



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 229 OF 2013

SERAH WANJIRU NGONDE.....1<sup>ST</sup> PLAINTIFF

SAMWEL NJENGE NGONGE .....2<sup>ND</sup> PLAINTIFF

JAMES JOSIAH KIMOTHO.....3<sup>RD</sup> PLAINTIFF

VERSUS

CHARLES NGONDE..... 1<sup>ST</sup> DEFENDANT

OBADIA WANYOIKE.....2<sup>ND</sup> DEFENDANT

COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT

RULING

Coming before me for determination is the Notice of Motion dated 13<sup>th</sup> February 2013 in which the Plaintiffs are seeking for orders of an interlocutory injunction restraining the Defendants from transferring, encumbering, trespassing into, taking possession, leasing, evicting the Plaintiffs from the parcel of land known as **Dagoretti/Waithaka/1058** (hereinafter referred to as the "Suit Property") pending the hearing and determination of this application and suit together with costs.

The Application is premised upon the grounds appearing on the face of it as well as the Supporting Affidavit of Samuel Njenga Ngonde who stated that the Suit Property has all the time been ancestral land passed down from general to generation in their family. He further stated that once the Suit Property was passed on to the 1<sup>st</sup> Defendant/Respondent who is their father, he decided unilaterally to sell it. He further stated that when he and the other Plaintiffs realized this intention by their father, they proceeded to register a caution in the Lands Office. However, he stated that the said caution was subsequently removed fraudulently and upon their conducting a search on the Suit Property on 28<sup>th</sup> November 2012, they realized that a transfer had been registered transferring the Suit Property to the 2<sup>nd</sup> Defendant/Respondent. He then stated that the new owner of the Suit Property being the 2<sup>nd</sup> Defendant has instructed his lawyers to send them an eviction notice dated 4<sup>th</sup> February 2013 giving them 14 days to vacate the Suit Property.

The Applicants further filed a Supplementary Affidavit sworn by Samuel Njenga Ngonde dated 21<sup>st</sup> March 2013 in which he stated that their application is pegged on the fact that they are entitled to the Suit Property being their ancestral land. He stated that their ancestral land was initially Dagoretti/Waithaka/172 which their parents sold to enable their father pursue further studies in Israel. He stated further that their parents then bought Dagoretti/Waithaka/212 out of which, along with other

subdivisions, the Suit Property was hived, which remained their ancestral land but registered in their father's name. He further stated that vide a family meeting, it was agreed that he and his siblings receive ¼ acre each and the Suit Property be allocated to the 3<sup>rd</sup> Plaintiff who was to stay on it together with the 1<sup>st</sup> Plaintiff who was still unmarried. He further stated that their father together with his second wife and her children relocated to a parcel of land in Ngong but remained the registered proprietor of the Suit Property together with the other subdivisions which he refused to transfer to his children as had been agreed. He further stated that when their mother passed on in the year 2004, their father returned to the Suit Property to look for a purchaser thereof leading to his transferring the same to the 2<sup>nd</sup> Defendant, who was fully aware that that was ancestral land.

The Application is contested. The 1<sup>st</sup> Defendant filed his Replying Affidavit sworn on 25<sup>th</sup> March 2013 in which he swore that he is the registered proprietor of the Suit Property which was a product of Dagoretti/Waithaka/212. He produced a copy of the Land Certificate in respect of Dagoretti/Waithaka/212 in his name. He further disclosed that he purchased the said parcel of land namely Dagoretti/Waithaka/212 in the year 1963 from one Mr. Muthama Chiira. He produced a copy of the agreement for sale in respect thereof. He further disclosed that in the year 2011, he decided to dispose off the Suit Property to the 2<sup>nd</sup> Defendant. He attached a copy of the agreement for sale. He further stated that the Suit Property was never ancestral land as the same was not passed down to him through inheritance. As to the lifting of the caution, he stated that the Plaintiffs had no *locus standi* to lodge a caution against the Suit Property as they have no claim or entitlement to the Suit Property.

The Application is further contested by the 2<sup>nd</sup> Defendant vide his Ground of Objection and Replying Affidavit sworn by him on 26<sup>th</sup> February 2013 in which he stated that he had known the 1<sup>st</sup> Defendant for several years when he approached him to purchase the Suit Property. He further stated that he agreed to purchase the Suit Property and that they went to a lawyer to have a sale agreement drafted. He further disclosed that before buying, he conducted a due diligence and established that the 1<sup>st</sup> Defendant had subdivided his land into 6 portions and that the Suit Property was one of them. He further disclosed that he bought the Suit Property from the 1<sup>st</sup> Defendant at a sum of Kshs. 2,700,000/-.

He further disclosed that in the course of the purchase, he learnt that the 1<sup>st</sup> Defendant had bought the larger parcel of land from one Muthama Ciira way back in 1962, therefore the land was not ancestral land. He further disclosed that upon learning of the impending sale the 1<sup>st</sup> Defendants children registered cautions on all the 6 subdivisions which were subsequently removed upon the intervention of the District Officer. He further stated that the Plaintiffs were informed about the lifting of their caution against the Suit Property by the Land Registrar through their address. He further contended that both he and the 1<sup>st</sup> Defendant followed all the laid down procedures for the transfer of the Suit Property into his name and that the Plaintiffs have no case against him and the 1<sup>st</sup> Defendant.

Both the Plaintiffs and the 2<sup>nd</sup> Defendant filed their written submissions which have been read and taken into consideration by this court.

In deciding whether to grant the temporary injunction sought after by the Plaintiffs, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”***

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case

was described as follows:

***“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is 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.”***

Section 24(a) of the Land Registration Act provides as follows:

***“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”***

Section 26 (1) of the Land Registration Act states as follows:

***“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except***

- 
- a. ***On the ground of fraud or misrepresentation to which the person is proved to be a party; or***
  - b. ***Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

Looking at the facts of this case, the Plaintiffs’ claim over the Suit Property is based on their assertion that the same is ancestral land. However, the 1<sup>st</sup> Defendant has demonstrated to the satisfaction of this court that the same was purchased from one Muthama Ciira way back in 1962. The 1<sup>st</sup> Defendant has displayed to this court a copy of his Land Certificate in respect of the larger parcel of land from which the Suit Property is hived. While neither the 1<sup>st</sup> Defendant nor the 2<sup>nd</sup> Defendant have produced copies of their Certificate of Title in respect of the Suit Property, I note that the Plaintiffs have not controverted their assertion as the registered proprietors of the Suit Property. Bearing this in mind, the legal provisions cited above apply in this case. In effect, the 1<sup>st</sup> Defendant was entitled to deal with the Suit Property as he wished including transferring the same to the 2<sup>nd</sup> Defendant as he did. This right is entrenched in the legal provisions cited above. Accordingly, I find that the Plaintiffs have no claim over the Suit Property and have therefore not established a prima facie case with a probability of success. Having arrived at this conclusion, I see no reason to further interrogate whether they have satisfied the other two conditions for the grant of an interlocutory injunction set out in the Giella case cited above.

Arising from the foregoing, this application is hereby dismissed. Let each party bear their own costs.

**SIGNED AND DELIVERED AT NAIROBI THIS 1<sup>st</sup> DAY OF November 2013**

**MARY M. GITUMBI**

**JUDGE**