



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 168 OF 2012

JAMES MWANGI.....1ST PLAINTIFF

ANN NYOKABI WAKANGU.....2ND PLAINTIFF

VERSUS

WANGUI GATUNDU AND JAMES MWANGI GATUNDU

(SUED AS PERSONAL REPRESENTATIVES OF THE ESTATE OF

GATUNDU WANJAGI EDWARD (DECEASED).....1ST DEFENDANTS

GRACE WANJIKU KABUI AND MACHARIA KABUI

(SUED AS PERSONAL REPRESENTATIVES OF THE ESTATE OF

KABUI KIGERA(DECEASED).....2ND DEFENDANTS

MARGARET RUGUGU MACHARIA (SUED AS

PERSONAL REPRESENTATIVE OF THE ESTATE OF MACHARIA

KARIUKI ALIAS JOSECK MACHARIA KARIUKI (DECEASED)

.....3RD DEFENDANT

MARGARET WANJIRU MAINA AND VIRGINIA NYAGUTHI

(SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF

MAINA NGURA REMINJIO (DECEASED).....4TH DEFENDANTS

BENSON GICHOHI MWATI AND ALEX KINGARA MWATI

(SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF

**MWATI GITHUGA (DECEASED).....5TH
DEFENDANTS**

MARY MUTHONI MWANGI (SUED AS PERSONAL

REPRESENTATIVE OF THE ESTATE OF MWANGI RIIKA

GEORGE (DECEASED).....6TH DEFENDANT

LYDIA NJERI KIMITI AND PETER KARIUKI KIMITI

(SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF

KIMITI GITHUA JAMES (DECEASED).....7TH DEFENDANTS

TABITHA WANJIRU GICHERU, JAMES MAINA GICHERU

AND JULIUS GACHAU GICHERU (SUED AS PERSONAL

REPRESENTATIVE OF THE ESTATE OF GICHERU WARUI ALIAS

GACERU WARUI (DECEASED).....8TH DEFENDANTS

GEORGE KARIUKI AND ZANIA WANJIKU KARIUKI

(SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF

KARIUKI GITHUGA (DECEASED).....9TH DEFENDANTS

RULING

Introduction

This ruling is on two applications that this Court directed be heard and determined together. The first is a Notice of Motion dated 27th March 2012 by the Plaintiffs, seeking an order a temporary injunction restraining the Defendants from dealing with the property known as Land Reference No. 209/138/40 (I.R No. 79189/1) (hereinafter “the suit property”), or in any way interfering with the Plaintiff’s peaceful and enjoyment of the said property pending the hearing and determination of this suit.

The second application is a Notice of Motion dated 7th May 2012 by the 5th Defendant in which he is seeking orders that the Plaintiffs suit and/or Plaint and Notice of Motion application dated 27th March, 2012, respectively be struck out and/or dismissed with costs to the 5th Defendants. Other than the 5th Defendant, the other Defendants did not participate at the hearing of the two applications.

The Plaintiffs’ Case

The Plaintiffs filed a supporting affidavit and further affidavit to their Notice of Motion sworn by the 2nd Plaintiff on 27th March 2012 and 23rd October respectively, and a replying affidavit to the 5th Defendant’s Notice of Motion also sworn by the 2nd Plaintiff on 23rd October 2013.

The Plaintiffs’ claim is that they are bona fide purchasers of the suit property for value consideration. They further state that that the suit property is registered in the name of Gatundu Wanjangi, Macharia Kariuki, Kabui Kagera, Maina Ngure, Mwati Githuga, Kariuki Githuga, Mwangi Rika, Kimiti Githua and Gacheru Warui all now deceased, who were trading as Kabui Partners, and who held their respective shares of the suit property equally, individually, distinctly and separately from each other. Further, that upon the death of the various registered owners, their said shares were transmitted to the administrators or executors of the their estates so as to be administered as part of the said estates.

