



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. 31 OF 2019**

**MILCAH NANGAMI..... PLAINTIFF**

**VERSUS**

**JULIUS KHAOYA WANYONYI..... 1<sup>ST</sup> DEFENDANT**

**ELIUD WECHULI INGWE.....2<sup>ND</sup> DEFENDANT**

**ANTHONY MAKOKHA.....3<sup>RD</sup> DEFENDANT**

**DISHON SERETO..... 4<sup>TH</sup> DEFENDANT**

**NICK WAMALWA.....5<sup>TH</sup> DEFENDANT**

**WILBERFORCE WAMBULWA..... 6<sup>TH</sup> DEFENDANT**

**GILBERT WANYONYI ..... 7<sup>TH</sup> DEFENDANT**

**DAVID BARAZA..... 8<sup>TH</sup> DEFENDANT**

**FLORANCE SANGURA..... 9<sup>TH</sup> DEFENDANT**

**STEPHEN WAFULA MPALA..... 10<sup>TH</sup> DEFENDANT**

**MOSES BARASA..... 11<sup>TH</sup> DEFENDANT**

**PHILIP MANGONE..... 12<sup>TH</sup> DEFENDANT**

**FELISTER NEKESA WAFULA..... 13<sup>TH</sup> DEFENDANT**

**ROBERT WALIAULA.....14<sup>TH</sup> DEFENDANT**

**R U L I N G**

By her plaint filed herein on 18<sup>th</sup> December 2019, the plaintiff sought Judgment against the fourteen (14) defendants in the following terms: -

(a) A declaration order against the defendants that land parcel NO BUNGOMA/NDALU/28 is matrimonial property and that the sale of part of the said land by the 1<sup>st</sup> defendant to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> defendants is null and void.

(b) Eviction orders to remove the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> defendants and demolish all structures and houses built on the land parcel NO BUNGOMA/NDALU/28 by the said defendants.

**(c) That an injunction be issued restraining the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> defendants from trespassing, ploughing leasing, building, planting or in any other way dealing with the land parcel NO BUNGOMA/NDALU/28.**

**(d) Costs.**

The basis of the plaintiff's claim is that she and the 1<sup>st</sup> defendant were married in 1960 and bought the land parcel **NO BUNGOMA/NDALU/28** (the suit land) where they established their matrimonial home and are blessed with ten (10) children. However, without her consent, the 1<sup>st</sup> defendant irregularly entered into sale agreements with the other defendants to whom he sold part of the suit land some of whom have proceeded to build houses on their portions thus necessitating this suit.

The 1<sup>st</sup>, 11<sup>th</sup>, 13<sup>th</sup> defendants are yet to file their defences to the claim.

In a joint defence filed on 22<sup>nd</sup> January 2020, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, and 14<sup>th</sup> defendants pleaded that the plaintiff was at all material time present and acknowledged the sale agreements to which she appended her signature and Identity Card Number. In any case, the suit land is solely owned by the 1<sup>st</sup> defendant and is not matrimonial property. That they are bona fide purchasers for value some of whom have been in possession for a period exceeding 12 years and the plaintiff's suit is therefore statute barred. The defendants also pleaded that this Court has no jurisdiction. Annexed to the defence are copies of the sale agreements between the 1<sup>st</sup> defendant and the other defendants herein.

By a Notice of Motion dated 23<sup>rd</sup> July 2020 and filed under Certificate of Urgency, the plaintiff citing the provisions of **Order 40 Rule 1, 2, and 3 of the Civil Procedure Rules** sought the following orders against the defendants: -

**1. Spent**

**2. Spent**

**3. That there be restraining orders restraining the defendants, their agents or servants from any other way interfering further with the suit land pending the hearing and determination of the suit.**

**4. That the defendants be condemned to pay costs of this application.**

The gravamen of the application which is founded on the grounds set out therein and supported by the plaintiff's affidavit also dated 23<sup>rd</sup> July 2020 is that the plaintiff is the wife to the 1<sup>st</sup> defendant and the suit land is matrimonial property. However, without her consent or that of the Land Control Board, the 1<sup>st</sup> defendant has transferred portions of the suit land to the other defendants. That the plaintiff reported the issue to the Director of Public Prosecution who declined to take any action because of the pendency of this suit and it is therefore in the interest of justice that this Court grants the orders sought. Annexed to the application is a letter dated 29<sup>th</sup> May 2020 from the office of the Director of Public Prosecution, a Certificate of Search in respect of the suit land and photographs showing a home.

