



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ENVIRONMENT AND LAND COURT AT KERUGOYA

CIVIL SUIT NO. 402 OF 2013

SOSPETER NJUKI KAGUNDU 1ST PLAINTIFF/APPLICANT

RACHAEL M. KAGUNDU 2ND PLAINTIFF/APPLICANT

NGURUNGU MUTHOKE 3RD PLAINTIFF/APPLICANT

VERSUS

NICHOLAS NGUTHI KIVINDA 1ST DEFENDANT/RESPONDENT

MUTUNYI KIVEO NGUTHI 2ND DEFENDANT/RESPONDENT

STANLEY NJIRU KIURA 3RD DEFENDANT/RESPONDENT

RULING

This is in respect to the plaintiffs/applicant's Notice of Motion dated 26th March 2013 and filed herein on 27th March 2013 seeking orders restraining the defendants/respondents either through themselves, their agents, servants or anyone claiming under them or otherwise howsoever from offering for sale, developing, selling, transferring, alienating, wanton, wasting or in any way disposing of or dealing with property known as L.R MBEERE/MBITA/2600, 3184, 3185, 3186, 3187, 3188, 3189 and 10 pending the hearing and determination of the suit. The same is supported by the affidavit of SOSPETER NJUKI KAGUNDU the 1st plaintiff/applicant herein in which he claims, inter alia, that the plaintiffs/applicants are beneficiaries of the aforementioned parcels of land (hereinafter referred to as the suit properties) and which he depones that the 1st defendant/respondent fraudulently registered. In their plaint filed on the same day, the plaintiffs/applicants pleaded that the defendants/respondents misled the illiterate parents of the plaintiffs/applicants and registered themselves as owners of the suit properties.

The application is opposed and in their replying affidavits, the respondents claim ownership of parcels No. MBEERE/MBITA/3184, 3185, 2600, 3186, 3187, 3188 and 3189 and have annexed Titles to the same. Defences have been filed in which the allegation of fraud is denied.

I have considered the application, the rival affidavits and the submissions by counsels.

This being an application for injunctive reliefs, it has to be considered in light of the principles set out in the case of **GIELLA VS CASSMAN BROWN 1973 E.A 358** which are:-

1. ***The Court must be satisfied that the applicant has a prima facie case with a probability of success***
2. ***That the applicant would suffer irreparable injury which is uncompensable in damages and,***
3. ***If in doubt, the Court will determine the application on the balance of convenience***

In assessing whether the applicant has laid out a prima facie case, the Court at this stage only looks at the strength of the pleadings and depositions filed by the parties to determine whether a prima facie case is established. And what is a prima facie case. In **MBAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS 2003 K.L.R 125**, Bosire J A in a judgment which the two other judges agreed with had the following to say about what is a prima facie case:-

“ So what is a prima facie case? I would say that in civil cases, it is a case in 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 letter”

From the material placed before me in this case, the defendants/respondents are the registered proprietors of the suit property and have annexed to their respective replying affidavits the copies of the title deeds to the said properties. The properties are registered under the ***repealed Registered Land Act*** and such registration is prime facie evidence that the defendants/respondents enjoy absolute ownership of the said properties which can only be defeated where fraud is proved. The plaintiffs/applicants have pleaded fraud in their plaint which has been denied in the defence and replying affidavits and this will be a matter for trial and cannot be determined on the basis of the affidavits and other depositions filed herein. Similarly, the plaintiffs/applicants have pleaded in their plaint that in the alternative, the defendants/respondents hold the disputed titles in trust for them and other beneficiaries. Again, this is not an issue that can be determined now and will have to await to be determined at the trial because whether or not a trust exists is a matter of evidence – **DORCAS WASIKE VS BENSON KHISA C.A CIVIL APPEAL NO. 87 of 2004 (ELDORET)**.

On the material before me, the defendant/respondents being the registered proprietors of the suit properties enjoy absolute ownership of the same which will only be defeated if fraud and/or trust are established at trial. In the circumstances, I am unable to find that the plaintiffs/applicants have established a prima facie case to warrant the granting of the orders sought and it would be a rare case to injunct the owner of a property. I do not find this to be such a case.

The principles set out in the **GIELLA** case (supra) have to be considered sequentially. The plaintiff/applicants have not surmounted the first hurdle of establishing a prima facie case and there is no reason to consider the other two principles.

The up-shot of the above is that the applicants Notice of Motion dated 26th March 2013 and filed herein on 27th March 2013 is hereby dismissed with costs.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2013

4/11/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Mr. Njoroge for Plaintiff – absent

Mr. Muyodi for Defendants – present

COURT: Ruling delivered this 4th day of November 2013 in open Court

Mr. Njoroge for plaintiff/applicant absent

Mr. Muyodi for defendant/respondents present

B.N. OLAO

JUDGE

4TH NOVEMBER, 2013