



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 23 OF 2020

WILSON KAMAU GIKUNGI

(Suing on behalf of the Estate of John Gikungi Munyi).....**PLAINTIFF**

VERSUS

MICHAEL NJAGI KATHIANYU.....1ST DEFENDANT

IGNATIUS NTHIGA KIMINJE.....2ND DEFENDANT

NAMU NJERU.....3RD DEFENDANT

NYAMU G. MUREITHI.....4TH DEFENDANT

MARIANO MWANGI GAKINYA.....5TH DEFENDANT

MARY NYAGUTHIII GAKURA.....6TH DEFENDANT

BERNARD MUCUNGU NTHIGA.....7TH DEFENDANT

LAWRENCE MUGAMBI RUTERE.....8TH DEFENDANT

THE DISTRICT LAND REGISTRAR MBEERE.....9TH DEFENDANT

THE HON. ATTORNEY GENERAL.....10TH DEFENDANT

RULING

A. INTRODUCTION

1. By a notice of motion dated 3rd August 2020 brought under the provisions of **Order 40 & Order 50 Rule 1** of the **Civil Procedure Rules, Sections 6, 3A & 1A** of the **Civil Procedure Act (Cap. 21)**, **Articles 40 & 159** of the **Constitution of Kenya** and **all other enabling provisions of the law**, the Plaintiff sought the following orders:

a) *Spent*

b) *Spent*

c) *That this honourable court be pleased to issue a mandatory injunction order restraining the Defendants/Respondents, their agents, assigns, successors in title or any other person whatsoever acting in their name, from entering into, cultivating, alienating, conveying, selling subdividing, apportioning, charging or disposing with or over the land parcels No. Mbeti/Kiamuringa/1995, 1996, 1997, 1608, 1609, 1610, 1646, 1647, 1648 and 1649 and 1600 and a prohibitory order be issued over the said lands pending the hearing and determination of this suit.*

d) *That this honourable court be pleased to issue an order to stay proceedings in Siakago M.L.C. & E No. 61 of 2019 pending hearing and determination of this suit.*

e) *That the costs of this application be provided for.*

B. THE PLAINTIFF'S CASE

2. The said application was based upon the grounds set out on the face of the application and the contents of the supporting affidavit sworn by the Plaintiff, Wilson Kamau Gikungi on 3rd August 2020. The Plaintiff contended that his late father John Gikungi Munyi (the *deceased*) was the lawful owner of *Title No. Mbeti/Kiamuringa/127 (parcel 127)*. It was contended that the 1st Defendant had fraudulently acquired and sub-divided parcel 127 into several portions namely *Mbeti/Kiamuringa/1995-1998; 1608-1610; 1999 and 1600* some of which he had transferred to the rest of the Defendants.

3. The Plaintiff further stated that the deceased had sometime in 1984 sold parcel 127 to the 1st Defendant who was unable to fulfil the terms of the sale. It was contended that there were further sale agreements between the deceased and the 1st Defendant dated 1987 and 1999 which varied the original sale agreement of 1984 but the 1st Defendant somehow managed to transfer the entire parcel 127 to himself in 1998 without the consent or knowledge of the deceased.

4. It is noteworthy that in paragraph 7 of the supporting affidavit the Plaintiff contended that completion documents for the sale of parcel 127 were given to the 1st Defendant by the deceased on the mutual understanding that the 1st Defendant would only use them for the purpose of obtaining finances from a financier and that he was not supposed to present them for registration as he did in 1998.

C. THE DEFENDANTS' RESPONSE

5. The 1st, 4th & 7th Defendants entered appearance and filed a statement of grounds of opposition dated 22nd September 2020 raising the following general grounds:

a) *That the suit on which the application was predicated was incompetent.*

b) *That the suit did not disclose a reasonable cause of action.*

c) *The application was bad in law.*

d) *The application was an abuse of the court process.*

6. The 8th Defendant filed a statement of grounds of opposition dated 15th September 2020 in opposition to the said application. He stated that he was the registered proprietor of parcel 1596 which was the subject of litigation in *Siakago MCL & E Case No. 61 of 2019 – Lawrence Mugambi Rutere v Wilson Kamau Gikungi* hence the Plaintiff was precluded from prosecuting the instant suit by virtue of **Sections 6 & 8** of the **Civil Procedure Act**. It was contended that the Plaintiff was guilty of undue delay in seeking the interim orders since he claimed to have discovered the alleged fraud in 2019.

7. There is, however, no indication on record of the rest of the Defendants having entered appearance or filed responses to the application. It is also evident from the court file that the Defendants who filed grounds of opposition did not file any replying affidavits.

D. DIRECTIONS ON SUBMISSIONS

8. When the said application was listed for hearing on 9th September 2020 it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and serve their respective submissions. However, by the time of preparation of this ruling only the 8th Defendant has filed written submissions.

E. THE ISSUES FOR DETERMINATION

9. The court has considered the Plaintiff's said application, the grounds of opposition and the 8th Defendant's submissions on record. The court is of the opinion that the following issues arise for determination herein:

a) *Whether the Plaintiff has made out a case for the grant of an interim injunction.*

b) *Whether the Plaintiff has made out a case for the grant of a prohibitory order.*

c) *Whether the court should stay further proceedings in Siakago MLC & E No. 61 of 2019.*

d) *Who shall bear costs of the application.*

F. ANALYSIS AND DETERMINATIONS

a) Whether the Plaintiff is entitled to the interim injunction sought

10. The court has considered the material on record on this issue. It is evident that the Plaintiff's suit for recovery of the suit properties is based upon alleged fraud on the part of the 1st Defendant only. None of the other Defendants were alleged to be privy to the said fraud and no particulars of fraud or knowledge thereof were pleaded against the 2nd -8th Defendants.

11. The court has noted that the Plaintiff has conceded that sometime in 1999 (that is about 21 years ago) the deceased discovered the alleged fraud on the part of the 1st Defendant but he did not take legal action for recovery of parcel 127. Instead, he entered into a further agreement with the 1st Defendant dated 20th May 1999 for the latter to retain 6 acres and to return 12 acres to the deceased after which he was to buy a further 7 acres at a price of Kshs. 40,000/- per acre. The court is of the opinion that if the 1st Defendant did not keep his part of the bargain, then he could only be guilty of breach of contract for which damages or rescission may be an adequate remedy.

12. The court is of the opinion that the Plaintiff has not really demonstrated a *prima facie* case with a probability of success at the trial as set out in the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358**. The material on record shows that the deceased obtained consent of the Land Control Board for the transfer of parcel 127 to the 1st Defendant. He also executed transfer forms and handed over all completion documents to the 1st Defendant about 36 years ago. When he discovered that the entire suit property was in the 1st Defendant's name in 1999, he did not take legal action against the 1st Defendant but he entered into a further agreement to facilitate the latter's acquisition of 13 of the 19 acres comprised in the suit property.

13. Although the Plaintiff shall be at liberty to prove the alleged fraud at the trial, the court is not satisfied that he has demonstrated a *prima facie* case with a probability of success at this juncture. The Plaintiff has also not given a plausible explanation for the delay in seeking an interim injunction even though he claims to have discovered the alleged fraud in 2019. It must be remembered that an injunction is an equitable remedy and that equity aids the vigilant and not the indolent. In the circumstances, it shall not be necessary to consider the other two principles for the grant of an injunction as the Plaintiff has failed to satisfy the first principle.

b) Whether the Plaintiff is entitled to a prohibitory order

14. It would appear that what the Plaintiff intended to seek was an order of **inhibition** under **Section 68** of the **Land Registration Act 2012** to prevent any further dealings with suit properties pending the hearing and determination of the suit. Although the court has already found that the Plaintiff has failed to make out a case for the grant of an injunction, the court is of the opinion that the suit properties ought to be preserved pending the hearing and determination of the suit. There is a risk that the suit properties may not be available upon conclusion of the suit which eventuality may render the suit nugatory should the Plaintiff ultimately succeed at the trial. The court is, therefore, inclined to grant an order of inhibition to prevent the registration of any transactions with respect to all the suit properties until the suit is heard and determined.

c) Whether the Plaintiff is entitled to a stay of further proceedings in Siakago MLC & E Case No. 61 of 2019

15. The court has considered the material on record on this issue. The Plaintiff is apprehensive that having been sued by the 8th Defendant in that suit for eviction from parcel No. 1596, that suit may be concluded before the instant suit. There is no doubt from the material on record that parcel 1596 is a sub-division of parcel 127 which is the subject of the instant suit. It is also evident that should the Plaintiff's instant suit ultimately succeed, its outcome shall affect *Siakago MLC & E No. 61 of 2019* since the 8th Defendant bought a sub-division of parcel 127.

16. The court is, however, of the opinion that the Plaintiff should have applied for a stay of proceedings before the Magistrates' court in the first instance and only move to this court upon being dissatisfied with the outcome. There is no indication on record that the Plaintiff ever sought such stay and, if so, with what result. The court is thus of the view that the application for stay of further proceedings before this court is premature. Accordingly, the court is not inclined to grant the same.

d) Who shall bear costs of the application

17. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with **Section 27** of the **Civil Procedure Act**. It is noted that the Plaintiff has only partially succeeded in his application. In the premises, the court is of the opinion that costs of the application should be costs in the cause.

G. CONCLUSION AND DISPOSAL ORDER

18. The upshot of the foregoing is that the Plaintiff's application only succeeds in part. The court shall grant an order of inhibition only and decline the rest of the prayers. Accordingly, the court makes the following orders for disposal of the notice of motion dated 3rd August 2020:

a) The Plaintiff's prayers for an interim injunction and stay of proceedings in *Siakago MLC & E Case No. 61 of 2019* are hereby declined.

b) An order of inhibition is under **Section 68** of the **Land Registration Act, 2012** is hereby granted to prevent any further dealings with *Title Nos. Mbeti/Kiamuringa/1995, 1996, 1997, 1608, 1609, 1610, 1646, 1647, 1648, 1649 and 1600* pending the hearing and determination of the suit or until further orders of the court.

c) Costs of the application shall be in the cause.

RULING DATED and **SIGNED** in Chambers at **EMBU** this **29TH DAY** of **OCTOBER 2020** and delivered via Microsoft Teams platform in the presence of Ms. Wairimu for Rugaita & Co. Advocates for the Plaintiff, Mr. Eddie Njiru for the 8th Defendant, Ms. Njenga for the Attorney General for the 9th – 10th Defendants, no appearance by Mogusu & Co. Advocates for 1st, 4th & 7th Defendants and in the absence of the rest of the Defendants.

Y.M. ANGIMA

JUDGE

29.10.2020