



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 54 OF 2019

RAPHAEL GACHOKI NJANGURU.....APPELLANT

VERSUS

BENEDICT KARAGU NDANJU.....1ST RESPONDENT

SUSAN MUTHONI NDANJU.....2ND RESPONDENT

RULING

Introduction

Before me is the Notice of Motion dated 16th December 2019 brought under *Order 40 Rule 1 CPR, Section 1A, 1B and 3A CPA*. The applicant seeks the following orders:-

(1) Spent.

(2) That the Honourable Court be pleased to issue with an order for cancellation of Title Deed for land parcel No. INOI/KIAGA/1243 and INOI/KIAGA/1244 being sub-division of INOI/KIAGA/326.

(3) That the Honourable Court be pleased to issue with an order for removal of bones for the 1st and 2nd defendants late father from the land parcel No. INOI/KIAGA/1243 and 1244 with the security from the OCS Kerugoya Police Station and the same be transferred to his clan land at Kibingo.

(4) That the defendants be restrained by way of temporary injunction as against to interfering, entering and/or working on land parcel No. INOI/KIAGA/1243 and 1244 pending the hearing and determination of this application inter-partes and thereafter the main suit.

(5) That the 1st and 2nd defendants father fraudulently obtained land parcel No. INOI/KIAGA/326 which is the subject matter of this suit without the consent of the plaintiff and later change to the defendants herein in this suit and I pray the Honourable Court be pleased to issue with an order for cancellation of 1st and 2nd defendants Title deed for land parcel No. INOI/KIAGA/1243 and 1244 for the same was fraudulently obtained.

(6) That the Court be pleased to issue with an order restraining the defendants, servants, agent, husband, wife, children, relatives, friends and any other relating to the defendants herein in this case from entering into, trespassing into, cultivating, demolishing structures thereon, disposing, selling, interfering with and/or in any other manner whatsoever dealing with any or all those parcel of land known as INOI/KIAGA/1243 and 1244 (hereinafter referred to as suit properties pending the hearing and determination of the suit).

(7) That the Court be pleased to issue with an order for cancellation of Title No. INOI/KIAGA/1243 and 1244 and the same order be served upon Land Registrar Kirinyaga Ndia for registration and insert the names of the defendants and be replaced with the names of the plaintiff.

(8) That this Honourable Court has jurisdiction to hear and determine this suit.

(9) Costs be provided for.

(10) That any other fraudulent act yet to be discovered.

The application is premised on the following grounds:-

- (a) That the defendants father fraudulently changed land No. INOI/KIAGA/326 and then changed to the 1st and 2nd defendants fraudulently also without consent to the plaintiff.
- (b) That barring of the 1st and 2nd defendants father from the same land.
- (c) That the Chief Magistrate failing to cancel Title deed for land parcel No. INOI/KIAGA/1243 and 1244 which is sub-division of INOI/KIAGA/326.
- (d) A declaration that parcel No. INOI/KIAGA/1243 and 1244 be reverted to the plaintiff.
- (e) That the said interference has been carried out fraudulently by defendants' father and without letter of consent to the plaintiff.
- (f) That the plaintiff shall suffer irreparable loss if the order from the Chief Magistrate remains as it is now.
- (g) AND GROUNDS in the annexed affidavit of RAPHAEL GACHOKI NJANGURU and further grounds to be adduced at the hearing hereof.
- (h) That the Honourable Court is the only Court which can cancel the same title deed.

Applicant's Statement of Facts

The applicant in his supporting affidavit deponed that land parcel No. INOI/KIAGA/326 was his clan land which was fraudulently changed by 1st respondent in 1967. He said that he was registered as owner in 1961. He stated that on 25th August 2006, the 1st respondent applied for sub-division and title deed was closed for sub-division. The applicant further stated that after the 1st respondent's father sub-divided L.R No. INOI/KIAGA/326 into two portions, he gave the respondents No. 1 and 2 whom their father died before the conclusion of Civil Case No. 181 of 2015 (Chief Magistrate Court Kerugoya). The applicant also stated that the 1st respondent was given parcel No. INOI/KIAGA/1243 measuring 1.60 Ha. while the 2nd respondent was given parcel No. INOI/KIAGA/1244 measuring 0.60 Ha. He wants this Court to issue an order for removal of bones for the 1st and 2nd defendants father from the land parcel No. INOI/KIAGA/1243 and 1244 with the security from the OCS Kerugoya Police Station and the same be transferred to his clan land at Kibingo.