The application was place before me on 27<sup>th</sup> July 2020 and I directed that it be served upon the defendants who would have 14 days within which to respond and that the same would be canvassed by way of written submissions and ruling would be on 8<sup>th</sup> October 2020 by way of electronic mail.

Having been served, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> defendants filed both a Notice of Preliminary Objection and a replying affidavit sworn by **ELIUD WECHULI INGWE** the 2<sup>nd</sup> defendant on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> to 13<sup>th</sup> defendants. In the Preliminary objection, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> defendants state that the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is statute barred and that the plaintiff did not exhaust the remedies set out in **Sections 11, 13, 14 and 26 of the Land Consolidation Act** and **Sections 26 and 29 of the Land Adjudication Act**. Further, that this suit is an abuse of the process of this Court as there are contractual agreements between the plaintiff and defendants and another Environment and Land Court case **No 12 of 2019** at Kitale Court.

In his replying affidavit, the 2<sup>nd</sup> defendant deponed, inter alia, that in 2004, the plaintiff and 1<sup>st</sup> defendant offered to sell land to him and they entered into an agreement (annexture **EW I – 1**) at a consideration of Kshs. 400,000/= . That a surveyor was engaged and the boundaries marked and the 2<sup>nd</sup> defendant took possession and put up a house. That the 3<sup>rd</sup> defendant also purchased and took possession of a portion of the suit land where he too built his home. That both he and the other defendants who also purchased portions of land from the plaintiff and 1<sup>st</sup> defendant have been awaiting the consent of the Land Control Board but were instead served with summons in this suit on December 2019. That the plaintiff is driven by malice and is colluding with her sons to frustrate the transfer process and if this application is allowed, they will suffer irreparable loss since they are innocent purchasers who have fulfilled their contractual obligations. Annexed to the replying affidavit are copies of various sale agreements entered into by some of the defendants and photographs of their homes.

Submission were filed both by **MR NYAMU** instructed by the firm of **R. E. NYAMU & COMPANY ADVOCATES** for the plaintiff and by **MR NJIIRI** instructed by the firm of **P. K. NJIIRI & ADVOCATES** for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 14<sup>th</sup> defendants.

I have considered the application, the rival affidavits, the Preliminary Objection as well as the submissions by Counsel.

Before I interrogate the merits or otherwise of the application, I must first address the issue of this Court's jurisdiction to determine this suit. That is because, in paragraph 11 of the defence, it is pleaded that: -

***“The jurisdiction of the Honourable Court is denied”***

I should have expected that the defendants would follow up on the challenge to this Court’s jurisdiction in the Preliminary Objection. This is because, a question of jurisdiction is so central in proceedings and ought to be put out of the way at the earliest opportunity. As was held in the **OWNERS OF THE MOTOR VESSEL “LILLIANS” .V. CALTEX OIL KENYA LTD**, a Court must down it’s tools the moment it decides that it has no jurisdiction. Unfortunately, however, other than the mere pleading in paragraph 11 of the defence, it has not been suggested on what ground this Court lacks the jurisdiction to determine this case. The dispute herein is one involving ownership of land and **Section 13 of the Environment and Land Court Act** donates to this power the jurisdiction to determine such disputes. I can only conclude that the plea on jurisdiction was not raised with any seriousness or at worst, is a typographical error.

The Notice of Motion dated 23<sup>rd</sup> July 2020 seeks an interlocutory injunction pending trial. The application must therefore be considered while bearing in mind the well-known principles set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD 1973 E.A 358**. These are: -

- 1. The Applicant must establish a prima facie case with a probability of success.**
- 2. An interlocutory injunction will not normally be granted unless the Applicant shows that he will suffer irreparable injury that cannot be adequately compensated by an award of damages.**
- 3. If in doubt, the Court will determine the application on the balance of convenience.**

A prima facie case was defined in **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL No 39 of 2002 [2003 eKLR]** as follows: -

***“..... a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

In **NGURUMAN LTD .V. JAN BONDE NIELSON & OTHERS C.A CIVIL APPEAL No 77 of 2012 [2014 eKLR]**, the Court stated thus:-

***“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation.”*** Emphasis mine.

The Court then adds: -

***“The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance, or as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”*** Emphasis mine.

Finally, as was stated in **FILMS ROVER INTERNATIONAL .V. CANNON FILM SALES LTD 1986 3 ALL. E. R**, the Court considering such an application should take the route or course that appears to carry the lower risk of injustice should it turn out to have been **“wrong”**.

This Court shall be guided by the above precedents and others while considering this application.

