



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 705 OF 2012

WALLACE MWAURA MUNGAI PLAINTIFF

VERSUS

DANIEL GICHIMU KARIUKI 1ST DEFENDANT

JAMES KINYANJUI KUNGU 2ND DEFENDANT

MURUGU KUNGU 3RD DEFENDANT

JOSEPH KIMENJU KUNGU 4TH DEFENDANT

MARY WANGUI NDUNGU 5TH DEFENDANT

GITHUNGURI CONSTITUENCY

RANCHING CO. LTD. 6TH DEFENDANT

R U L I N G

1. The Plaintiff has brought his Application by way of Notice of Motion dated 7th November 2012 seeking firstly that pending the hearing and determination of the same, the Court be pleased to grant a temporary interim injunction restraining the Defendants by themselves, employees and/or their agents from dealing with the title number Ruiru Kiu Block 2/4267 (hereinafter “the suit property”) in any manner whatsoever. His further prayer is that the temporary interim injunction should be put in place until the final determination of this suit. The said Notice of Motion is brought under the provisions of **Order 40 (1) (a), (4) (1) & (2), 3, 3 (3), 4 (1)** of the *Civil Procedure Rules* as well as **section 3A** of the *Civil Procedure Act*. The Application is predicated on the grounds that the Plaintiff has valid title documents for the suit property having bought the same from its rightful owners. The Plaintiff also maintained that the first, second, third and fourth Defendants had no colour of right in respect to the title of the suit property. Those Defendants had continued to erect structures on the suit property which if not stopped would, according to the Plaintiff, defeat the very essence of the loss that the Plaintiff intended to safeguard by his Application.
2. The Plaintiff’s said Application is supported by his Affidavit sworn on 7th November 2012. He

averred to the fact that on or about the 9th March 2012, he had entered into an agreement to purchase the suit property from the fifth Defendant for the amount of Shs. 6 million. Prior to entering into the said Agreement, the Plaintiff maintained that he had carried out due diligence in relation to the suit property which was previously owned by the sixth Defendant who had subdivided its land and allocated plots to its members. Prior to the fifth Defendant buying the suit property, the same had belonged to one Harrison Kungu Ndungu who had transferred it to the fifth Defendant. The Plaintiff had been assured by the sixth Defendant that the property was clean and belonged to the fifth Defendant. After signing and completing the transfer documents into his name, the Plaintiff detailed that he had visited the suit property for inspection purposes as he intended to develop the same. He was surprised to find a sign erected thereon indicating that the suit property was not for sale. Upon enquiry of both the fifth and sixth Defendants, they professed no knowledge as to who was actually situated upon the suit property. On a subsequent visit, together with the fifth Defendant, the Plaintiff discovered that the persons claiming to be owners of the same were the first, second, third and fourth Defendants. They had allegedly obtained title to the suit property in 2004, whereas the record of the sixth Defendant indicated that the original owner, the said Mr. Ndungu was the registered proprietor at that time. Although the Plaintiff had reported the matter to the Police nothing had been done and the first, second, third and fourth Defendants continued to occupy the suit property.

