



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 834 of 2012

ELIZABETH WAMBUI KIRAGU.....PLAINTIFF

-VERSUS-

NDIRANGU MACHARIA.....DEFENDANT

RULING

The plaintiff by Notice of Motion dated 12th November 2012 expressed to be brought under Order 40 rules 1(a), 243 of the Civil Procedure Rules 2010, Sections 1A, 3A of the Civil Procedure Act. The Notice of Motion application sought the following orders:-

1. The Defendant his agents, servants be restrained from interfering with, offering for sale, sub-dividing, charging. Leasing or in any other manner dealing with all that parcel of land known as Ruiru Kiu Block 2/280 pending the hearing and determination of this application.
2. The Defendants, his agents, servants be restrained from interfering with, leasing or in any other manner dealing with all that parcel of land known as Ruiru/Kiu Block 2/2820 pending the hearing and determination of this suit.
3. Costs of the application be provided for.

The application was supported on the grounds that:-

- a) The Plaintiff is the registered owner of the suit land known as Ruiru Kiu Block 2/2820.
- b) The Defendant has entered on the said parcel of land and started erecting beacons.
- c) The plaintiff is apprehensive that if the defendant is not stopped by this honourable Court he is intent on dispossessing the plaintiff her parcel of land.
- d) The plaintiff will suffer irreparable harm and damage if the defendant is not stopped by this court from interfering with the said piece of land.

Additionally the application is supported by the affidavit of Elizabeth Wambui Kiragu sworn on 12th November 2012 in support of the application.

The defendant has filed a replying affidavit sworn on 28th January 2013 in opposition to the plaintiff's notice of motion application.

Briefly the plaintiff/applicant's case is that she bought the parcel of land title No. Ruiru Kiu Block 2/2820 from one Joseph Kungu Kamau who was a member of Githunguri Ranching Company Ltd and had been allocated the plot vide ballot No. 2050 issued by the said company. It is the plaintiff's case that after purchasing the plot from the said Joseph Kungu Kamau she was given all the ownership documents and that she paid all dues to Githunguri Ranching Company Limited relating to survey fees, transfer and clearance fees to enable her to process her title. Notably she states that Githunguri Constituency Ranching Company Ltd issued her with a clearance certificate for plot No. 2820 dated 17th February 2009 to enable her to process her title at the lands office. The plaintiff duly processed title and was issued with a title deed for title No. RUIRU KIU BLOCK 2/2820 by the Land Registrar Thika on 2nd September 2010 as per the copy of title annexed to the supporting affidavit as "FWK1".

THE PLANTIF STATES THAT SHE INSTITUTED Thika CMCC 203 of 2012 against the Defendant to restrain the defendant from alienating her said parcel of land. The said suit was however dismissed by the Thika court for want of jurisdiction necessitating the plaintiff to file the instant suit in this court. The plaintiff contends that she is the genuine owner of the suit property and that the defendant should be restrained by way of injunction from interfering with the suit property until the suit is heard and determined on merits.

On his part the defendant avers that he is the rightful owner of the suit property having purchased the same from one Joseph Kimani Wahoro. Interestingly the defendant also claims to have purchased the suit property from the said Kimani Wahoro who held a ballot number 2050 for the plot issued by the said Githunguri Constituency Ranching Company in 1997. He claims to have processed his title that was issued on 7th January 1997, by the Thika District Land Registrar. The defendant further avers that the agreement for sale under which the plaintiff acquired title was made by an advocate who had no practising certificate and the agreement was therefore *void abinitio* and could therefore not operate to confer any right or interest in favour of the plaintiff.

The defendant further explains that owing to the loss of the green card relating to the subject property at the Thika lands Registry the Land Registrar sought authority from the Chief Land Registrar to reconstruct the land register Green Card and following the approval of the Chief Land Registrar the loss of the green card was gazetted in the official Kenya Gazette after which a new register was opened and the defendant was issued with a new title deed on 17th October 2011. The defendant further avers that his title was erroneously shown as being delineated on RIM sheet No. 3 while it ought to have been on sheet No. 4 and that this error was corrected by the Director of surveys.

I have considered all the affidavits by the parties and the annexures thereto but I find it intriguing that the same Githunguri Constituency Ranching Company Ltd could issue a Ballot No. 2050 that attached to the suit parcel of land to two totally different personalities and further proceed to issue the personalities with the other support documents to process the title documents. Equally intriguing is the fact that the Thika Lands Registry proceeded to issue two separate titles to two different persons in respect of the same land. My view is that the court needs to receive explanations from Githunguri constituency Ranching Company Ltd and the Land Registry as to the duplications as regards the Ballot for the suit property and the title in respect of the suit property.

Each of the title holders claims to be the genuine owner and it is therefore imperative to receive evidence at the trial to determine which of the two competing titles is the genuine one. Quite clearly only one of the titles can be genuine one but which one is it?

In the circumstances of this case the court cannot appropriately make a determination at the interlocutory stage as each of the parties claims to be the registered owner of the suit property and each of the parties has exhibited documents to support their claim of ownership. In the court's view this is a matter that requires to be fully interrogated and investigated at the full hearing of the suit where evidence will be taken and witnesses cross examined with a view of establishing which of the two persons is legally entitled to the ownership of the suit property.

In the premises the order that commends itself in the interest of justice is to have the parties maintain the

status quo until the matter is fully heard and the ownership of the suit property, finally determined.

I am alive to the submissions by both counsels of the parties where the plaintiff's counsel forcefully urged that in view of the fact that the plaintiff has demonstrated that she holds title to the land she has established she has a prima facie case with a probability of success and hence would be entitled to an injunctive order. The title put up by the defendant puts to question who between the two holds the valid title.

The defendant's counsel submitted that the defendant has already subdivided the land and effected sales. No evidence however was tendered to demonstrate the subdivisions have indeed been carried out and if carried out that they have been affected through registration. The counsel further contested the validity of the agreement that effected the title to the plaintiff stating that the agreement having been prepared and attested by an advocate who did not hold a practising certificate the same was *void abinitio* and could not effectuate a valid transaction. I have reviewed the sale agreement annexed to the defendants replying affidavit annexed as "NMXII" and the same is between Joseph Kungu Kamau and Regina Wairimu Njoroge and apparently does not relate to the Plaintiff herein.

In the premises and as I have alluded to above this is a matter where the court would need to hear the parties and their witnesses at the trial to determine who between the two holds the genuine title and therefore entitled to the suit property. I therefore direct that the parties do maintain the status quo such that there will be no subdivision and/or registration disposal of the suit property pending the hearing and determination of the suit.

The costs for this application will be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff
..... for the Defendant