



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 598 of 2011

**IRENE NJOKI MUIRURI (Suing as the personal
representative of the estate of**

MARY WANGUI KARANJA.....PLAINTIFF

VERSUS

SAMUEL MWANGIDEFENDANT

RULING

The application for determination before the court is the Notice of Motion dated 31st October 2011 brought by the Plaintiffs under Order 50 Rule 1 and Order 40 Rule 1, 2, and 3 of the Civil Procedure Rules, and section 1A and 1B of the Civil Procedure Act. The application is supported by the affidavit of Irene Njoki Muiruri, which was deponed to on the same date.

The application is seeking for the following substantive orders:-

1. An order of temporary injunction restraining the Defendant, his servants, agents or any other person acting under his authority or claiming from him from reselling, offering for sale, transferring or leasing RUIRU EAST/JUJA EAST BLOCK 2/1972 pending the hearing and determination of this suit.
2. A mandatory injunction compelling the District Land Registrar Thika to revert title of RUIRU EAST/JUJA EAST BLOCK 2/1972 (hereinafter referred to as the suit property) to the name of Mary Wangui Karanja

The grounds for the application are that the Plaintiff is the personal representative of the estate of Mary Wangui Karanja who died on 14th March 2009, and who was the owner of the suit property. The Plaintiff thereupon discovered in January 2011 that the suit property had been transferred to one Samuel Mwangi Muchahi who is the Defendant herein, after conducting a search at the Lands Registry at Thika. Further, that the sale agreement was purportedly entered by the deceased Mary Wangui Karanja and Defendant on the 23rd July 2010 after the Deceased's death. The Plaintiff reported this matter to the Chief Registrar, the Kenya Police and the Criminal Investigation Department and investigations are being conducted.

The Plaintiff fears that as the Defendant was issued with a certificate of title with respect to the suit property on 15th November 2010, there is danger that the same may be transferred to unsuspecting third parties. The Plaintiff annexed as evidence copies of the following: a grant of letters of administration issued to her by this Court on 8th June 2011; the said sale agreement dated 23rd July 2010; a certificate of

death showing that Mary Wangui Karanja died on 14th March 2009; a certificate of search of the suit property dated 18th January 2010; the title issued to the Defendant with respect to the suit property; and the title to the suit property issued to the Deceased on 23rd November 1994, the original of which the Plaintiff claims is in her possession.

The application is opposed by the Defendant. He depones in his replying affidavit sworn on 12th January 2012 that he is the absolute owner of the suit property, which land was sold to him legally. He explained that the suit property had been offered for sale in an advertisement in the *Daily Nation* newspaper dated 22nd June 2010, and that he contacted the advertiser through a telephone number that had been provided therein whereupon they met and he was shown the suit property. Further, that the advertiser claimed the land belonged to his cousin Mary Wangui Karanja, who was later introduced to the Defendant and they agreed on the purchase price. The Defendant also stated that he conducted a search and confirmed that the suit property was in the seller's name, and they entered into an agreement for the sale on 23rd July 2010. They later applied for the land board consent which was issued on 1st July 2010. The Defendant further stated that he paid Kshs 750,000/= as the purchase price to the said Mary Wangui Karanja in cash.

The Defendant averred that on learning that the suit property was in dispute in March 2011, he contacted his advocates who wrote a letter to the *Daily Nation* newspaper on 12th April 2011 requesting for the details of the person who had advertised for the sale of the said property. The said newspaper provided the name of the advertiser as one Julius Gikonyo. The Defendant further averred that he didn't know the seller before the transaction, neither did he know her whereabouts, since all the transactions were done either at his Advocate's office or at the Thika Lands office.

The Defendant stated that the telephone calls he has made to the seller have gone unanswered since his discovery of the dispute, and admitted that he was summoned by the police at Thika where he met the Plaintiff herein. The Defendant attached as evidence the copies of the following documents; the advertisement in the *Daily Nation* newspaper of June 22, 2010; the title issued to him on 15th November 2010 with respect to the suit property; the Letter of Consent issued on 1/07/2010; a bank statement; and the sale agreement dated 23rd July 2010.

The application was heard on 1st October 2012. Mr. Makori, the counsel for the Plaintiff, submitted that no letters of administration had been taken out when the property was allegedly sold to the Defendant, and that the said transaction was therefore fraudulent. Counsel further submitted that the Plaintiff had established a *prima facie case* and had produced documents to show that the property belonged to Mary Wangui Karanja who was deceased at the time the alleged transfer. Further, that under section 45 of the Law of Succession Act (Cap 160), it is illegal and criminal to transact with the property of a deceased person without letters of administration. He also submitted that the contract of sale was illegal *ab initio* and any subsequent transaction was also void *ab initio*.

Counsel for the Defendant, Mr. Kinuthia, reiterated the arguments made in opposition to the application, and submitted that the death certificate produced by the Plaintiff in evidence did not refer to the seller but someone else who died long before. He contended that the Defendant was a *bona fide* purchaser and did not participate in any fraud as he believed that the seller was the owner of the suit property. The Counsel also denied that the Defendant was an intermeddler under section 45 of the Law of Succession Act, as he is already in occupation of the land and had paid for it. Counsel concluded that the Plaintiff had not stated what irreparable damage she would suffer, while the Defendant would suffer irreparably as he would suffer a loss of Kshs 750,000/= that he used to purchase the suit property.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. At this stage what I am required to do is determine the application before me on the basis of the requirements stated in ***Giella vs Cassman Brown & Co Ltd, (1973) EA 358*** as to the grant of a temporary injunction, and in ***Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109*** as to the grant of a mandatory injunction.

In the case of a temporary injunction, the requirements are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience. For a mandatory injunction to issue there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of title to the suit property issued to her deceased mother on 23rd November 1994, and the Defendants has also produced a copy of title with respect to the same property issued to him on 10th November 2010. This is therefore an application that can only be decided on the balance of convenience as the Court cannot at this stage make a finding as to which of the two titles is the valid title. In addition the circumstances under which the second title and later title was issued to the Defendant and whether there was any fraud involved can only be established after full trial.

It is my finding that the balance of convenience tilts in favour of the Plaintiff as her title was the first in time, and it is necessary to maintain the *status quo* and preserve the property while the inquiry is done as to how the transfer of the suit property to the Defendant arose. It is also the finding of this Court that since there are outstanding issues to be settled after the full hearing, this is not a clear case for a mandatory injunction to issue.

The order of this Court arising from the foregoing reasons is that the Defendant, his servants, agents or any other person acting under his authority or claiming from him are hereby restrained from reselling , offering for sale, transferring or leasing RUIRU EAST/JUJA EAST BLOCK 2/1972 pending the hearing and determination of this suit or until further orders. The prayer for a mandatory injunction is denied.

The costs of the application dated 31st October 2011 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 7th day of November 2012.

P. NYAMWEYA

JUDGE