



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 1320 OF 2014

PETER THAIRU GATHUNA.....PLAINTIFF

VERSUS

LUCIA WANJIKU KAMAU.....1ST DEFENDANT

GATUNDU NYAKINYUA CO. LTD.....2ND DEFENDANT

THE REGISTRAR OF LANDS, THIKA.....3RD DEFENDANT

RULING

The application before Court is one dated **8th October 2014** filed by the Plaintiff wherein he seeks an order of injunction restraining the 1st and 2nd Defendants, their agents, servants and/or employees from entering, trespassing, selling, transferring, disposing or in any manner whatsoever from dealing with plot known as **Gatwanyagaga/Ngoliba Block 1/1441**, pending the hearing and determination of the suit. The application is premised on grounds outlined thereunder and supported by an affidavit sworn by the Plaintiff.

The Plaintiff's case as outlined in the affidavit is that he purchased the suit plot measuring **0.3660Ha**, through a sale agreement executed by him and one **Priscilla Njeri Kang'ong'a** on **6th March 1996**, for a consideration of **Kshs. 40,000/-** and took immediate possession. The said **Priscilla Njeri Kang'ong'a** (hereinafter the seller) on **25th June 1973** paid to the 2nd Defendant an equivalent of one share and was issued with a **Receipt No. 786** as well as a Share Certificate **No. 0822**. Thereafter, the seller balloted for a plot and upon payment of the requisite fees, the 3rd Defendant issued her the title to the suit plot on **13th January 2002**. The Plaintiff deposed that he and the seller appeared before the Land Control Board, Thika to obtain consent for the transfer of the suit plot which was granted and title was issued in his name on **30th January 2002**.

It was deposed by the Plaintiff that through a letter dated **9th September 2014**, he was summoned to the Deputy County Commissioner, Thika East office. There, he learnt that the 2nd Defendant had in a letter addressed to the 3rd Defendant stated that the suit plot belonged to one **Marisieni Njuhi Gitau**, and that title thereto had been issued to the 1st Defendant on **7th March 2013**. Further, that he was issued with a notice to voluntarily vacate the plot failing which he would be evicted. The Plaintiff states that he has been in occupation thereof since the purchase in **1996** and that he stands to suffer irreparable loss if the order sought is not granted.

The 1st Defendant swore two Replying Affidavits dated **10th November 2014** and **10th March 2015**. She deposed that her mother in law **Njuhi Gitau** (deceased **29th September 2005**) had shares with the 2nd Defendant, holder of **Share Certificate No. 1995**, and that she was allocated **Plot No. 1441**, the suit plot herein. She deposed that in the year **2000**, she and the deceased visited the suit plot and found that the Plaintiff had trespassed thereon. Their verbal requests that he vacates the plot were declined. It was her disposition that before the deceased's demise, it was agreed as a family that she inherits the suit plot and upon her mother in-law's demise, she presented her death certificate to the 2nd Defendant and requested that the plot be transferred to her. She took over the deceased's share in the 2nd Defendant and upon execution of the transfer, the plot was registered in her favour and title deed issued on **7th March 2014**.

The 1st Defendant admitted that seller had a share in the 2nd Defendant and an allottee of **Plot No. 391** and therefore, the Plaintiff purchased **Plot No. 391** and not the suit plot herein. She referred to a letter of clearance by the 2nd Defendant addressed to the 3rd Defendant dated **28th October 2011**, marked "LWK1" wherein the 2nd Defendant confirmed that the deceased was the owner of the suit plot. The 2nd Defendant deposed further that the Plaintiff's supporting documents were not genuine as they either did not make reference to the suit plot or did not bear stamps as required by law.

Wambui Wakahuthu, the Chairlady and one of the Directors of the 2nd Defendant swore a Replying Affidavit on **14th January 2015**, wherein she adopted the contents of the Defence as if set out verbatim. In the defence it was averred that the suit plot did not belong to seller and she therefore had no capacity to dispose of the suit plot to the Plaintiff. It was further averred that the Plaintiff's documents appeared backdated and therefore suspect as there is no way the Registrar of Lands would issue a second title in **2014** in face of the Plaintiff's title allegedly issued in **2002**. The 2nd Defendant contended that the Plaintiff's title is the one obtained fraudulently and thus ought to be nullified.

The application was canvassed by way of written submissions which I have carefully read and considered. The task before this Court is to determine the application in light of the principles set out in the celebrated case of **Giella v Cassman Brown & Co. Ltd (1973) EA 358**, **these principles are;- that the applicant must show a prima facie case with the probability of success, secondly, an injunction would not normally be granted unless the applicant might otherwise suffer irreparable injury, and thirdly, when the Court is in doubt, it will decide the application on a balance of convenience.**

Has the Plaintiff established a prima facie case with chances of success?

In support of his application, the Plaintiff annexed a copy of the seller's Share Certificate **No. 0822** and a Sale Agreement for **Parcel No. 1441** dated **6th March 1996**. He also availed a copy of the title and green card for the suit plot which shows that the register was opened on **14th January 2002** when title was issued to the seller and subsequently transferred to the Plaintiff on the **30th January 2002**. Also annexed was a Certificate of Official Search as at **9th November 2004**, which shows that the Plaintiff was the registered owner thereof. The Plaintiff explained that he made an application for an official search on **5th September 2014** but his request was declined as he was notified to avail the Clearance Certificate. He annexed a copy of the said receipt showing that communication. The Plaintiff's evidence as to ownership of the plot was contested by the 1st Defendant who annexed a copy of the deceased's Share Certificate **No. 1995**; a copy of a Transfer in her favour indicating that the transfer is in consideration of a gift; a letter from the 2nd Defendant addressed to the 3rd Defendant confirming that the suit plot belonged to the deceased; and a copy of the title deed issued in favour of the 1st Defendant on **7th March 2014**.

It is evident that there is a dispute as to the ownership of the suit plot with each party producing supporting documents proving ownership

including Certificates of Title, which according to **Section 26(1) of the Land Registration Act**, are to be held as conclusive evidence of proprietorship. The 2nd Defendant, the custodian of the official register of the property including the disputed plot maintained that the disputed plot originally belonged to the

deceased and that the Plaintiff's title was fraudulently obtained. However, no records were availed to support this assertion. Nonetheless, this evidence that can be adduced at the hearing where the issue as to ownership will be fully canvassed. Each party has also made an allegation that the other's title was obtained by fraud, a ground which title to property can be challenged.

Whereas a prima facie case has not been established, the Plaintiff has, to the satisfaction of the court, demonstrated that he has an interest on the suit property. The just cause would therefore be for this Court to safeguard the plot pending the determination of the suit.

Having now carefully considered the pleadings herein, the written submissions and the relevant laws the Court finds that;-

- 1. The 1st and 2nd Defendants, their agents, servants and/or employees are hereby restrained from entering, trespassing, selling, transferring, disposing or in any manner whatsoever from dealing with plot known as Gatwanyagaga/Ngoliba Block 1/1441 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.***

Dated, Signed and Delivered this 5th day of **November, 2015**

L. GACHERU

JUDGE

In the Presence of:-

Mr Mokuu holding brief for M/s Kiangayu for 1st Defendant and Mr Kimani for 2nd Defendant

None attendance for the Plaintiff/Applicant

Mr Mokuu holding brief for M/s Kiangayu for the 1st Defendant/Respondent

Mr Mokuu holding brief for Mr Kimani for the 2nd Defendant/Respondent

None attendance for the 3rd Defendant

Hilda: Court Clerk

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of above counsels.

L. GACHERU

JUDGE