



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.27 OF 2012

PETER .G.N. NG'ANG'A.....1ST PETITIONER
KEZIAH WANJIKU NG'ANGA.....2ND PETITIONER

AND

THE REGISTRAR OF TITLES.....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT
HARRISON MAINA KARIUKI.....3RD RESPONDENT
PETER MAINA MUGAMBI.....4TH RESPONDENT
JOSEPH MACHARIA MUCHIRI.....5TH RESPONDENT

RULING

1. The Petitioners/Applicants, Peter G.N.Nganga and Keziah Wanjiku Nganga, filed an Application dated 30th January 2012 supported by an Affidavit sworn by Peter G.N. Nganga on the same date. The Application is premised on **Article 22** and **23** of the **Constitution** of Kenya, 2010 and seeks the following orders:

“ i)

ii) That the Respondents by themselves or by any servant or agent of each of them and in particular the 3rd , the 4th and 5th respondent be restrained by a temporary injunction in the first instance from howsoever selling, transferring, charging or dealing with property 3rd Respondent's title No. IR 15500 LR No.9508, 4th respondent's title number IR 129898 LR No.9508/5 and the 5th Respondent's title number IR 129900 LR No. 9508/3 being subdivision of 3rd Respondent's title number IR no. 15500 LR No.9508 pending the hearing and determination of the Application inter partes. (sic)

iii) That the Respondent by themselves or by servants or agents of each of them and in particular the 3rd,4th and 5th Respondent be restrained from selling, charging, transferring or howsoever dealing with the 3rd Respondent's title No. IR 15500 LR No.9508, 4th Respondent's title number IR 129898

LR No.9508/5 and the 5th Respondent's title number IR 129900 LR No. 9508/3 being subdivision of 3rd respondent's title number IR no. 15500 LR No.9508 pending the hearing and determination of the Petition.

iv) That pending hearing and determination of the Petition a copy of this order be registered against title IR No. 15500 LR No.9508,title number IR 129898 LR No. 9508/4,IR no. 129899 LR no 9508/5 and IR No. 129900 LR No.9508/3.

v) The honourable Court be pleased to make any other orders deemed fitting within its inherent jurisdiction.

vi) Cost occasioned hereby be awarded to the Petitioners.”

2. To put the matters into perspective, the Petitioners herein, filed Petition dated 30th January 2012 claiming a violation of **Articles 27,40(3),47 and 50 of the Constitution**. They also claim a violation of **Section 60 and 65 of Registration of Titles Act (RTA) Cap 481 Laws of Kenya**.

3. The facts leading up to the dispute are that on or about 4th April 1991, the 1st Petitioner charged his title IR No.15500 (LR No.9508) to Standard Chartered Bank of Kenya Ltd to secure a financial facility of Ksh.3,000,000.00. The Bank later exercised its statutory power of sale upon default in repayment of the facility .

4. The Bank in consequence thereof sold the property to the 3rd Respondent who later subdivided it and sold portions of it to 4th and 5th Respondent. The Petitioners proceeded to file a suit in Milimani Commercial Court HCCC No. 1364 of 2001 Peter G.N.Nganga & Keziah Wanjiku Nganga vs standard chartered Bank of Kenya Ltd & others challenging the sale and transfer of the property to the 3rd Respondent. On 10th February 2011, the 3rd Respondent filled an Application seeking to discharge the interim orders issued on 23rd November 2001 which prohibited the 3rd Respondent from subdividing the suit. The orders were discharged on 24th February 2011 by Okwengu J. Thereafter the matter was stayed pending the outcome of Civil Appeal No. 149 of 2003.

5. While the High Court and the Court of Appeal matters were both pending, the 3rd Respondent filled Misc.Appl.No.922 of 2005 at the High Court seeking orders of Certiorari and Mandamus against the decision of the principal Registrar of Titles and the Director of Survey to sub-divide the land. The Application was dismissed and parties advised to await the outcome of HCCC No.1364 of 2000 and Civil Appeal No.139 of 2003. Thereafter, the present proceedings were instituted.

Petitioners/Applicant case

6. The Petitioners contend that they are entitled to the ownership and possession of Title No. IR 15500 LR. No. 9508 situated in Nairobi. They also claim that the subdivision of the 3rd Respondent property title number IR NO 15500 LR No.9508 and transfer of the subdivision thereof namely title number IR 129898 LR.no.129899 LR No.9508/5 to the 4th Respondent and Title IR No.129900 LR No. 9508/3 to the 5th Respondent was acquired fraudulently through an order granted in Milimani HCCC No.1364 of 2000.

7. It is the Petitioners contention that the 3rd Respondent in collusion with the 1st, 4th and 5th Respondent have infringed on their fundamental and Constitutional rights under **Articles 27,40(3),47 and 50** of the

Constitution and also claim that the statutory duty imposed on the 1st Respondent under **Section 60 and 65** of the **RTA** is administrative and quasi judicial in nature and that duty was breached by the 1st Respondent.

8. The Petitioners further contend that failure by the 1st Respondent to summon the Petitioners and to conduct an inquiry and give both parties a fair opportunity to be heard and present evidence in opposition

is a violation of their rights to protection by the law and therefore pending the hearing and determination of the Petition, interim reliefs as sought in the Application should be granted to them.

Respondent Case

9. The Application is opposed. The 4th and 5th Respondent filed Replying Affidavits sworn on 1st August 2012 and 8th June 2012, respectively.

10. It is the 4th Respondent position that he is the owner of the property in dispute having lawfully purchased it from the 3rd Respondent . He claims that he was an innocent purchaser of value without notice who holds a good title to the property and so no adverse orders should be issued against him.

11. It is the 5th Respondent's position that he is the registered owner of title No LR No. 9508/3 having acquired it from the 3rd Respondent on 18th May, 2011 after establishing that there was no encumbrance to it. Accordingly, he claims that the Petitioners have no interest in the said parcel of land and they cannot suffer any loss since their title had been extinguished through statutory power of sale. In support of this position, he cited the Court of Appeal decision in Central Kenya Limited vs Trust Bank Limited & 4 Others , Civil Appeal no. 215 of 1996 where the Court held that the Appellant had no right or title left in the suit property upon exercise of statutory power of sale unless it was proved during trial of the suit that there existed substantive fraud or conspiracy to defraud the other party.

12. It is the Respondent's their further contention that there are no restraining orders obtained by the the Petitioners in prior suits, and if any were issued, then the same were meant to maintain the status quo which was in favour of the the 3rd Respondent. In his written submissions, the 3rd Respondents specifically claims that the order issued on 11th March 2002 in HCCC No.1364/2001 did not bar him from dealing with his Title No. LR.9508.

13. The Respondents further claim that the 1st Respondent correctly fulfilled his role in deleting spurious entries in the land register and maintain that the Petitioner have failed to demonstrate a *prima facie* case with a probability of success, and the allegation of fraud can only be dealt with during the trial of the main of the main suit and it is their contention that the Petitioners' remedy lies in damages. They therefore seek that the Application should be dismissed with costs.

Determination

14. I have considered the Application and the rival submissions before me and I am conscious of the fact that I am being called upon to exercise discretion at an interlocutory stage and without going to the merits of the Petition.

15. The conditions for granting an interlocutory injunction are now well settled in Giella v Cassman Brown & Co Ltd (1973) EA 358 which are 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 and thirdly, that if the court is in doubt it will decide the application on a balance of convenience.

16. On the material before me , I am satisfied that the Petitioners have not established a *prima facie* case with a probability of success. The Petitioners have not tendered any evidence to show that the 1st Respondent in excising his special powers and duties under **Section 65 of Registration of Titles Act** infringed on Petitioners right as guaranteed by **Article 27,40, 50 and 47 of the Constitution**. The law is now settled that a person alleging violation of a constitutional right has the obligation of demonstrating the manner in which they have been violated with some measure of precision. See the case of Anarita Karimi Njeru-v- Republic, (1979) KLR 154

17. In my view, it is not enough for the Petitioners to contend that the 1st Respondent did not summon them to conduct an inquiry before the cancellation of the entries against the titles in issue.

18. It is not disputed in this case that the original title I.R 15500 LR 9508 was encumbered with a registered charge in favour of the Standard Chartered Bank of Kenya Ltd. It is also not disputed that the Bank exercised its statutory power of sale as chargee and therefore the transfer in favour of 3rd respondent created indefeasible title. Any issues regarding the manner in which the sale and transfer were conducted are issues in contest within HCCC No.1364/2000 and C.A No.139/2003 and that is the right forum to challenge the sale and transfer to the 3rd Respondent an indefeasible title. In my view the Petitioners have no right or title in this matter, they have not established a *prima facie* case with a probability of success.

19. Having held that the plaintiffs have failed to demonstrate a *prima facie* case with a probability of success. I will then determine whether the denial of an injunction will cause injury or loss to the petitioners that cannot be compensated by an award of damages. On this issue I totally agree with the submissions by the 5th Respondent that the petitioners remedy lies in damages.

20. **Section 24** of the **Registration of Titles Act** provides a remedy for any person who believes that he was deprived his interest in land through fraud or error. It states as follows:

“Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription.”

21. A clear reading of the above statutory provision shows that any person who claims loss of interest in land through fraud, error or misdescription in any grant or certificate of title can sue for damages against the person who may have committed the alleged fraud.

22. With regard to balance of convenience, I would say that the same wholly falls in favour of the 4th and 5th Respondents. Looking at it again, the Petitioners admitted that they took a loan of Ksh. 3,000,000.00 from the Standard Chartered Bank which exercised its statutory power of sale (upon default in payment) and transferred the property to the 3rd Respondent who later subdivided the land and transferred different portions of it to the 4th and 5th Respondent who are in possession of the said portions. Looking at the facts in totality, the balance of convenience favours the Respondents as against the Petitioners whose case, sadly, is weak from my view point.

23. Lastly, and for the reasons given, the Petitioners have not demonstrated that they deserve the orders sought and I find that the Application dated 30th January 2012 lacks merit and is hereby dismissed with costs to the Respondents.

24. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF APRIL, 2013

**ISAAC LENAOLA
JUDGE**

In the presence of:

Irene – Court Clerk

Mr. Ng'ang'a for 3rd Respondent

No appearance for Parties

Order

Ruling duly delivered.

ISAAC LENAOLA
JUDGE
5/4/2013