



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 26 OF 1992

NDEFFO CO

LTD.....PLAINTIFF

VERSUS

**M H SHAW (ADMINISTRATOR OF THE ESTATE OF THE LATE J.T. OBELHOZER) .
.....1ST DEFENDANT**

**JOHN WACHIRA KAMAU.....2ND
DEFENDANT**

**LUCY WANGARI KAMAU.....3RD
DEFENDANT**

RULING

1. The plaintiff herein filed a Notice of Motion dated **9th May, 2013** seeking the following orders *inter alia*:

(i) A temporary injunction be issued restraining the defendants by themselves, agents, employees, servants, children, spouses, legal representatives or anybody else claiming authority from them from subdividing, partitioning, leasing, selling, charging or dealing in any other way in the parcel of land known as L.R. Nos 449 and 6501 (*the suit parcels*) pending hearing and determination of this suit.

(ii) The cost of this application be borne by the respondent.

2. The application is based on the grounds stated on the face thereof and is supported by the affidavit sworn by **Charles Mbugua**, the plaintiff’s director. He depones that the suit parcels once belonged to the late **JT Oberholzer** and that the plaintiff’s members occupied the parcels in 1969 or thereabouts; that the said JT Oberholzer instituted a suit, **Nairobi HCCC No 1933 of 1980** against the plaintiff which suit was found in his favour and the plaintiff's members were to be evicted. Before the decree could be executed, the parties entered into negotiations which led to the plaintiff paying **Kshs 95,000** as consideration for the suit parcels, with a waiver on the mesne profits and interest thereon as granted in the decree.

3. As the plaintiff's embarked on obtaining the relevant consents to enable them transfer the suit parcels to themselves, they received a letter from the firm of **Daly and Figgis** Advocates which contents implied that the suit parcels belonged to one **Florence Nyambura** whose husband had purchased the same from JT Oberholzer. The said parcels were subsequently transferred to her and a title deed issued in her name. The 2nd and 3rd defendants, being the administrators of Florence Nyambura’s estate have now started

subdividing the suit parcels with the intention of disposing the same to third parties.

4. The application is opposed vide the 2nd and 3rd defendant's Grounds of Opposition dated **24th October, 2013**. They contend that the application is bad in law as there was no cause of action and that the suit had abated; that the application was also defective as the applicant had no locus standi to institute this claim, nor could the court enforce an illegality. It was also their contention that the suit was *res judicata* as **Nairobi HCCC No 1933 of 1980** had substantively dealt with the matter and this suit was therefore an abuse of the court process. Finally they stated that the plaintiff's members did not reside on the suit parcels and that they (*the Defendants*) were not served with summons.

5. On their own motion, the plaintiff/applicant filed written submissions. Counsel for the Plaintiff submitted that the plaintiff was the legal purchaser of the suit parcels and relied on the case of **Bakshis Singh & Bros v Panafric Hotels Ltd (1986)** and **Section 3(5)** of the **Sale of Goods Act**. They further submitted that the consent obtained by the defendants from the Land Control Board was null and void and relied on **Peter Karanja Mungai v Daniel Njoroge Kamau & 2 Others (2005) eKLR** and **Njamunyu v Nyaga (1983)**. They also submitted that they were entitled to the orders sought as **Section 53** of the Indian Transfer of Property Act, as well as **Sections 23 and 24** of the **Registration of Titles Act** supported their claim that as registered owners who had been deprived of their land through fraudulent means, the contract was voidable and damages should be sought against the person who had acquired the title through fraud.

6. Counsel for the 2nd and 3rd defendants equally filed written submissions, reiterating their position in the Grounds of Opposition. It was their contention, that the application was bad in law, as there was no cause of action and that the suit had abated as per **Order 24(4) of the Civil Procedure Rules, 2010**. They relied on the case of **George Kirima v Rufus Kiambati M'Ikuri (2013) eKLR**. To support their position that the suit was *res judicata*, they relied the case of **Peter Ngugi Kabiri v Esther Wangari Githinji & Another (2013) eKLR**, **Joseph Karanja Mukuna v Gabriel Mburu Maina (2013) eKLR** and **Edwin Thuo v the Attorney General & Another (Nairobi Petition No 212 of 2012)**. They further submitted that this suit was an abuse of the court process under **Order 2 Rule 15** and that the plaintiff's members did not reside on the suit parcels therefore they had not established a prima facie case. They relied on the case of **Cecilia Kadzo Emmanuel (suing as the administrator of the estate of Jonathan M Karisa) v Miriam Chea Mungai (2013) eKLR** in which the principles set out in **Giella v Cassman Brown** were repeated. Finally, the 2nd and 3rd defendants submitted that they were not served with summons, which was in violation of **Order 5** of the **Civil Procedure Rules, 2010**.

7. I have considered the application, affidavits filed in support thereof and submissions filed by the respective parties and I find the issues for determination to be as follows:

- a) *Is the suit res judicata?*
- b) *Has the suit abated?*
- c) *Were summons extracted?*
- d) *Is the Applicant entitled to the orders of injunction sought at this interlocutory stage on the facts and circumstances of this case?*

Is the suit is res judicata?

8. The 2nd and 3rd defendants maintain that this suit is *res judicata*. An earlier suit Nairobi HCCC No 1933 of 1980 filed by JT Oberholzer against the plaintiffs had dealt with the matter substantively therefore this suit was an abuse of the court process. In one of the cases relied on by counsel for the 2nd and 3rd defendants, **Peter Ngugi Kabiri v Esther Wangari Githinji & Another (supra) Ombwayo J**, held that for a suit to be *res judicata*, the following elements had to be present:

- i) *The matters in issue had to be identical*
- ii) *The parties had to be identical*
- iii) *The title had to be the same*
- iv) *There had to be concurrence of jurisdiction*
- v) *There had to be finality of the previous decision*

9. Looking at the elements that must be present for a suit to be considered *resjudicata*, I am of the view that this suit is not *res judicata* for the reasons that although it is true that Nairobi HCCC No 1933 of 1980 dealt with finality the issue of the suit parcels and orders of eviction were issued, the parties in that suit later entered into an agreement where the plaintiff allegedly paid consideration of Kshs 95,000 as full purchase price of the suit parcels. To me, this subsequent agreement halted the execution of the decree and changed the standing of the plaintiff whose members would no longer be considered as trespassers. In filing the current suit the plaintiff now considering itself the owner of the suit parcels filed a claim of ownership which is pending before this court for determination, and which claim is very different from the cause of action in Nairobi HCCC No.1933 of 1980.

Has the suit abated?

10. The 2nd and 3rd defendants contend that the suit abated as per **Order 24 (4) of the Civil Procedure Rules**, because there was no substitution of the deceased party with her personal representatives. They relied on the case of **George Kirima v Rufus Kiambati M'ikuri (2013) eKLR**.

11. However, looking at the court record, on **19th October, 2011**, parties agreed by consent to substitute the deceased 2nd defendant **Florence Nyambura** with the 2nd and 3rd Defendants. This consent was adopted as an order of the court. There was no objection by the defendants at that point and the issue that the suit had abated was not raised. I therefore find that the 2nd and 3rd defendants are properly on record.

Were summons extracted?

12. The Defendants contend that they were never served with summons as required by **Order 5** of the **Civil Procedure Rules**. The court record reveals that summons, were extracted on **10th May, 2012**. However there is no signed copy of summons returned or an affidavit of service stating that the summons were indeed served. An affidavit of service dated **20th May, 2013** sworn by **Manuel Sakayo Markey** was filed stating that the 2nd and 3rd defendants were served with the current application and the court order issued on **9th May, 2013**. Furthermore, the firm of Gordon Ogola, Kipkoech & Co filed a notice of appointment to act for the defendants on **10th October, 2013**. From the record, there is no clear evidence on whether summons were served although the same were extracted.

Is the Applicant entitled to the orders of injunction sought at this interlocutory stage on the facts and circumstances of this case?

13. The principles upon which the court will grant an injunction are well settled and articulated in the decision of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358**. The Applicant needs to show that he has a *prima facie* case with probability of success; that he stands to suffer irreparable damage that cannot be compensated by an award in damages and if the court is in doubt, it will determine the application on a balance of convenience. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the applicant has a *prima facie* case. It must also be noted that the purpose of an injunction is to maintain status quo pending the hearing and determination of the matter before it.

14. It is noteworthy that the court is not required to make final findings of contested facts but to weigh

the relative strength of the parties cases. This observation was considered by Lord Diplock in American Cyanamid Co. V Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL at 510 where he stated as follows:

“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

15. I share the views expressed by the learned Judge in the aforementioned case. I say so in consideration of the submissions set out by the respective parties. The suit before this court is a fairly old matter. The original parties have since died and administrators of their estates have taken over. I believe even the directors of the plaintiff who filed this matter have since changed. However, the claim is still alive and the court must hear and determine the matter to conclusion. The issues raised in this suit are complex and can only be determined during full trial after production of the relevant evidence and calling of witnesses. In the meantime, the suit parcels must be preserved because failure to do so, may result in the suit parcels being disposed of to third parties which will change the substratum of the suit and further complicate this case which is already complicated enough.

16. I am therefore satisfied that the applicant has established a prima facie case. The plaintiff's members are also in occupation of the suit parcels and failure to grant the orders sought could result in their members being evicted by the 2nd and 3rd defendants. This being a claim for land, any loss incurred by the 2nd and 3rd defendants can be quantified and the plaintiff ordered to compensate them by way of damages if they emerge victorious in this case.

17. I therefore allow prayer 3 in the Notice of Motion dated **9th May, 2013** pending the hearing and determination of the suit. Costs of the application will be in the cause.

Dated, Signed and delivered at Nakuru this 10th day October, 2014.

L N WAITHAKA

JUDGE

In the presence of:

Ms. Fatma holding brief for Gordon Ogola & Co. Advocates for the 2nd and 3rd Respondents.

N/A for the Plaintiff.

N/A for the 1st Respondent.

Emmanuel – Court Assistant.