



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 113 OF 2017

ERIC KARIUKI MBURU.....PLAINTIFF

VERSUS

JAMLICK IRUNGU WANJOHI.....1ST DEFENDANT

MARY WANGECI.....2ND DEFENDANT

FRANCIS KAIRU WAINAINA.....3RD DEFENDANT

FRANCIS MWANGI MUGA.....4TH DEFENDANT

JOHNSON NJERU MBURATI NJOGU.....5TH DEFENDANT

JULIUS KIRIMI MATI.....6TH DEFENDANT

SOSPETER NTHIGA DAVID.....7TH DEFENDANT

LAND REGISTRAR, MBEERE.....8TH DEFENDANT

ATTORNEY GENERAL.....9TH DEFENDANT

RULING

1. By a notice of motion dated 10th October 2017 brought under **Order 51 Rule 1 of the Civil Procedure Rules, section 3A of the Civil Procedure Act (Cap. 21) and section 68 of the Land Registration Act 2012**, the Plaintiff sought an order of inhibition to prevent all dealings with the following parcels of land pending the hearing and determination of the suit, that is;

a) Title No. Nthawa/Gitiburi/3402

b) Title No. Nthawa/Gitiburi/3403

Title No. Nthawa/Gitiburi/3404

Title No. Nthawa/Gitiburi/3405

Title No. Nthawa/Gitiburi/3406

Title No. Nthawa/Gitiburi/3407

Title No. Nthawa/Gitiburi/3607

Title No. Nthawa/Gitiburi/3608

Title No. Nthawa/Gitiburi/3609

Title No. Nthawa/Gitiburi/3610

Title No. Nthawa/Gitiburi/3611

2. The said application was based upon the grounds set out in the body of the notice of motion. It was contended, in a nutshell, that the 1st defendant had fraudulently obtained the original suit property i.e. *Title No. Nthawa/Gitiburi/2290* (hereinafter *parcel 2290*) fraudulently and consequently sub-divided it into the parcels listed in paragraph one hereof (hereinafter *the suit properties*). It was contended that some of the said parcels were transferred to the 3rd – 7th Defendants as purchasers.

3. The application was supported by the Plaintiff's own supporting affidavit sworn on 10th October 2017. The Plaintiff contended that his late father, Joseph Kariuki (hereinafter *Kariuki*) had purchased parcel 2290 from the 1st Defendant's late father, Simon Wanjohi (hereinafter *Wanjohi*).

4. It was further stated that upon the making of the said agreement, Wanjohi handed over the original title deed for parcel 2290 to Kariuki. However, both of them died in 1997 and 2001 respectively before the transfer of parcel 2290 could be effected.

5. It was further contended that sometime in 2010 the said Wanjohi fraudulently gazetted the loss of the title deed for parcel 2290 with a view to obtaining a new title deed and depriving Kariuki of the said land.

6. The 1st, 3rd, 4th, 5th and 7th Defendants filed separate replying affidavits in opposition to the said application. The 3rd, 4th, 5th and 7th Defendants stated that they were merely innocent purchasers for value of the various suit properties and that they were strangers to the allegations of fraud. They stated that there were no encumbrances against the suit properties at the time of purchase.

7. The 1st Defendant contended that the title deed for parcel 2290 was stolen from their home when they were attacked by criminal gangs and that its loss was reported to the police. He maintained that parcel 2290 lawfully belonged to his late father, Wanjohi and that he lawfully sub-divided and sold some of the suit properties to the 3rd – 7th Defendants.

8. When the said application was listed for hearing on 14th February 2019, all the parties except the Attorney General had filed their respective submissions. The Attorney General was given forty five (45) days within which to file and serve a response and submissions to the application. However, by the time of preparation hereof, no response or submissions had been filed by the Attorney General.

9. The court has considered the Plaintiff's said application, the replying affidavits in opposition thereto as well as the written submissions on record. The court is of the view that the main question for consideration is whether or not the Plaintiff has made out a case for the grant of an order of inhibition under **section 68** of the Land Registration Act, 2012. The purpose of the order is to preserve the property in issue by preventing the registration of further transactions against the title.

10. It is apparent from the plaint and other documents filed that the Plaintiff is essentially seeking recovery of the suit properties which are all sub-divisions of parcel 2290. The basis of the claim is fraud on the part of the 1st Defendant who has denied any wrongdoing. He has even contended that the sale agreement between Kariuki and Wanjohi was null and void for want of consent of the Land Control Board for the sale transaction.

11. In the case of **Rudi Marquardt Electronic Co. Ltd V Vallery Jimoi Khazalwa & 4 Others [2015] eKLR**, Anthony Kaniaru J distinguished between an order of inhibition and order of injunction. He was of the view that as long as an applicant has an arguable or plausible case then it would be prudent for the court to preserve the property in dispute.

12. The court is satisfied on the basis of the material on record that the Plaintiff's case is not merely fanciful or frivolous. It is a claim which is worthy of consideration at a full trial. The Plaintiff is not required to demonstrate fraud at this interlocutory stage as long as he has laid a basis for it in the pleadings and documents on record. Whether or not the 1st Defendant will establish that the sale agreement between Kariuki and Wanjohi was null and void is best determined at the trial. The question of proof of fraud is similarly a matter for the trial judge.

13. As was held in the case of **Shivabhai Patel Vs Manibhai Patel [1959] EA 907**, the court has a duty to preserve property which is in dispute. It was held, *inter, alia*, that;

“...In my opinion it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If the Plaintiff succeeds in this suit (and part of his claim is based on this cheque) there might be a barren result, and that it is the duty of the court to avoid...”

14. The court is therefore satisfied that the Plaintiff has made out a case for the preservation of the suit property. Accordingly, the Plaintiff's notice of motion dated 10th October 2017 shall be allowed in the following terms.

a) An order of inhibition is hereby granted to prohibit all dealings with respect to *Title Nos. Nthawa/Gitiburi/3402, 3403, 3404, 3405, 3406, 3407, 3607, 3608, 3609, 3610 & 3611* pending the hearing and determination of the suit.

b) Costs of the application shall be in the cause.

15. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 13TH day of JUNE, 2019.

In the absence of both the Plaintiff and Defendants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

13.06.19