Respondents Statement of Facts

The respondents filed grounds of opposition/Preliminary Objection and a replying affidavit. The Grounds of opposition/Preliminary Objection are as follows:-

- (1) That this application has no merit and/or any basis.
- (2) That the suit is res-judicata.
- (3) The plaintiff has no cause of action against the defendants.
- (4) The orders sought in the application are the same in the plaint and the life of the suit is pegged on the application.
- (5) No injunction ought to be issued against a registered owner of land.
- (6) The applicant has not paid costs of the previous suits.
- (7) The suit is fatally defective as no grounds of fraud are advanced.
- (8) The suit is time barred.
- (9) That the applicants have not advanced any sufficient grounds upon which the orders sought may be made.

The replying affidavit is sworn by Susan Muthoni Ndanju, the 2nd respondent who stated that the applicant seems to have a complaint with her father and not the respondents and that he failed to sue their father and therefore this suit is defective and raises no cause of action against them. The 2nd respondent also stated that she acquired the suit land through a transfer from her late father after following all the requisite procedures in transferring the land. She stated that the applicant has sued her, her brother and their father in ELC No. Misc. 20/2014 (Kerugoya) claiming the same orders for cancellation of their title deed and that the case was dismissed.

The 2nd respondent further deponed that the applicant had also sued her and the 1st respondent in CMCC No. 181/2015 (Kerugoya) seeking the same orders and the case was also dismissed. She said that the applicant

has not paid the costs of the previous suits and that this suit should be stayed until the costs of the previous suits are paid. He annexed a copy

of the bill of costs marked **BKN 3(a)**. The respondent also stated that this suit is res-judicata and that the plaintiff has not demonstrated prima facie case with any probability of success. He stated that he is the registered owner of land parcel No. INOI/KIAGA/1243 since 25/8/2006 and has been in occupation of the same and that no injunction ought to be issues against a registered owner of land.

Legal Analysis

I have considered the Notice of Motion dated 16th December 2019 and the supporting affidavit. I have also considered the replying affidavit and the annexures in support thereto. I have equally considered the grounds of opposition/Preliminary Objection. I have noted that the plaintiff/applicant is acting in person. The respondent in his replying affidavit has deponed that he is the registered owner of the suit property L.R. No. INOI/KIAGA/1243 and that he has been in occupation since he was registered on 25/8/2006. He also deponed that the prayers the applicant is seeking in the said application are similar to those in the plaint which if granted will dispose of the entire suit. The principles for the grant of injunction under **Order 40 Civil Procedure Rules** were set out in the celebrated case of **Giella Vs Cassman Brown & Company Limited (1973) E.A. 358** where it was held at **page 360** 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. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience (E.A. INDUSTRIES VS TRUFOODS (1972) E.A. 420.)”

I have looked at the factual statements in support and in opposition to the said application. I have also looked at the grounds of opposition/Preliminary Objection in which the respondents have raised weighty issues of a preliminary nature. I have warned myself that I am not expected to decide the finality of the issues raised at this stage considering that the applicant is acting in person. On the face of the record, it is my humble view that the applicant has not established a prima facie case with a probability of success as envisaged in the **Giella** case (supra). The applicant has not also shown that he will suffer irreparable injury which would not be adequately compensated by an award of damages if the interlocutory orders sought are not granted. Deciding the application on the third limb of the formula laid down in **Giella Vs Cassman Brown Co. Limited** (supra), I find that the balance of convenience tilts against granting the orders sought.

Consequently, the said Notice of Motion dated 16th December 2019 is hereby dismissed with costs in the cause. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 9th day of October, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Kiragu holding brief for Ann Thungu
2. Appellant in person – present
3. Mbogo – Court clerk