3. The matter came before this Court on 8th November 2012 under Certificate of Urgency, wherein the Court granted a temporary injunction Order pending the *inter-partes* hearing of the Plaintiff's said Application. On the 16th November 2012, the fifth Defendant swore a Replying Affidavit as regards the Plaintiff's said Application. She detailed that when she and the Plaintiff had found out that the suit property was being interfered with by the first to fourth Defendants, they had mutually agreed to rescind the sale from her to the Plaintiff. She had refunded the Plaintiff the sum of Shs. 2 million, retaining Shs. 4 million. The fifth Defendant stated that it was true that the first, second, third and fourth Defendants, either jointly or severally, had no legal or equitable claim to the suit property. Further, the Plaintiff had no claim as against the fifth Defendant and she maintained that she was non-suited.
4. On 5th December 2012, the first Defendant filed Grounds of Objection under the provisions of **Order 51 rule 6** as well as a Replying Affidavit sworn on 3rd December 2012. The Grounds of Objection maintained that the Plaintiff did not have any protestable interest in the suit property. The first Defendant detailed that he was legally seized of a substantial portion of the suit property and had a title therefore, free from all encumbrances. He reiterated that he was legally possessed of his interest in the suit property to the exclusion of everybody else including the Plaintiff. In his Replying Affidavit, the first Defendant detailed that the fifth Defendant had never owned the suit property and that from the outset, it had belonged to the said Harrison Ndungu Kungu. That individual had sold off half an acre to the first Defendant in 1995 and proportionally distributed the remaining three quarters of an acre to his younger siblings, the second, third and fourth Defendants. The deponent attached a copy of the Agreement in this connection. The first Defendant denied that the Plaintiff had carried out any due diligence as regards the purchase of the suit property for, if he had done so, he would have been aware of the registered interest of the first Defendant. In his view, the said Harrison Ndungu Kungu having sold off the property in 1995 had no further interest in the same and lacked the capacity to sell or transfer any interest in the suit property to the fifth Defendant.
5. Further, the first Defendant stated that the sixth Defendant could not properly give any assurance as to the ownership of the suit property as it was involved in the initial transfer to the first Defendant as well as to the second, third and fourth Defendants. The first Defendant attached a copy of the Clearance Certificate dated 22nd April 2004 issued by the sixth Defendant addressed to the District Land Registrar at Thika. He also attached a copy of a Certificate of Official Search dated 5th June 2009, issued on 8th June 2009, which detailed that the proprietors of 0.5 HA of Ruiru Kiu Block 2/4267 were the first, second, third and fourth Defendants. As well, the first Defendant attached a copy of a Certificate of Official Search dated 3rd April 2012 which again detailed that the first to fourth Defendants were the proprietors of the suit property and that a Title

Deed had been issued. One wonders why the first Defendant did not exhibit a copy of that Title Deed to his said Affidavit. However, the first Defendant having confirmed that the suit property was lawfully purchased from the said Harrison Ndungu Kungu detailed that he had paid the sum of Shs. 125,000/- for his portion thereof and attached a copy of the payment instrument being a Banker's Cheque issued by the Gateway House Branch of the Standard Chartered Bank. He confirmed that he had been in occupation of the half acre portion of the suit property since August 1995 and had developed the same. He repeated that the suit property had never belonged to the fifth Defendant and that she had no capacity in which to sell the same. He concluded his said Replying Affidavit by stating that the Plaintiff had no lawful and/or just claim to the suit property and that his Application before this Court should be dismissed.