It is the Plaintiffs’ contention that they entered into an Agreement for Sale for the suit property with the

Defendants in 2009, and that the said Defendants are the administrators and beneficiaries of the respective estates of Gatundu Wanjangi, Macharia Kariuki, Kabui Kagera, Maina Ngure, Mwati, Kariuki Githuga, Mwangi Rika, Kimiti Githua and Gacheru Warui. Further, that they duly paid to the Defendants the sum of Kshs.4,250,000/= as a 10% deposit of the purchase price and are currently in possession of the suit property. The Plaintiffs also claim that they have made various improvements and developments thereon since they took possession of the suit property, with the legitimate expectation of the same being registered in its favour.

It is the Plaintiffs' averment that they have always been ready and willing to perform their contractual duties as per the said Agreement, but that the delay in completion of the transaction has been occasioned by the obtaining of the completion documents by the Defendants. However, that the Defendants' have now irregularly and unlawfully breached the sale agreement by starting to scout for buyers with the intention of selling the suit property at higher price to third parties. The Plaintiffs are apprehensive that unless injunctive orders are granted by this Court the Defendants will proceed to deal with the suit property in manner adverse to their interests in the suit property. The Plaintiffs annexed various documents in support of their application including the sale agreement entered into with the Defendants, the letters of administration and confirmation of grants issued to the Defendants and correspondence between the Plaintiffs and Defendants' then lawyers on the sale transaction including on payment of the deposit of the purchase price

The 5th Defendant's Case

The 5th Defendant filed Grounds of Opposition dated 2nd May 2012 and a replying affidavit sworn on 7th May 2012 by Benson Gichohi Mwathi, a co-administrator of the 5th Defendant as their response to the Plaintiffs' notice of Motion. The said deponent also swore an affidavit on 7th May 2012 in support of the 5th Defendant's Notice of Motion. The 5th Defendant admitted that the registered owners of the suit property as shown on the face of the title documents are the late Gatundu Wanjangi, late Macharia Kariuki late Kabui Kigera, late Maina Ngure, late Mwati Githuga, late Kariuki Githuga, late Mwangi Riika, late Kimiti Githua and the late Gacheru Warui.

Further, that at all material times the said registered owners, although registered as tenants in common in equal shares, held the said property on their own behalf and on trust for thirteen (13) other persons that were named by the deponent in the replying affidavit, and that the Plaintiffs were at all material times aware of the fact that the beneficial owners of the said property were more than the persons sued as Defendants.

The 5th Defendant averred that the Plaintiffs have deliberately and knowingly failed to disclose that the subject Agreement for Sale was not fully executed, and hence was incomplete, and was also conditional on the estates of the registered persons perfecting their Grants of Letters of Administration or the issuance of effective Certificates of Confirmation of the concerned estates. He gave the particulars of the Defendants who did not have authority to sign and those who did not sign the said sale agreement. Further, that the Plaintiffs had not made payment of the balance of the purchase price, and that the deposit paid had been refunded back.

The 5th Defendant further averred that the Plaintiffs gave false information to the effect that they had been put in possession, whereas the suit property comprises of a commercial building that is occupied by several business tenants who pay rent to a committee representative of the estates of the deceased registered owners, known as M/s Kabui & Others. He also alleged that the Plaintiffs had suppressed two letters, the first dated 8/3/2012 written to the Defendants' Advocates formally bringing the said sale transaction to a close, and which effectively is a notice to rescind/cancel the agreement for sale; and the second dated 19/3/2012 from the Plaintiffs' Advocates, conceding the expiry of the said agreement and seeking for extension of time. Copies of the two letters were attached by the 5th Defendant.

The Submissions

The Plaintiffs' Advocates filed submissions dated 23rd October 2013 on the two Notices of Motion, wherein it was argued that the Plaintiffs have a *prima facie* case with a probability of success at trial, for the reasons that they had shown that Kabui Traders were the registered owners of the suit property and that their respective shares were transmitted to their respective administrators and executors after their death. Further, that it is evident from the certificates of confirmation given to the said estates that the respective administrators were authorized to deal with the suit property, and duly executed the sale agreement with the Plaintiffs.

