shall dispose of Kiambaa/Thimbigua/5317 pending the hearing and determination of the suit or until further orders of this Court.***
- 2. The injunction granted herein will last for a period of 12 months from the date hereof and will lapse at the expiry of that period unless the same is extended by the court following an application made to the court in that regard.***
- 3. The parties are directed to comply with Order 11 of the Civil Procedure Rules and set the matter down for hearing without delay.***

4. Costs of the application shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this 9th day of October 2015

L. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the 1st and 2nd Defendants

.....For the 3rd Defendant

.....For the 4th Defendant

.....For the 5th Defendant

..... Court Clerk

L. GACHERU

JUDGE