



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 345 OF 2019**

**JANE RUGURU GATHURU.....PLAINTIFF**

**=VERSUS=**

**PETER GATHURU CHEGE.....1ST DEFENDANT**

**REGINA NYAMBURA.....2ND DEFENDANT**

**ERNEST MWANIKI WANGUL.....3RD DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LIMITED.....4TH DEFENDANT**

**CHIEF LAND REGISTRAR.....5TH DEFENDANT**

**THE ATTORNEY GENERAL.....6TH DEFENDANT**

**RULING**

1. The plaintiff and the 1st defendant are wife and husband. From 5/8/2006 to 23/1/2014, the 1st defendant was the registered proprietor of Land Parcel Number **Dagoretti/Riruta/1648 (the suit property)**, having acquired it through succession to the estate of his late mother. In 2014, the 1st defendant sold and transferred the suit property to the 3rd defendant. The 3rd defendant was financed by the 4th defendant (the Bank) through a charge created against the title.

2. On 4/11/2019, the plaintiff brought this suit against the six defendants. She sought a permanent injunctive order against the Bank. Further, she sought cancellation orders in relation to the entries relating to proprietorship and encumbrances, currently existing in the names of the 3rd and 4th defendants, respectively. In the alternative, she prayed for damages equivalent to the current market value of the suit property. Her case was that the suit property was ancestral land that was bequeathed to her husband (the 1st defendant) during the subsistence of their marriage by his parents as an inheritance and was hived out of **Title Number Dagoretti/Riruta/944**. She contended that she was a beneficial owner of the suit property whose original title document she held. She averred that the 1st defendant fraudulently transferred the suit property to the 3rd defendant. Prior to the impugned transfer, she had sued the 2nd defendant in Nairobi ELC Case No 518 of 2012, seeking an eviction order against her.

3. Contemporaneous with the plaint, the plaintiff brought a notice of motion dated 31/10/2019 seeking an order restraining the 3rd and 4th defendants against selling, disposing or interfering with the suit property, pending the hearing and final determination of this suit. She further sought an order restraining the 1st, 2nd and 3rd defendants against interfering with the suit property. Lastly, she sought a *status quo* order relating to the suit property. The said application is the subject of this ruling.

4. The application was supported by the plaintiff's affidavit sworn on 31/10/2019 in which she outlined her case as summarized above. She further deposed that she lodged a caution which was duly registered against the subject title, to restrict any transactions over the suit property. To support this contention, she exhibited a filled copy of an unwitnessed, uncertified and unregistered copy of Form LR 22 (Caution) dated 30/3/2012. She also exhibited a copy of an unsworn affidavit dated 30/3/2012.

5. The 1st to 3rd defendants did not respond to the motion. The 4th defendant filed a statement of defence dated 18/12/2020 and opposed the application through a replying affidavit sworn on 18/12/2019 by Jackson Kimathi. The 4th defendants' case was that in December 2013, the 3rd defendant applied for a loan through its Kawangware Branch and was accorded a loan facility of Kshs 9,100,000 for the purpose of purchasing the suit property, which was at the time registered in the name of the 1st defendant. The 3rd defendant provided the title to the suit property whereupon the 4th defendant carried out due diligence. Subsequently, the charge was duly registered and the funds were disbursed to the 3rd defendant. The 3rd defendant had, however, subsequently failed to service the loan and the debt on the loan account stood at Kshs 8,655,641 as at 10/12/2019. The 4th defendant denied the allegations of fraud on their part.

6. The 5th and 6th defendants filed a joint statement of defence dated 21/11/2019 in which they denied the allegation of fraud on their part. They averred that the suit property was transferred and charged in compliance with relevant statutory provisions. They added that the plaintiff's suit was fatally defective for non-compliance with the mandatory provisions of the Government Proceedings Act.
7. The application was canvassed orally on 13/7/2020. Mr Wambugu, counsel for the applicant, submitted that the suit property was a matrimonial property. He added that the 1st defendant had fraudulently obtained a replacement title while the plaintiff held the original title. He urged the court to preserve the suit property by granting the injunctive order.
8. Supporting the application, Ms Opondo, counsel for the 2nd defendant submitted that the 2nd defendant supported the application because she was in possession of the suit property.
9. Ms Kwamboka, counsel for the 4th defendant submitted that the 3rd defendant purchased the suit property from the 1st defendant and charged the title to the 4th defendant. She added that the plaintiff was trying to change the goal posts by claiming that the suit property was matrimonial property yet her case had been that the suit property was the 1st defendant's ancestral land. She added that trustship was a matter of fact which needed to be proved through evidence. She further submitted that the 4th defendant carried out due diligence before accepting the title as security. She added that the Bank would be prejudiced by an injunctive order.
10. I have considered the application, the responses thereto, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudential principles applicable to the key question in this application. The single question falling for determination in this application is whether the applicant has satisfied the criteria upon which jurisdiction to grant an interlocutory injunction is granted.
11. The criteria for grant of an interlocutory prohibitory injunction was spelt out in **Giella v Cassman Brown (1973) EA 358**. First the applicant is required to demonstrate a *prima facie* case with a probability of success. Secondly, the applicant is required to demonstrate that if the injunctive order is not granted, he would suffer irreparable damage that cannot be indemnified through an award of damages. Thirdly, should there be doubts on either of the first two limbs, the court is required to decide the application on a balance of convenience. Lastly, at this stage of interlocutory proceedings, the court does not make conclusive or definitive findings or pronouncements on the substantive issues in the suit. Conclusive and definitive findings and pronouncements are for the trial forum.
12. In the present application, the applicant contends that the suit property was at all material times an ancestral land registered in the name of her husband but she had a beneficial interest in it. Her husband inherited the suit property from his mother. The applicant lives in Thika while the suit property is situated in Dagoretti. The applicant's case is that the transfer of the suit property from her husband to the 3rd defendant was fraudulent. She contends that she caused a caution to be registered against the title to prevent dealings in the suit property and the caution was fraudulently removed. To support her allegation of fraud, she exhibited Form RL 22 (Caution) which, though dated and signed by her, is unwitnessed, uncertified and unregistered. Further, she exhibited an affidavit which, though signed by her, is unsworn because it does not bear the signature/name/stamp of the commissioner for oaths. Lastly, she did not exhibit a copy of the parcel register. In my view, these unwitnessed, uncertified, unregistered, and uncommissioned documents do not constitute evidence of existence of a caution on the subject parcel register.
13. Further, the applicant has at this interlocutory stage not demonstrated a *prima facie* case of involvement in the alleged fraud by the 3rd and 4th defendants who are the current registered proprietor and chargee, respectively, of the suit property. There is no *prima facie* evidential materials presented to the court at this stage to demonstrate that the 3rd and 4th defendants were privy to the alleged fraudulent activities.
14. Thirdly, the applicant has not demonstrated that an ultimate award of damages would be inadequate as an indemnification. To the contrary, she has made a plea for damages as an alternative relief.
15. In the absence of doubt about the first and second limbs of the requirements in **Giella v Cassman Brown (1973) EA 358**, I will not focus on the third limb.
16. The totality of the above findings is that the plaintiff/applicant has failed to satisfy the criteria upon which our courts exercise jurisdiction to grant interlocutory injunctions. Consequently, the plaintiff's notice of motion dated 31/10/2019 is dismissed for lack of merit. The plaintiff shall bear costs of the motion.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF OCTOBER 2020.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Wambugu for the Plaintiff

Ms Daudi for the 2nd Defendant

Ms Kwamboka for the 4th Defendant

Court Clerk - June Nafula