



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 1408 OF 2016

MARGARET WANGARI NJERI.....PLAINTIFF/APPLICANT

=VERSUS=

GRACE WAMBUI.....1ST DEFENDANT/RESPONDENT

NJONGA INVESTMENT COMPANY LTD.....2ND DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 14th November 2016 brought under Section 63(e) and 3A as read together with Section 1A and 1B of Cap 21 Laws of Kenya Order 40 Rules 1 and 2 and Order 51 rule 1 of the Civil Procedure Rules 2010 and Section 68 of the Land Registration Act No. 3 of 2012.

2. It seeks order:-

(1) Spent

(2) Spent

(3) That the 1st defendant, her servants, agents, employees and any and/or all persons howsoever acting for or in her stead be restrained from encroaching into, trespassing in, interfering with and/or howsoever dealing with a parcel of land known and/or described as Plot No. 7 within Ruiru/Ruiru East Block 2 No.4317 pending the hearing and determination of this suit.

(4) Spent

(5) That the 2nd defendant, its servants, agents, employees, and any and/or all persons howsoever acting for or in its stead be inhibited from transferring, registering or issuing title to the 1st defendant or any other person other than the plaintiff pending the hearing and determination of this suit.

(6) Costs be in the cause.

3. The grounds are on the face of the application and are set out in paragraphs a to e.

4. The application is supported by the affidavit on Margaret Wangari Njeri the plaintiff/applicant herein sworn on the 14th November 2016.

5. The application is opposed. There is a replying affidavit sworn by Grace Wambui, the 1st defendant/respondent sworn on the 24th March 2017. There is also a replying affidavit sworn by Patrick Mutugi Kagiri in support of the 1st defendant/respondent's case on the 24th March 2017. The 2nd defendant/respondent who was served did not file any response.

6. There is also the plaintiff's/applicant's notice of motion dated 20th December 2016 brought under Section 3A of the Civil Procedure Act, Order 40 Rule 3 (1) and (3) of the Civil Procedure Rules and Section 5(1) of the Judicature Act. It seeks orders that the 1st defendant/respondent be committed to civil jail for disobeying the order so the court issued on 23rd November 2016. The application is supported by the affidavit of Margaret Wangari Njeri sworn on the 20th December 2016.

7. In response to this application the 1st defendant/respondent has sworn a replying affidavit dated the 24th March 2017.

8. On the 21st March 2017, the court directed that the two applications be heard together and canvassed by way of written submissions.

The plaintiff's/applicant's submissions

9. There is an agreement of sale between the plaintiff and the 2nd defendant and a share certificate was issued by the 2nd defendant in favour of the plaintiff. The 1st defendant/respondent purports to have purchased the suit plot yet there is no sale agreement between her and the 2nd defendant to that effect. That the 1st defendant in her scheme to defeat the plaintiff's claim purports to have sold the land to a third party yet she was present in court on 29th November 2016. The plaintiff/applicant prays that the notice of motion dated 14th November 2016 be allowed and further that the 1st defendant/respondent be cited for contempt of court.

The 1st defendant's/respondent's submissions

10. The plaintiff/applicant has failed to convey legal documents to show that she is vested with absolute ownership rights and interests over the suit property. That the suit property belongs to Patrick Mutugi Kagiri who is in possession and occupation of the same. In the absence of the 2nd defendant's respondent this court cannot make a conclusive finding as to who between the plaintiff and the 1st defendant was the purchaser of the suit property.

The 1st defendant/respondent has relied on the case of **Alfred Kariuki Kihu vs Stanley Charles Muchiri & Another [2011] eKLR**.

11. The plaintiff/applicant ought to enjoin Mr. Kagiri (the third party) to these proceedings. The plaintiff/applicant has failed to demonstrate irreparable damage as she is not in possession of the suit property. She has relied on the case of **David Waweru Gathoni (suing as a legal representative of the Estate of Hannah Gathoni Wanyama (deceased) vs Joseph Kipkemoi Ruto [2015] eKLR**. The balance of convenience tilts in favour of Mr. Kagiri. She has also relied on the case of **Ochieng Okello vs Judy Akinyi Oduor Aguka & 14 Others [2012] eKLR**.

12. The plaintiff's/applicant's application is opposed as there is a replying affidavit on record. That the 1st defendant/respondent was granted leave to file the said replying affidavit, hence it is properly on record. She prays that the application be dismissed with costs.