6. The third and fourth Defendants together swore a Replying Affidavit dated 3rd November 2012. First of all they revealed that the fifth Defendant was their sister in law, married to their brother the said Harrison Ndungu Kungu. They noted that in 1968 their father had shared out the family piece of land between the brothers being the first to fourth Defendants. The third and fourth Defendants noted that the family plot that was to be shared was too small. The said Harrison Ndungu Kungu had approached both their father and the first, second, third and fourth Defendants with the proposal that the family plots be sold and a piece of land procured at Ruiru whereupon each brother would get a plot in his own right. In this way, the suit property was purchased in the year 1972 measuring 1¼ acres. The suit property had then been demarcated, was occupied by the Defendants who commenced living there uninterrupted since 1983. The third and fourth Defendants went on to say that in 1991 there had been a family meeting which resulted in an agreement dated 18th August 1991 which they annexed to the Replying Affidavit. That agreement provided for each of the brothers to get a quarter acre of land while to compensate Harrison for the sale of his earlier plot, he was to get a half acre of land. The same had been surveyed in 1999.
7. The Replying Affidavit then went on to say that after dealing with the shares held in the sixth Defendant, the brothers applied for and secured the title for the suit property in the joint names of the first, second, third and fourth Defendants. The title was issued on 23rd April 2004 and the deponents attached a copy thereof to their said Replying Affidavit. The same revealed that the first Defendant was the registered owner of 0.2 HA of the land and the other three Defendants were the registered owners of 0.1 HA each. The third and fourth Defendants then related events in 2011 in relation to a boundary dispute as between the brothers. It had been resolved that each of the brothers would appoint their own independent surveyor to determine the boundaries of each of their plots. From the Replying Affidavit, it does appear that the boundary dispute is yet to be resolved hence the reason why the Title for the suit property remains in the joint names of the four brothers being the first to fourth Defendants herein. In order to further exemplify that position, the third and fourth Defendants annexed to the Replying Affidavit the share certificates in the name of the said Harrison Ndungu Kungu dated 19th October 1972 and that certificate in their joint names dated 7th September 1999. The third and fourth Defendants reiterated the first Defendant's position that the fifth Defendant could not possibly have bought the land from her husband and that the sixth Defendant did not have any locus nor mandate to effect the alleged transfer of the suit property to the fifth Defendant and/or the Plaintiff herein. The third and fourth Defendants pointed out that they were in occupation of the suit property not the Plaintiff. The latter's claim was based on consideration that he allegedly paid to the fifth Defendant and, as he was not in occupation of the suit property, the balance of convenience lay with the first to the fourth Defendants.
8. The Plaintiff filed his submissions herein on 27th February 2013. He maintained that he had purchased the suit property from the fifth Defendant having paid Shs. 6 million therefore. Relying upon the authority of **Giella v Cassman Brown (1973) EA 358**, the Plaintiff maintained that he had established before Court a *prima facie* case with probabilities of success in that from the records available at the sixth Defendant's offices, it was evident that it had been the lawful proprietor of the suit property at the time and had transferred the same to the fifth Defendant, issuing a share certificate in her name as evidence of ownership of the suit property. The Plaintiff also maintained that it had been established that the Title issued to the first to fourth Defendants

had been obtained by fraudulent means by their presenting forged letters to the Land Registrar at Thika. They had also participated in the forgery of the fourth Defendant's documents, the presentation of fraudulently altered documents as originals and fraudulently backdating the date of the Transfer of the Title to the suit property to appear as if it had been issued in the year 2004. It was the Plaintiff's submission in that with the rescission of his Sale Agreement with the fifth Defendant, he had been exposed to loss of expectation. He submitted further that the Defendants' evidence did not invalidate their defective title to the suit property and, as such, they should be prohibited from occupying or dealing with the same. Finally, the Plaintiff noted that the sixth Defendant had neither entered appearance nor filed a Defence despite having been served with summons.

9. The fifth Defendant filed her submissions on 19th July 2013 and stated that she did not oppose the injunctions sought by the Plaintiff. She had mutually agreed (orally) to rescind the sale agreement of the suit property that she had entered into with the Plaintiff upon discovery that the suit property was being interfered with by the first, second, third and fourth Defendants. She had refunded to the Plaintiff the amount of Shs. 2 million out of the total purchase price agreed at Shs. 6 million. She then made the interesting submission that she did not consider that the Plaintiff's Application had been presented before Court with entirely clean hands. Presumably, the fifth Defendant meant by this that the Plaintiff had failed to disclose to this Court as to the Shs. 2 million refund as above. In any event, the fifth Defendant maintained that she was non-suited as there was no reasonable cause of action disclosed as against her.
10. The first Defendant's submissions were also filed on 19th July 2013 and opened by stating that the Plaintiff's suit was baseless and ought to be struck out. He maintained that the Plaintiff had not proved a *prima facie* case that warrants an injunction. In his opinion, there were four issues for the Court's consideration being:

“(a) Whether the 5th defendant had capacity to effect the alleged sale

(b) Whether the plaintiff has brought any evidence to show ownership or proof of transfer

(c) Whether the Plaintiff has any protestable interest

(d) Whether the plaintiff exercised due diligence when buying the parcel of land.”

The first Defendant commented that the fifth Defendant had tried to explain how she had come to own the suit property but that she had realised at some point that her husband, the said Harrison Ndungu Kungu, had already sold the suit property. As far as the Plaintiff was concerned, the first Defendant noted that he had not shown any proof that indeed there had been a transfer to him (or indeed the fifth Defendant) of the suit property, neither had he shown any search that he did carry out due diligence. He had only brought before the Court a copy of the Sale Agreement that he had entered into with the fifth Defendant. He had not provided any Title Deed or any other proof of ownership. He had annexed receipts for monies paid to the fifth Defendant but no proof of ownership. In the first Defendant's opinion, the only claim that the Plaintiff had was as against the fifth Defendant for the monies paid to her. The Plaintiff's loss in this regard could be compensated for by him being repaid the amount that he had outlaid to the fifth Defendant. The first Defendant concluded his submissions by stating that he had shown that he had legal documents that demonstrated that he had legally purchased his portion of the suit property and that he had exclusive proprietary rights thereto against all others.

11. In opening their submissions filed herein on 20th May 2013, the third and fourth Defendants set out what they considered to be the issues for the Court to determine as regards the Plaintiff's said Application as follows:

“(a) Whether the 3rd and 4th Defendants are bona fide owners of the subject parcel of

land.

(b) Whether the 5th Defendant had capacity to effect the alleged sale.

(c) The applicability of caveat emptor.

(d) Whether the Plaintiff has made the elements stipulated in **Giella –vs-Cassman Brown** as against the 3rd and 4th Defendants.

(e) Whether the present case and the application is an abuse of the Court process.

(f) The upshot.”

Thereafter the third and fourth Defendants went into the history of their acquisition of their portion of the suit property owned since 1983 without any incident. They pointed to the initial registration of their brother Harrison Ndungu Kungu as the first shareholder of the suit property through the share certificate issued by the sixth Defendant. Having paid the transfer charges, the third and fourth Defendants were issued with their own share certificates by the sixth Defendant in April 2004. Following upon that, the third and fourth Defendants, together with the first and second Defendants, applied for the Title to the suit property which was lawfully issued and it is still subsisting as conclusive proof of ownership. There was nothing that had been placed before Court to controvert the third and fourth Defendants’ exclusive proprietary rights over their portions of the suit property. The third and fourth Defendants denied that the fifth Defendant had any capacity to effect the alleged sale of the suit property to the Plaintiff. She had made no effort in her Replying Affidavit to explain to the Court how she had become the owner of the suit property and how she had procured the purported Share Certificate dated 25th November 2011 from the sixth Defendant.

12. The third and fourth Defendants continued their submissions as regards the applicability of caveat emptor. They accused the Plaintiff of not carrying out due diligence as required of a prudent buyer otherwise he could have established the ownership particulars of the third and fourth Defendants herein. He had obviously not visited the suit property prior to purchasing it otherwise he would have noted the development thereon. They concluded that the Plaintiff could not now seek to drag innocent parties into what they termed a “botched sale” and growth which had nothing to do with the third and fourth Defendants. As regards the principles laid down in **Giella v Cassman Brown**, the third and fourth Defendants maintained that the Plaintiff had not even, in elucidating what kind of investigation he had made before purchasing the suit property, if at all. He had made wild, unfounded claims of fraud in his Plaint without any justification in law or in fact. In the opinion of the third and fourth Defendants, the Plaintiff had fallen far short of establishing a *prima facie* case, at least as against the third and fourth Defendants. As far as irreparable loss is concerned, the third and fourth Defendants submitted that the Plaintiff had allegedly paid Shs. 6 million to the fifth Defendant for the suit property. Both he and the fifth Defendant had mutually consented to rescind the Sale Agreement entered into between them. The Plaintiff had received a part refund of Shs. 2 million. The Plaintiff had never even set foot on the suit property. As a consequence, his interest was not so much in the purchase of the suit property but in seeking a refund from the fifth Defendant of the liquidated sum of Shs. 4 million. There was no irreparable harm that the Plaintiff would suffer that could not be compensated by way of damages. Further, the third and fourth Defendants maintained that since they had been residing on the suit property since 1983 the balance of convenience tilted in their favour. They concluded that the Plaintiff had not satisfied the conditions as per **Giella v Cassman Brown** (supra) to warrant the remedy of injunction. The Plaintiff clearly had no cause of action as against the third and fourth Defendants. Indeed, they maintained that he was unlikely to sustain the main suit as against them. His Application was devoid of merit and should be dismissed.

13. To succeed in an application for interlocutory injunction, the Plaintiff must satisfy this court in relation to the principles of granting interlocutory injunctions as per **Giella v Cassman Brown** (supra) as exemplified in **Mrao Ltd. versus First American Bank of Kenya Ltd & 2 Ors (2003)**

KLR 125. That case detailed the principles of granting an interlocutory injunction as follows:

- "a) The applicant must show a *prima facie* case with a probability of success;**
- b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;**
- c) If the court is in doubt, it will decide an application on the balance of convenience."**

Mrao also established that:

"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."

14. In my view, the Plaintiff herein has failed to establish a *prima facie* case sufficient to warrant the granting of injunctive relief. The Agreement for Sale of the suit property as between him and the fifth Defendant dated 9th May 2012 is unstamped and seems to have been drawn by a company of real estate agents – Bemwa Realtors Ltd. There is no completion date specified therein and on the whole must be considered a shoddy document particularly as it has not been drawn up by an advocate. The Plaintiff's claim to being entitled to the suit property under the said Agreement for Sale, is based on receipts exhibited as "WMM 2" to the Supporting Affidavit, from the sixth Defendant dated 25th November 2011 (so far as the fifth defendant is concerned) and dated 30th September 2011 (so far as the said Harrison Ndungu Kungu is involved in the transaction). Then there is the share certificate in the name of the Plaintiff issued by the sixth Defendant dated 16th March 2012 exhibited as "WMM 3". As far as I can see from the face thereof, it bears no relation to the suit property. There is what is entitled a Clearance Certificate for 1 ¼ Shamba (whatever that may mean), issued by the sixth Defendant addressed to the District Land Registrar at Thika. That is exhibited as part of "WMM 3". That so-called Clearance Certificate does detail the Title No. of the suit property but, in my opinion, cannot fly in the face of the copy of the Title Deed annexed to the Replying Affidavit of the third and fourth Defendants as exhibit "MJ 6". Further, I am satisfied that the prior dated other documentation annexed by the third and fourth Defendants to their said Replying Affidavit, including copies of similar Share Certificates, as well as the Clearance Certificate from the sixth Defendant dated 22nd April 2004 quite apart from the Certificates of Official Searches, clearly establish the first to fourth Defendants' claim to the suit property. However, these are all matters which will be gone into at the trial of this suit in due course.

15. What is for this Court to determine is whether interlocutory orders in favour of the Plaintiff should be made in the meantime. In view of the documentation that I have referred to above, I do not consider that the Plaintiff has made out a *prima facie* case. Further, I tend to agree with the fifth Defendant when she stated in her Replying Affidavit that the Plaintiff had not come before this Court with totally clean hands. He has had the benefit of a refund of Shs. 2 million out of the Shs. 6 million that he paid to the fifth Defendant under the said Agreement for Sale dated 9th May 2012. He also failed to inform the Court that the said Agreement for Sale had been mutually rescinded as between him and the fifth Defendant. To my mind therefore, I agree with the submissions of the third and fourth Defendants herein to the extent that the Plaintiff's real claim is as against the fifth Defendant and is with regard to the refund of Shs. 4 million being the difference between the agreed purchase price and the Shs. 2 million he has already received from the fifth Defendant. In my view, the loss which the Plaintiff has suffered, most likely at the hands of the fifth Defendant, can be adequately compensated by an award of damages. As I see it, I have no need to consider the third test in relation to the principles of **Giella v Cassman Brown** (supra)

in relation to the balance of convenience.

16. As a result, I dismiss the Plaintiff's Notice of Motion dated 7th November 2012 with costs to the first, second, third, fourth and fifth Defendants.

DATED and delivered at Nairobi this 11th day of November, 2013.

J. B. HAVELOCK

JUDGE