



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 34 OF 2018

ANTONY MWANGI NGURUCHI

(Suing as the Legal Representative of the Estate of

GRACE WAIRIMU NGURUCHI).....PLAINTIFF/APPLICANT

VERSUS

JOEL NYORO MAIKO.....1st DEFENDANT/RESPONDENT

MUKANGU MEN AND WOMEN SELF HELP GROUP

(Through its officials)

ELLYDON THIIRU MWETHI (Chairman)

STEPHEN KINYANJUI NJUGUNA (Secretary)

DAVID MUNGAI ITHEBU (Treasurer).....2nd DEFENDANT/RESPONDENT

COUNTY LAND REGISTRAR

NYANDARUA/SAMBURU.....3RD DEFENDANT/RESPONDENT

RULING

1. The matter before me for determination is a Notice of motion dated the 19th June 2018 which seeks the following orders;

i. Spent

ii. Spent

iii. That the Defendants/Respondents by themselves, their servants, agents, or otherwise however be restrained from entering, cultivating, selling, alienating, disposing, encumbering or otherwise dealing with in any way with LR No. Nyandarua/Ndemi/1907, Nyandarua/Ndemi/1908, Nyandarua/Ndemi/1909, Nyandarua/Ndemi/1910, Nyandarua/Ndemi/1911 being subdivisions of Nyandarua/Ndemi/1193, including the new subdivisions being Nyandarua/Ndemi/10819-10824 pending the hearing and determination of this Application.

iv. That the Defendants/Respondents by themselves, their servants, agents, or otherwise however be restrained from entering, cultivating, selling, alienating, disposing, encumbering or otherwise dealing with in any way with LR No. Nyandarua/Ndemi/1907, Nyandarua/Ndemi/1908, Nyandarua/Ndemi/1909, Nyandarua/Ndemi/1910, Nyandarua/Ndemi/1911 being subdivisions of Nyandarua/Ndemi/1193 including the new subdivisions being Nyandarua/Ndemi/10819-10824 pending the hearing and determination of this suit.

v. That the Defendants/Respondents by themselves, their servants, agents, or otherwise however be restrained from interfering with the Plaintiff's possession and use of LR No. Nyandarua/Ndemi/1907, Nyandarua/Ndemi/1908, Nyandarua/Ndemi/1909, Nyandarua/

Ndemi/1910, Nyandarua/Ndemi/1911 being subdivisions of Nyandarua/Ndemi/1193 including the new subdivisions being Nyandarua/Ndemi/10819-10824 together with all the grass, trees, plants, soil, and all fruits of the land growing and existing thereon pending the hearing and determination of this Application.

vi. **Spent**

vii. The cost of this application be provided for.

2. The said application is premised on the grounds on the face of it as well as on the sworn affidavit of Anthony Mwangi Nguruchi the Plaintiff/Applicant herein, dated the 19th June 2019.

3. Upon service of the said application to Respondents, and whereas the 2nd Respondents filed their Replying affidavit on the 20th July 2018, there was no response from both the 1st Respondent, (who was served through substituted service as he could not be traced), and the 3rd Respondent.

4. On the 14th November 2018 when the matter came up for inter-parties hearing, by consent, parties agreed to dispose of the Application by way of written submission wherein the Applicant made an oral application to amend prayers 2, 3 and 4 of his application as well as the plaint to include land parcels No. Nyandarua/Ndemi/10819-10824. There being no objection, the application to amend was granted as sought.

5. By the time I was writing this ruling, only the Applicant and the 2nd Respondent had filed their written submissions.

Applicant's submission.

6. It was the Applicant's submission that the mother land, being No. Nyandarua/Ndemi/1193 that gave rise to all the sub-divisions was registered to his late mother Grace Wairimu Wanguruci who passed away on the 5th November 2001.

7. That before the succession pleadings could be undertaken in respect to her estate, the 1st Respondent herein fraudulently procured the registration of the suit land in his name by transmission using the grant purportedly issued in Succession Cause No. 174 of 2011, Estate of Leah Wambui Kamau and Estate of John Lokwauri Macahria both deceased. That he then sub-divided the suit land into 5 parcels of land which resulted into No. Nyandarua/Ndemi/1907-1911, parcels which he then proceeded to fraudulently transfer to the 2nd Respondent before disappearing to an unknown place.

8. That despite the said developments, the Applicant has been in possession of the suit land which he depends on for his livelihood but is apprehensive that the Respondents might transfer or dispose the said parcels of land rendering the suit nugatory.

9. It was the Applicant's submission that he had discharged all the established principles as was set out in the celebrated case of **Giella vs Cassman Brown [1973] EA 358**.

10. That he had established a prima facie case to the effect that through the production of documents, he had proved that indeed his late mother Grace Wairimu Wanguruci was the proprietor of the mother land No. Nyandarua/Ndemi/1193. That through fraudulent means the 1st Defendant had used fraudulent letters of Administration in an unrelated case wherein he had subsequently caused the transmission of the suit land to himself, before subdividing it into Nyandarua/Ndemi/1907-1911 and later changing them to Nyandarua/Ndemi/10819-10824 before disposing them to the 2nd Respondent.

11. That the 2nd Defendant's defence that he was a bonafide purchaser was not available to him because it was a known fact that the 1st Respondent was a wanted man wherein he and his family had gone into hiding since the year 2011 hence he was not available to show the 2nd Respondent the suit land unless he was holding the same on behalf of the 1st Respondent as a conduit.

12. That he would suffer irreparable harm if the orders in the application were not granted. This was because the suit land was family land on which the Estate of the deceased were in possession and utilized the proceeds from therein for their survival. That the 1st defendant disappeared to an unknown place wherein the 2nd Defendant who is a self-help group and whose members reside in Kiambu County have never utilized the land.

13. The Plaintiff submitted that the balance of convenience tilted on their side as the persons in possession of the suit land together with the deceased's estate.

2nd Respondent's submission

14. The 2nd Respondent opposed the application herein for reasons that the applicants had not satisfied the laid down principles in the case of **Giella vs Caseman Brown** (supra).

15. While relying on the case of **Nguruman Limited vs Jan Bonde Nielsen 7 2 Others [2014] eKLR**, the 2nd Respondent's submission was that the Applicant had not established a prima facie case with the probability of success for reason that he did not demonstrate that he was either in physical possession of the suit land or that he depended on the same. That it was not sufficient just to state that he was in physical possession of the land.

16. That further, the Applicant had not informed the court that he was dispossessed of the suit land by the 2nd Respondent or that he was in danger of being dispossessed of the same. That in fact it was the 2nd Respondent who had a better and indefeasible title to the land which title had not been cancelled by the court and therefore he had an advantage over the Applicant.

17. On the second issue of whether the Applicant stood to suffer irreparable damage if the orders so sought were not granted, it was the 2nd Respondent's submission that save for citing his apprehension that the 2nd Respondent may dispose of the suit land, the Applicant had not demonstrated any grave injury that was actual and substantial. That his apprehension was merely speculative injury. That the only action that the 2nd Respondent had caused that could have been construed as being an action capable of disposing of the land was the sub-division of the land in the year 2017. No other adverse action had been taken since then.

18. That the balance of convenience did not tilt in favour of the Applicant at this stage because the 2nd Respondent held title to the suit land and was entitled to its proprietary rights until the matter was heard and determined.

19. The 2nd Respondent further submitted that the suit land was not in danger of being wasted, damaged or alienated and there had been no evidence adduced by the Applicant to the contrary.

20. That it would not be just to bar the 2nd Respondent from any sort of access to the suit property while the Applicant continues to enjoy use thereof. That by so doing, the parties would not be put on equal footing which was contrary to the provisions of Section 3A of the Civil Procedure Act. The 2nd Respondent relied on the decided case of **E. Muriu Kamau & Another vs National Bank of Kenya Limited [2009]eKLR**.

Determination

21. The issue for determination by this court is whether the Applicant has established a prima facie case to enable this court grant him the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420)."

22. Has the Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

"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."

23. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicant, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the applicant is deserving of the orders sought. The Court is not required to determine the merit of the case.

24. It is the Applicant's submission that the proprietor of the subject suit herein was his deceased mother one Grace Wairimu Wanguruchi who died intestate on the 5th November 2001. That after her death, the 1st Defendant through fraudulent means transferred the land to himself through transmission and thereafter sold the same to the 2nd Defendant before disappearing to an unknown place. That the 2nd Defendant had subsequently subdivided the suit land before registering it in its name. It was the Applicant's further submission that they have been in actual possession of the said parcel of land and that they were apprehensive that the 2nd Respondent would cause the same to be alienated and/ or disposed of thus rendering the suit nugatory.

25. The 2nd Respondent on the other hand opposed the Applicant's application stating that he had not discharged the onus placed on him by the principles in the **Giella vs Cassman Brown** (Supra) to warrant the orders so sought because he had not established a prima facie. That since the 2nd Respondent had the title to the suit land, his proprietary rights over the suit land at this stage were superior to the possessory rights relied upon by the Applicant. That the court ought to place the parties at equal footing because by granting the Applicant the prayers sought, the 2nd Respondents would be disadvantaged in view of the fact that they held the title deed.

26. Looking at the facts of this case, the 2nd Respondent has demonstrated its ownership of the suit property by producing to this court its title deed. The Plaintiff has intimated that the title deeds produced by the 2nd Defendant are fraudulent. So far as I can tell, the title deed produced by the 2nd Respondent holds sway at this interlocutory stage of these proceedings. The law prescribes how a court may approach such a scenario. Section 26 (1) of the Land Registration Act states as follows:

"The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

27. Since the 2nd Respondent has exhibited title deeds to the suit land. The above legal provision binds this court to take that as prima facie evidence of ownership unless it can be challenged on the grounds of fraud or misrepresentation or where the title deed has been acquired illegally, unprocedurally or through a corrupt scheme.

28. At this interlocutory stage, I believe that the Plaintiff has not been able to demonstrate sufficiently that the titles held by the 2nd Respondent were procured in any of the ways herein above stated and which demonstration can only be at the hearing of the main suit.

29. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 2nd Respondent's title but the mere proof that they hold a duly registered certificate which on the face of it was properly acquired is sufficient to lead the court to hold that the Applicant has not established that there is a prima facie case.

30. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

31. As was held by the Court of Appeal in the case of **Mugah –v- Kunga [1988] KLR 748**, in land matters status quo orders should always be issued for purposes of preserving the subject matter.

32. The court's practice directions of Gazette Notice No. 5178/2014 paragraph 32 is relatively clear. It gives the court the leeway and discretion to make an order for status quo to be maintained until determination of a case.

33. Since the court is in doubt of which party is in possession of the suit, I am of the view that at this stage a case management strategy would be more proportionate and appropriate without prejudicing either party. To this effect thereof I do order as follows:

- i. That both, parties do maintain status quo as at 19th June 2018 until the matter is heard and determined.
- ii. The parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 30 days.
- iii. The costs of the application dated shall be in the cause.

Dated and delivered at Nyahururu this 14th day of May 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE