



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 301 OF 2013

GATEI WA NGANDA.....PLAINTIFF/APPLICANT

=VERSUS=

KAMITI FARMERS COMPANY LTD....1ST DEFENDANT/RESPONDENT

PETER KIENJEKU MWAURA.....2ND DEFENDANT/RESPONDENT

JOHAH MBUGUA NJOROGE.....3RD DEFENDANT/RESPONDENT

PATRICK RWAMBA.....4TH DEFENDANT/RESPONDENT

THE COMMISSIONER OF LANDS.....5TH DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR.....6TH DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 27th February 2013 brought under Order 40 Rules 1, 2, 3 and 9 of the Civil Procedure Act, Section 68 of the Land Registration Act and all other enabling provisions of the law.

2. It seeks orders:-

(1) Spent.

(2) Spent.

(3) That pending the hearing and determination of this suit the first, second, third and fourth defendants whether by themselves, individually or jointly, their servants and/or agents or otherwise from doing the following acts or any of them, that is to say from:-

(a) Entering into any sale agreement, selling, transferring, disposing of, pledging, constructing, leasing charging or in any other manner howsoever alienating or dealing with all that piece of land known as NAIROBI BLOCK 117/431, Nairobi.

(b) Effecting any change whatsoever in the state, condition, ownership and occupation of the suit property or any part thereof.

(c) Interfering in any manner whatsoever in the plaintiff's interest in the suit property including the plaintiff's right of occupation and enjoyment of the suit property.

(4) Spent.

(5) An order under Section 68 of the Land Registration Act (Amendment) Act be issued directing THAT ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or any kind of right title or interest in ALL THAT parcel of land known as NAIROBI BLOCK 117/431 with any land registry, government

department, and all other registering authorities BE AND IS HEREBY inhibited pending the hearing and determination of this suit and this order be noted on the respective land register.

(6) That the orders sought in prayer 2, 3, 4 and 5 above do bind the fourth defendant and fifth defendant and further that the fifth and sixth defendant be hereby directed to make entries of the said order in the relevant land register.

(7) That costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 22.

4. The application is supported by the affidavit of Gatei Wa Nganda, the plaintiff/applicant herein sworn on the 27th February 2013 and a further affidavit sworn on the 26th April 2013.

5. The application is opposed. There is a replying affidavit by Mbugua Kariuki the chairman of the 1st defendant/respondent sworn on the 26th April 2013 and a further affidavit by Michael Chege, director of the 1st defendant sworn on the 3rd July 2013. There is also a replying affidavit sworn by Johah Mbugua Njoroge the 3rd defendant/respondent on his own behalf and that of the 2nd defendant sworn on the 17th April 2013. There is also a replying affidavit sworn by Edwin Wafula, Land Registrar based in Ministry of Lands Nairobi sworn on the 27th May 2013.

6. On the 3rd December 2013, the court directed that the application be canvassed by way of written submissions.

7. It is the plaintiff's/applicant's submissions that the suit property belongs to him. The claim that he sold the property is false. The transfer to the 2nd and 3rd defendants was not done by the bona fide officials of the 1st defendant/respondent hence it's a clear case of fraud.

8. The plaintiff/applicant has established that he has a prima facie case with a probability of success. He has put forward the cases of **Giella vs Cassman Brown and Company Ltd [1973] E.A 358. Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125.**

9. The 1st defendant/respondent transferred the share to the plaintiff/applicant and the process of obtaining a title deed from the 5th defendant/respondent commenced. The 5th defendant affirmed that the plaintiff was the rightful allottee of the suit property on 13th March 2002 with the undertaking to issue a lease as soon as the plaintiff formally accepts the conditions. There is no agreement for sale or a transfer instrument to show that 2nd and 3rd defendants purchased the property from the plaintiff/applicant. The 4th defendant/respondent despite being served has not entered appearance yet he is constructing on the suit property.

10. The plaintiff/applicant shall suffer irreparable damage which would not adequately be compensated by an award of damages. He has put forward the cases of **John Kirori Wamurangi vs John Mwaniki Kiarie & Another [2013] eKLR; Margaret Njeri Muiruri vs Bank of Baroda Civ Appeal No 90 of 2001.**

11. The balance of inconvenience tilts in favour of the plaintiff/applicant who is the bonafide owner of the suit property. He prays that the application be allowed.

12. It is the 1st defendant/respondent's submissions that the suit property was transferred to the plaintiff and a share certificate issued on 1st October 1996. On 26th June 2002 the chairman of the 1st defendant acknowledged receipt of sub division scheme approval from the commissioner of lands, confirmed the plaintiff as the allottee of the property and authorized the issuance of the lease to him. The 2nd and 3rd defendants may have purchased the property without confirming who the bonafide directors of the defendants were.

13. It is the 2nd and 3rd defendants submissions that they are the registered owners of the suit property by virtue of a certificate of lease dated 4th September 2012. The plaintiff/applicant does not have title. They have put forward the case of **Paul Muira & Another vs Jane Kendi Ikinuya & Others ELC No 747 of 2007; Muriuki Marigi vs Richard Marigi Muriuki & Another Nyeri CA No 189 of 1996; Joseph Kaburu vs M'ithinji M'Mburugu [2005] eKLR.**

14. A letter of allotment confers a temporary right that becomes subservient to registered interest in the land. The issue of fraud can only be determined at the trial. The rights of a registered proprietor are provided for in Section 26 of the Land Registration Act, 2012.

15. They have also put forward the case of **Hannan Wangui Ithebu vs Joel Ngugi Magu & Another Civil Appeal No 86 of 1999.** The plaintiff/applicant is not entitled to the reliefs sought and prays that the application be dismissed with costs to the defendants/respondents.

16. I have considered the notice of motion dated 27th February 2013, the affidavits in support and the annexures. I have also 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/applicant's application meets the threshold for grant of temporary injunctions.

(ii) Who should bear costs?

17. In their submissions counsel have substantiated their clients 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 Company 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.

18. It is the plaintiff's/applicant's case that he is the owner of the suit property. Further that he did not sell it to the 2nd and 3rd defendants. The 1st defendant transferred the share to plaintiff. The 5th defendant affirmed that he was the rightful allottee of the suit property on 13th March 2002. The 1st defendant/respondent confirms that the suit property was transferred to the plaintiff/applicant and a share certificate issued on 1st October 1996.

19. On the other hand the 2nd and 3rd defendants/respondents claimed to have bought the suit property from the plaintiff/applicant. The plaintiff/applicant has denied. I note that there is no agreement for sale or transfer instrument to show that the 2nd and 3rd defendants purchased the property from the plaintiff/applicant.

20. In the **Kenleb Cons Ltd vs New Gatitu Services 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.

21. The 2nd and 3rd defendants/respondents have failed to prove that they acquired the suit property from the plaintiff/applicant. I am of the view that section 26 of the Land Registration Act 2012 would not afford then any protection in view of the exceptions therein. The 1st defendant/respondent has confirmed that the suit property was transferred to the plaintiff/applicant. I find that the plaintiff/applicant has established a prima facie case with probability of success at the trial.

22. I also find that the plaintiff/applicant has demonstrated that he is likely to suffer irreparable injury which cannot be compensated by an award of damages if the injunction is not granted.

23. I am of the view that the balance of convenience tilts in favour of the plaintiff/applicant who was issued with a share certificate by the 1st defendant/respondent.

24. In conclusion, I find merit in the application and I grant the orders sought namely:-

(a) That pending the hearing and determination of this suit the 1st, 2nd, 3rd and 4th defendants whether by themselves, individually, or jointly, their servants and/or agents be and are hereby restrained from:-

(i) Entering into any sale agreement, selling, transferring, disposing of, pledging, constructing, leasing, charging or in any other manner howsoever alienating or dealing with all that piece of land known as Nairobi/Block 117/431/Nairobi.

(ii) Effecting any change whatsoever in the state, condition, ownership and occupation of the suit property or any part thereof.

(iii) Interfering in any manner whatsoever in the plaintiff's interest in the suit property including the plaintiff's right of occupation and enjoyment of the suit property.

(b) An order is hereby issued under Section 68 of the Land Registration Act is hereby issued directing that all further registration or change of registration in the ownership, leasing, subleasing allotment, user, occupation or any kind of right title or interest in all that parcel of land known as Nairobi/Block 117/431 with any land registry government department and all other registering authorities be and is hereby inhibited pending the hearing of this suit and this order be noted on the respective land registers.

(c) That the orders in (a) and (b) do bind the 4th, 5th and 6th defendants, and further that the 5th and 6th defendants do make entries of the order in the relevant land registers.

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

It is so ordered.

Dated, signed and delivered in Nairobi on this 2ND day of APRIL 2019.

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the 1st Defendant

.....Advocate for the 2nd and 3rd defendants

.....Advocate for the 4th and 5th defendants

.....Court Assistant