



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 197 OF 2014

**NANCY NJERI MWANGIPLAINTIFF/
APPLICANT**

**ESTHER MWIHAKI GICHARU ALIAS ESTHER MWIHAKI MWAURA....2ND
PLAINTIFF/APPLICANT**

VERSUS

**CHARLES MURIMI NJOGU.....1ST
DEFENDANT/RESPONDENT**

**YOUNGLINE CARGO FORWARDING
LTD.....2^NDEFENDANT/RESPONDENT**

**FAMILY BANK.....3RD
DEFENDANT/RESPONDENT**

RULING

The application for my determination is the Notice of Motion dated 20th June 2014 and filed herein on 29th June 2014 premised under the provisions of **Order 40 Rule 1 and 2 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act** seeking the following orders:-

1. *Spent.*
2. *That the Court do issue a temporary injunctive orders restraining the 1st defendant/respondent, his agents and/or employees from encroaching, trespassing, invading and/or cultivating the land parcel known as RUIRU/MUGUTHA BLOCK 1/T. 5087 belonging to the applicants herein by virtue of breach of agreement herein pending the hearing and determination of this application.*
3. *That the Court do order the Thika Land Registrar to register an inhibition on land title RUIRU/MUGUTHA/1/T.5087 pending the hearing and determination of this application.*
4. *That the 3rd defendant/respondent be ordered not to charge any interest on any land parcel RUIRU/MUGUTHA/BLOCK 1/T.5087 pending the hearing and determination of this application.*
5. *That costs of this application be provided for.*

The application is supported by the affidavit of the 1st plaintiff/applicant NANCY NJERI MWANGI and also based on the grounds raised therein.

The application is opposed by all the defendants/respondents herein. The 1st defendant/respondent CHARLES MURIMI NJOGU has filed a replying affidavit also on behalf of the 2nd defendant/respondent of whom he is the managing director while the 3rd defendant/respondent filed grounds of opposition.

The application has been canvassed by way of written submissions which have been filed by counsels for all the parties herein.

I have considered the application, the rival affidavits and annexures thereto as well as the grounds of opposition and the submissions by counsels.

The applicant's case as can be gleaned from the supporting affidavit of NANCY NJERI MWANGI the 1st plaintiff/applicant herein is that she bought the parcel of land No. RUIRU/MUGUTHA/BLOCK 1/T.5087 (hereinafter the suit property) from the 2nd plaintiff/applicant's father namely GICHARU MUGO MBOCE although the said property was registered in the names of the 2nd plaintiff/applicant as per the copy of title deed annexed and marked **NNM**. She then used the said title to secure a facility of Ksh. 400,000/= from K-Rep Bank. She was however un-able to service the facility and decided to sell it in order to finance her daughter's education. The 1st defendant/respondent agreed to buy the suit property at Ksh. 1,700,000/= and an agreement was executed in the names of the 2nd defendant/respondent as the buyer and as per that agreement (paragraph 3), a sum of Ksh. 420,000/= was to be paid to K-Rep Bank Thika to settle the outstanding loan but it would appear that the loan was not paid and it accrued to Ksh. 7000,000/= yet by that time, the suit property had already been transferred into 1st defendant/respondent's names and he used the same title to secure financing from the 3rd defendant/respondent and is now asking the 1st plaintiff/applicant to vacate the suit property hence this application.

In opposing the application, the 1st defendant/respondent deponed that the 1st plaintiff/applicant and her husband approached him with an offer to purchase the suit property so that they could pay off a loan at K-Rep Bank which was threatening to foreclose the property which had been used to secure a loan. So he paid Ksh. 420,000/= directly into the 1st plaintiff/applicant's loan account at K-Rep Bank after they had entered into an agreement in addition to Ksh. 1,351,000/= that he had paid directly to the 1st plaintiff/applicant and her husband and a further Ksh. 39,000/= through M-Pesa making a total sum of Ksh. 1,771,000/= He was then registered as the owner of the suit property after it had been discharged by K-Rep Bank. He then charged the title with the 3rd defendant/respondent after it had been released to the 2nd

defendant/respondent upon the instructions of the 1st plaintiff/applicant. He therefore instructed his advocate to issue an eviction notice to the 1st plaintiff/applicant and her husband to vacate his property. The 1st plaintiff/applicant cannot therefore seek a refund of the purchase price long after the transaction and this application is only meant to pre-empt the eminent eviction proceedings.

On its part, the 3rd defendant/respondent filed grounds of opposition raising the following:-

1. ***That the threshold established in GIELLA VS CASSMAN BROWN LTD 1973 E.A 358 had not been met and this application is un-meritorious and an abuse of the Court process.***
2. ***That there is no privity of contract between the 3rd defendant/respondent and the plaintiff/applicants.***
3. ***That an injunction cannot issue to restrain from happening that which has already happened.***
4. ***That the application and indeed the entire suit discloses no reasonable cause of action against the 3rd defendant/respondent.***

I must begin by stating that the application as drawn sought an injunction pending the hearing of the application and not the suit itself. A party is bound by its pleadings and in **RELIABLE ELECTRICALS**

ENGINEERING VS MANTRAL KENYA LTD H.C.C.C NO. 190 OF 2005 (MOMBASA), an application drawn in a similar manner was dismissed by **Kasango J.** It is trite law that a Court can only give orders as sought by the party through its pleadings. If the applicants herein sought orders for an injunction pending the hearing of the suit, that was not pleaded. Having said so, it was held in **ODD JOBS VS MUBIA 1970 E.A 476** that **“a Court may base its decisions on a un-pleaded issue if it appears from the course followed at the trial that the issue has been left to the Court’s decision”**.

In this application before me, and notwithstanding the defect in the pleadings, all counsels filed their responses and submissions on the basis that this Court was handling an application for injunction pending the hearing of the main suit. This Court will therefore determine the same on its merits.

This being an application for injunction, it has to be determined within the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** where it was held as follows:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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”

A prima facie case on the other hand was defined by the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A. CIVIL APPEAL NO. 39 OF 2002** 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 from the latter”

Further, in considering an application for interlocutory injunction which is an equitable remedy, the Court will take the course that appears to carry the lower risk of injustice and this remedy will be denied to a party that does not approach the Court with clean hands.

This Court will consider all the above in determining this application. It is not in dispute that although the suit property was initially purchased by the 1st plaintiff/applicant vide an agreement entered into with the 2nd plaintiff/applicant’s father, she subsequently sold it to the 1st defendant/respondent in whose names it is now registered. The 1st defendant/respondent in turn has now charged it to secure a loan from the 3rd defendant/respondent. The registration of the suit land in the names of the 1st defendant/respondent vests in him all the rights and privileges appurtenant to such registration as provided for under **Sections 27 and 28 of the repealed Registered Land Act** under which the title was issued. The plaintiffs have pleaded in their plaint that the suit property has been illegally registered in the names of the 1st defendant/respondent. At this stage, I am not expected to make any final decision as to fraud or any illegality because those are matters for trial. What the 1st plaintiff/applicant has to show for purposes of this application is a prima facie case with a probability of success and on the evidence before me, she has not done so. As the registered proprietor of the suit property, it would be a rare case indeed for the 1st defendant/respondent to be restrained from encroaching, trespassing, invading or cultivating the suit property. How does the Court restrain one from trespassing unto his own property? That would be a contradiction. The 1st plaintiff/applicant was not coerced into selling the suit property to the 1st defendant/respondent. She did so voluntarily. In paragraph 8 and 9 of her supporting affidavit, she depones as follows:-

8: “That due to hard economic times, I saw it fit together with my husband together with my family members to sell the said suit property in order to finance the education of my daughter”

9: “That a family decision was realized that we sell the premises and I approached the 1st defendant whom we fellowship with at the same church that is (Deliverance Church Ruiru) and

he agreed to buy the suit property and the agreed price was Kenya Shillings one million seven hundred only

(Ksh. 1,700,000/=)”

Given the above, the plaintiffs/applicants cannot be said to have established a prima facie case with a probability of success as against the 1st and 2nd defendants/respondents to warrant the grant of the injunctive reliefs sought herein.

With regard to the 3rd defendant/respondent, there is really no privity of contract. The suit property now belongs to the 1st defendant/respondent who has secured a loan of Ksh. 3,000,000/= from the 3rd defendant/respondent using the title as security. It would therefore be unjust for this Court to issue injunctive orders against the 3rd defendant/respondent or even purport to order it not to charge any interest on the loan facility because the plaintiffs/applicants are strangers to that arrangement. The plaintiffs/applicants have also failed to establish a prima facie case against the 3rd defendant/respondent.

For the same reasons appearing above, there would be no basis upon which this Court can order the Thika Land Registrar to place an inhibition of the title to the suit property which the 1st plaintiff/applicant admits having sold to the 1st defendant/respondent.

Ultimately therefore, the plaintiffs/applicants have not met the threshold set out in the case of ***GIELLA*** (supra) to warrant the grant of injunctive reliefs. Having failed to surmount the first hurdle of establishing a prima facie case with a probability of success, there is no need to examine the two other tests.

Ultimately therefore, and upon considering all the evidence before me, I am not satisfied that the plaintiffs/applicants are deserving of the orders sought in their Notice of Motion dated 20th June 2014 and filed herein on 24th June 2014. The same is accordingly dismissed with costs to the defendants/respondents.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015

4/12/2015

Before

B.N. Olao – Judge

Mbogo – CC

Mr. Chris Maina for Plaintiffs/Applicants – present

Ms Kiragu for Mr. Rurigi for the 1st and 2nd Defendants/Respondents – present

Mr. Ngangah for Mr. Kibicho for the 3rd Defendant/Respondent -present

COURT: Ruling delivered, dated and signed this 4th day of December, 2015 in open Court.

Mr. Chris Maina for Plaintiffs/Applicants – present

Ms Kiragu for Mr. Rurigi for the 1st and 2nd Defendants/Respondents – present

Mr. Ngangah for Mr. Kibicho for the 3rd Defendant/Respondent –present

B.N. OLAO

JUDGE

4TH DECEMBER, 2015