13. I have considered the Notice of Motion dated 14th November 2016, the affidavit in support and the annexures. I have considered the replying affidavit and the annexures, the written submissions of counsel and the authorities cited. The issues for determination are:

(i) Whether or not the plaintiff's application has met the threshold for grant of temporary injunctions.

(ii) Who should bear costs?

14. In their submissions counsel have substantiated their client's respective positions stated in their respective affidavits. It is now appropriate to consider the facts which have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown and Co. Ltd [1973] EA 358**. In the case of **Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

15. It is the plaintiff's/applicant's case that there is an agreement of sale between her and the 2nd defendant. A share certificate was issued by the 2nd defendant/respondent in her favour. The 1st defendant/respondent claims to have purchased the suit plot from the 2nd defendant/respondent yet he has not exhibited a sale agreement to that effect. I have considered the facts presented by the plaintiff/applicant and find that she has established a prima facie case with probability of success at the trial.

16. In the case of **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & Another 1990 KLR 557 Bosire J (as he then was)** held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

I am satisfied that the plaintiff/applicant deserves this kind of protection.

17. I also find that the plaintiff/applicant has demonstrated that she is likely to suffer irreparable injury which cannot be compensated by damages if the injunction is not granted. I am of the view that the balance of convenience tilts in favour of the plaintiff/applicant as she was issued with a share certificate by the 2nd defendant/respondent. In conclusion, I find merit in the notice of motion dated 14th November 2016 and the same is allowed.

18. I have considered the Notice of Motion dated 20th December 2016 and the affidavit in support. I have considered the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination is whether or not the alleged contemnor is guilty of contempt of the court order and what orders should this court make in the circumstances. In their submissions, counsel have substantiated their client's respective position stated in their respective affidavits.

19. It is the plaintiff's/applicant's submission that orders issued on 29rd November 2016 were served upon the 1st defendant. At the time the 1st defendant who had just commenced construction went ahead and completed the construction despite a court order. The plaintiff/applicant

prays that the 1st defendant/respondent be punished for disobeying the court order.

20. The 1st defendant/respondent on the other hand submits that she was not in control of the suit property when the order was issued. Further that the plaintiff/applicant has failed to prove that she (1st defendant) knowingly and wilfully disobeyed the court order. She prays that the application be dismissed with costs.

21. I have gone through the court record on the 29th November 2016. The 1st defendant was personally present in court. She sought time to put in her response to the notice of motion dated 14th November 2016. She was aware of the court orders issued on 15th November 2016 as the same were extended in her presence. At the time she did not tell the court that she had disposed the suit plot to a third party. I have looked at the purported sale agreement annexed to her replying affidavit and marked "GW1". The same appears to be a sham. There is no evidence of whether any consideration was ever paid. I find that this is just a plot by the 1st defendant to avoid punishment for disobeying a court order.

22. I am of the view that the 1st defendant/respondent went ahead to complete construction despite the court orders. I rely on the authority of **Maisha Nishike Ltd vs Commissioner of Lands & Others [2011] eKLR** in finding that the 1st defendant/respondent knowingly, wilfully disobeyed the court order issued on 15th November 2016 and extended on 29th November 2016. I find merit in this application and allow it.

23. In conclusion, therefore, having allowed the notice of motion dated 14th November 2016, I hereby grant the orders sought namely:-

(a) That a temporary injunction be and is hereby issued restraining the 1st defendant, her servants, agents, employees and any and/or all persons howsoever acting for or in her stead from encroaching into, trespassing in, interfering with and/or howsoever dealing with a parcel of land known as Plot No 7 within Ruiru/Ruiru East Block 2 No 4317 pending the hearing and determination of this suit.

(b) That the 2nd defendant, its servants, agents, employees and any and/or all persons howsoever acting for, in its stead are hereby inhibited from transferring, registering or issuing title to the 1st defendant or any other person other than the plaintiff pending the hearing and determination of this suit.

(c) The costs of this application do abide the outcome of the main suit.

24. With respect to the notice of motion dated 20th December 2016, I grant the orders sought namely:-

(a) That the 1st defendant, Grace Wambui having been found guilty of disobeying the court order issued on 15th November 2016 and extended on 29th November 2016 is hereby fined Kshs.100,000 in default twelve (12) months imprisonment, to be paid within sixty (60) days from the date of delivery of this ruling.

(b) That costs of this application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28TH day of JANUARY 2019

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant