



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC NO. 594 OF 2013

MARGARET WAMBURA CHUBI1ST PLAINTIFF

JAMES MWANIKI CHUBI 2ND PLAINTIFF

VERSUS

NJAGI CHUBI1ST DEFENDANT

JOSEPH NJAGI MUNENE2ND DEFENDANT

RULING

By their plaint filed herein on 22/5/2013, the plaintiffs/applicants sought against the defendants/respondents a declaration that the sub-division of land parcel No. KABARE/GACHIGI/2109 by defendants/respondents was illegal and wrongful and cancellation of the same plus a refund of the crops destroyed.

Simultaneously with that plaint, the plaintiffs/applicants filed a Notice of Motion under **Order 40 Rule 1 and 2 of the Civil Procedure Rules** seeking an injunction remedy in respect of land parcel No. KABARE/GACHIGI/2109 and the sub-division thereof being KABARE/GICHIGI/2715 and 2716 until this suit is determined.

The defendants/respondents filed a defence to the claim and a replying affidavit in opposition to the said application.

The parties' advocates appeared before me on 10/6/2013 and canvassed the said application orally. That is the subject of this ruling.

I have considered the application, the supporting and replying affidavit as well as the submissions by the advocates and other relevant annextures.

It is not in dispute that the 1st and 2nd plaintiff and the 1st defendant were the joint owners of the parcel of the land known as KABARE/GACHIGI/2109 (hereinafter referred to as the suit land). It is also not in dispute that on 14/9/2012, the 1st defendant sold $\frac{3}{4}$ acres out of the suit land to the 2nd defendant at a consideration of Ksh. 800,000/=. According to paragraph 3 of the sale agreement between the 1st and 2nd defendants, the 1st defendant was to ***“carry out the sub-division process to separate his share”*** from the suit land which he would then transfer to the 2nd defendant. Although the 2nd defendant/respondent has stated in his replying affidavit that the plaintiffs/applicants were aware about this transfer to him, the affidavit of the 1st plaintiff/applicant in support of this application is that the

plaintiffs/applicants were not aware about the sub-division which was done behind their back and that they only knew about the transaction involving the 1st and 2nd defendants/respondents when they saw the 2nd defendant/respondent putting beacons on the land in May, 2013. It was then that they did a search at the Lands office and discovered that the title in respect of the suit land had been closed and new sub-divisions made creating KABARE/GACHIGI/2715 and 2716 and that the former had been transferred to the 2nd defendant/respondent. According to the plaintiffs/applicants, they were not even involved in signing the mutation that did the sub-division. Since the sale agreement is dated 14/9/2012, and the title deed in respect of KABARE/GACHIGI/2715 which the 1st defendant/respondent sold to the 2nd defendant/respondent is dated 25/4/2013, it is clear that by the time the 1st defendant/respondent was selling his portion to the 2nd defendant/respondent, the original title was still KABARE/GACHIGI/2109 as the land had not been sub-divided. Indeed the sale agreement is to the effect that the 1st defendant/respondent was selling his share of 0.3 Ha to the 2nd defendant/respondent. As the land was co-owned, the three owners had to agree on the terms and conditions of the sale including its partition. That is provided for under **Section 96 (i) of the Land Registration Act**. Indeed under **Section 94 (i) of the Land Registration Act**, none of the joint owners could deal with their un-divided share of the suit land without the consent in writing of the other owners. Similar provisions are found in **Sections 101 to 104 of the now repealed Registered Land Act** under which the suit land was registered. In view of those clear provisions of the law, the onus was on the 1st defendant to show that the plaintiffs consented to the partition and sale of the suit land. The plaintiffs aver that they were not involved in any partition of the suit land and I have not been shown any consent in writing signed by them. Since the interests of the plaintiffs/applicants and the 1st defendant/respondent in the suit property was joint and un-divided, it was necessary for the 1st defendant/respondent to involve the plaintiffs/applicants in any sale or sub-division of the same.

The submissions that the 2nd defendant/respondent was an innocent purchaser does not appear to be supported by the documentary evidence herein. The fact that he had to go to Court in Kerugoya Principal Magistrate's Court Civil Case No. 317 of 2012 to obtain orders of transfer of 0.3 Ha out of the suit land is a clear indication that he must have been aware that the transaction was not above board. Indeed the order issued by the Court in the Case No. 317 of 2012 also lifted the cautions and restrictions on the suit land which was evidence enough to the 2nd defendant/respondent that his transaction with the 1st defendant/respondent over the suit land was fraught with problems.

From the above, I am satisfied that the plaintiffs/applicants have established a prima facie case with a probability of success to warrant the injunctive remedy which is one of the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A. 358**.

On the second principle set out in the **GIELLA** case (supra) which is that the applicant has to show that he may otherwise suffer irreparable injury which would not otherwise be adequately compensated by an award of damages, this Court has already found, prima facie, that the plaintiffs/applicants were not involved in the sub-division of the jointly owned suit property. That is contrary to the law and as was held in **MOHAMED VS COMMISSIONER OF LANDS & FOUR OTHERS K.L.R (E & L) I at page 217**, once a transgression against the law is established against a party, it is no answer to allege that the applicant may be compensated in damages.

Finally, if the Court were to determine the issue on a balance of probability, it would do so in favour of the applicants.

Ultimately therefore, I grant the orders sought in the plaintiffs/applicants Notice of Motion dated 22/5/2013. Costs in the cause.

B.N. OLAO

JUDGE

2/7/2013

2/7/2013

Before B.N. OLAO – JUDGE

CC – Muriithi

Mr. Ngige for Ms Thungu for Plaintiff present

Ms Kiragu for Kimemia for Defendant present

COURT: Ruling delivered in open Court this 2nd day of July 2013.

B.N. OLAO

JUDGE

2/7/2013