As to whether the plaintiff has established a prima facie case, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, and 14<sup>th</sup> defendants have filed together with their defence copies of sale agreements by which the 1<sup>st</sup> defendant was selling to the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 14<sup>th</sup> defendants’ portions of land hived from the suit land. The sale agreements were executed on various dates starting from 26<sup>th</sup> March 2010 (in the case of the 7<sup>th</sup> defendant) upto 8<sup>th</sup> November 2019 (in the case of the 14<sup>th</sup> defendant). The 1<sup>st</sup> defendant has not rebutted the averments that he sold those portions of land to the said defendants. But what is even more important is that in almost all of those sale agreements, the plaintiff is listed as a witness and has actually signed as such. Again, there was no supplementary affidavit by the plaintiff rebutting the contents of the said agreements. It is therefore difficult, given those circumstances, for the plaintiff to plead, as she has now done, that the sale agreements were executed without her knowledge or consent. She cannot therefore be heard to claim that there is ***“a right which has been or is threatened with violation”*** when she witnessed the 1<sup>st</sup> defendant relinquishing his interest in portions of the suit land – **NGURUMAN LTD .V. JAN BONDE NIELSEN** (supra). Neither can she properly claim ***“that there exists a right which has apparently been infringed by the opposite party”*** – **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD** (supra).

It is also instructive to note that some of the defendants have been in possession and occupation of their respective portions of land as far back as March 2010 (over 10 years ago now). Surely, it cannot be that it is only now that the plaintiff has discovered that the defendants are trespassing and interfering with the suit land. There is merit in the 2<sup>nd</sup> defendant’s replying affidavit when he depones in paragraph 16 thereof that the ***“plaintiff is driven by malice colluding with her sons to frustrate transfer process.”***

The plaintiff also appears to hinge her application on the fact that no consent of the Land Control Board was obtained for the transactions. That may be so as no such consents have been annexed to the replying affidavit. That would therefore render the sale agreements null and

void. However, as is now clear following the decision in **WILLY KIMUTAI KITILIT .V. MICHAEL KIBET C.A CIVIL APPEAL No 51 of 2015 [2018 eKLR]**, that alone cannot defeat the defendants' rights as the doctrines of constructive trust and proprietary estoppel may be applicable.

In my view therefore, the plaintiff has not surmounted the first limb of the test set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD** (supra) and her application must be dismissed on that ground alone. This is because, the grounds set out in that case must be considered sequentially and as was held in the case of **NGURUMAN LTD .V. JAN BONDE NIELSEN** (supra): -

***“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”***

Having said so, I have perused the plaintiff's application and the supporting affidavit and there is no mention of what irreparable injury that cannot adequately be compensated by an award of damages, if any, she will suffer if the application is declined. Already, as I have stated above, some of the defendants have occupied their respective portions for periods in excess of 10 years without any hinderance. If there was any likelihood of such irreparable injury, it ought to have been raised many years ago. All that the plaintiff has deponed to is that the defendants' actions are ***“meant to cause confusion on the suit property”*** (paragraph 10) and further, that the defendants have erected ***“barbed wire”*** and put up ***“fencing posts.”*** I do not consider that to be evidence of irreparable loss or injury. The plaintiff has therefore also not surmounted the second limb of the test in **GIELLA .V. CASSMAN BROWN & CO LTD** (supra).

Even if I was in doubt as to the first and second limbs set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD** (supra) and consider this application on the balance of convenience, it would tilt in favour of the defendants. This is because, granting the orders sought by the plaintiff would amount to evicting the defendants from the suit land and demolishing their homes, which are among the orders sought in the plaint, before the main suit is heard and determined. It would result in granting an interlocutory mandatory injunction. Such an order can only be granted under special circumstances and only in clear cases – **LOCABAIL INTERNATIONAL FINANCE LTD .V. AGROEXPORT & OTHERS (1986) ALL. E. R 901**. I do not consider this to be one of those clear cases where the grant of such an order would be justified.

The up – shot of the above is that the plaintiff's Notice of Motion dated 23<sup>rd</sup> July 2020 and filed herein on 24<sup>th</sup> July 2020 is devoid of any merits. It is accordingly dismissed with costs to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> defendants.

Finally, I notice that there is also at this Court Environment and Land case **No 12 of 2019** involving the plaintiff and three other defendants over the same land. The parties will have to consider consolidating the two cases at the appropriate time.

**Boaz N. Olao.**

**J U D G E**

**8<sup>th</sup> October 2020.**

**Ruling dated, signed and delivered at BUNGOMA this 8<sup>th</sup> day of October 2020** by way of electronic mail as was advised to the parties on 27<sup>th</sup> July 2020.

**Boaz N. Olao.**

**J U D G E**

**8<sup>th</sup> October 2020.**