The Plaintiff also submitted that as the Defendants have not issued the 21- days completion notice required by the sale agreement, the said agreement cannot be said to have been rescinded or lapsed, and that the letter referred to by the 5th Defendant dated 8th March 2013 was not a notice to rescind. The Plaintiff's counsel relied on the decisions in **Gitau vs Wanganga, Nairobi HCCC No. 519 of 1974** and **Johnson Joshua Kinyanjui & Vinubhai Virpal Shah vs Rachel Wahito Thande & Richard Njogu Thande (The Administrators of the Estate of the Late Henry Thande), Nairobi Civil Appeal No 284 of 1997** in this respect.

The Plaintiffs also claim that they will suffer irreparable damage if the injunction sought is not granted as they have always been ready and willing to complete the sale transaction, have been given possession of the suit property and made various improvements and developments thereon, and also for reasons that each land has its unique value as held in **Muiruri vs Bank of Baroda (Kenya) Ltd, (2001) KLR 183**. It is the Plaintiff's further claim that it is the Defendants who have breached the sale agreement, and that they registered a caveat against the suit property only as a measure to safeguard their interests in the same.

In opposition to the 5th Defendant's Notice of Motion dated 7th May 2012, the Plaintiffs' counsel relied on the decision in **DT Dobie and Company (Kenya) Ltd vs Joseph Mbaria Muchina & Another, (1982) KLR 1** to submit that it is evident that there are issues in the dispute between the parties herein that ought to proceed to full hearing for determination, including whether there is a valid agreement subsisting between the parties and if there has been a breach thereof.

The counsel for the 5th Defendant filed submissions dated 23rd May 2014 and reiterated therein that the 5th Defendant was a stranger to the said agreement for sale entered into by the Plaintiffs, and did not sanction the same. Further, that the said sale agreement failed to comply with the requirements of the law, as the persons claiming to have executed the agreement for the registered owners had no locus or authority from the court to do so.

The counsel also relied on section 45 of the Law of Succession Act and the decisions in **In the Matter of the Estate of Veronica Njoki Wakogoto (Deceased), (2013) e KLR** and **Rose Wambui Wahito vs John Ian Maingey (2013) ekLR** to submit that the said sale agreement was as a result irregular and illegal, as it amounted to meddling with the deceased's property without the requisite authority, and was thus incapable of specific performance as sought by the Plaintiffs.

Lastly, the 5th Defendant's counsel submitted that the Plaintiffs do not stand to lose anything as the moneys paid as deposit has been refunded to them, and as they have never obtained any interest in the suit property, the balance of convenience does not tilt in their favour.

The Issues and Determination

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The first issue to be determined is whether the Plaintiffs' Amended Plaint dated 23rd October 2013 and Notice of Motion dated 27th March 2012 are amenable to striking out. The law on striking out of pleadings is stated in Order 2 Rule 15 of the Civil Procedure Rules and in various judicial decisions. Order 2 Rule 15(1) provides that:

(1) At any stage of the proceedings the court may order to be struck out or amended any

pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

The salient principles that apply to striking out of pleadings are that this is a draconian measure to be employed sparingly, and that the grounds for striking out must be plain on the face of the pleadings and from the facts alleged by the parties. This was stated by the Court of Appeal in D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 as follows at page 9:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

The overriding principle therefore to be considered in an application for striking out of a pleading is whether it raises any triable issues. An examination of the Plaintiffs’ Amended Plaint dated 23rd October 2013 and Notice of Motion dated 27th March 2012 shows that the Plaintiffs are seeking permanent and temporary injunctions restraining the Defendants from dealing with the suit property, and specific performance of the sale agreement dated 18th December 2009. They also seek special damages as an alternative.

It is in this respect not disputed by the Plaintiffs and 5th Defendant that a sale agreement with respect to the suit property was entered into by the Plaintiffs and Defendants. What is disputed by the 5th Defendant is the legality and validity of the said agreement arising from the alleged lack of authority of the Defendants to enter into the same, and from its alleged rescission. These are triable issues that can only be determined after further evidence and argument at full trial, and which therefore render the Plaintiffs’ suit

and application filed herein not amenable to striking out. It is also necessary in this regard to hear all parties herein on the issues raised. The 5th Defendant's Notice of Motion cannot therefore be allowed.

The second issue therefore remaining to be determined is whether the Plaintiffs have met the threshold for the grant of temporary orders of injunction. I will proceed to determine this issue on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, which are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience. The first question I must answer is whether the Plaintiff has established a *prima facie* case.

A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** 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.”

The Plaintiffs rely on the sale agreement they entered into with the Defendants on 18th December 2009 as evidence of their rights over the suit property. The 5th Defendant on the other hand avers that the Defendants did not have legal capacity to enter into the sale agreement with the Plaintiffs. I have perused the annexures presented by the Plaintiffs as evidence, and note that for some Defendants, the issue of, and confirmation of their grants of representation were made before the date of the said sale agreement, and for other Defendants the letters of administration are issued before the date of the agreement, but the confirmation of grant took place after the said agreement.

The position in law is that one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. It is in this respect noted by the court that all Defendants had been issued with grants of letters of administration as at the time of entering into the sale agreement with the Plaintiffs. However, under section 55 of the said Act it is provided that no grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71 of the Act. This court cannot in this regard definitively state at this stage what the legal effect of the sale agreement entered into by the Plaintiffs and Defendant is, in light of the fact that some of the Defendants' grants had been, and others had not been confirmed at the time of entering onto the sale agreement.

To this extent I find that in light of the uncertainty presented by the Plaintiffs' case, the Plaintiffs' Notice of Motion will have to be determined on the basis of a balance of convenience. I find in this regard that the balance of convenience does tilt in favour of the Plaintiffs to the extent that they provided evidence of the sale agreement entered into with the Defendants for the purchase of the suit property, even if its legal effect is yet to be determined, and to the extent that they also paid a deposit of Kshs 4.5 million pursuant to the said sale agreement. The Plaintiffs provided evidence of such payment in their annexures to their supporting affidavit sworn by the 2nd Plaintiff on 27th March 2012, in terms of a copy of a cheque dated 24th September 2009 for Kshs 4.5 million payable to the Defendants' then Advocates, and a letter from the said advocates addressed to the Plaintiffs' Advocates dated 24th September 2009 confirming receipt of the same.

The 5th Defendant on his part did not bring any evidence of the alleged return of the deposit paid by the Plaintiffs. The letter he relies upon dated 8th March 2013 from J.M Mugo & Company Advocates addressed to the Plaintiffs' Advocates on record only indicates an intention to return the deposit money as follows:

“Given the above, our clients do not wish to keep this matter in abeyance any longer: the

only way forward is to return the deposit money. We shall therefore be acting accordingly which please confirm”

No evidence was provided by the 5th Defendant of the further actions returning the said money as indicated in the said letter.

However, the above findings notwithstanding, the issue of possession of the suit property is disputed, and I note in this regard that the Plaintiffs did not bring any evidence of the said possession or of the improvements they allege to have made on the suit property. Arising from the foregoing reasons, it is accordingly ordered as follows:

1. The prayers in the Notice of Motion dated 7th May 2012 by the 5th Defendant are hereby denied.
2. The Defendants, by themselves or their agents and/or servants be and are hereby restrained from selling, transferring, mortgaging, charging, alienating, or in any other manner disposing of the parcel of land known as Land Reference No. 209/138/40 (I.R No. 79189/1) pending the hearing and determination of this suit.
3. The Plaintiffs shall not in any manner interfere with the Defendants’ possession and occupation of the parcel of land known as Land Reference No. 209/138/40 (I.R No. 79189/1) pending the hearing and determination of this suit
4. The costs of the Plaintiffs’ Notice of Motion dated 27th March 2012 and the 5th Defendant’s Notice of Motion dated 7th May 2012 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____15th____ day of ____July____, 2014.

P. NYAMWEYA

JUDGE