



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 326 OF 2017

DIVYANSHU RAVINSHANKAR PANCHAL.....PLAINTIFF

VERSUS

DOGO MOHAMED.....1ST DEFENDANT

DIRECTOR OF LAND ADJUDICATION2ND DEFENDANT

LAND REGISTRAR, KWALE.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

PWANI MOHAMED JUMA.....5TH DEFENDANT

MAEMBE MOHAMED JUMAA.....6TH DEFENDANT

SAUMU MOHAMED JUMAA.....7TH DEFENDANT

RIZIKI MOHAMED JUMA.....8TH DEFENDANT

AND

DAVID MWAKONDO MAGANGA.....INTERESTED PARTY

R U L I N G

1. The Plaintiff/Applicant brought a Notice of Motion dated 11th September 2017 in which he is seeking for orders:

- a. That service of this application be disposed with in the first instance the same be heard ex-parte and certified urgent.
- b. That the Honourable Court be pleased to issue a temporary injunction to restrain the 1st Defendant either by him, his agent, servants, proxies, beneficiaries or persons claiming through, for or from them from wasting, damaging, or alienating, selling or advertising and or offering for sale plots and/or developments on PLOT NUMBER KWALE/TSUNZA/1166 pending the hearing and determination of this application inter-parties and thereafter pending the hearing and determination of the application herein.
- c. That the Honourable Court be pleased to issue a temporary injunction to restrain the 1st Defendant either by him, his agent, servants, proxies, beneficiaries or persons claiming through, for or from them from wasting, damaging or alienating, selling or advertising and/or offering for sale plots and/or developments on PLOT NUMBER KWALE/TSUNZA/1166 pending the hearing and determination of the suit herein.
- d. That the Honourable Court be pleased to issue an inhibition to restrain the 3rd Defendant either by him, his agent, servants, proxies, beneficiaries or persons claiming through, for or from them from registering any instrument, transfer, mortgage disposing of KWALE/TSUNZA/1166 pending the hearing and determination of the suit herein.

e. Costs.

2. The Application is based on the following grounds:

i. The subject matter of the suit is land parcel number KWALE/TSUNZA/1166 is owned by the Plaintiff by virtue of purchase for valuable consideration.

ii. The 1st Defendant is offering the aforesaid property for sale to a 3rd party despite the fact that the Plaintiff had partially paid purchase price as agreed in sale and agreement dated 26/08/2013.

iii. The alienation of the suit property to a 3rd party will further complicate this dispute as the Plaintiff is (sic) claims ownership, having expended money in acquisition of the same.

iv. The 1st Defendant intends to dispose the suit property to a 3rd party thereby defeating the Plaintiff's interest in the suit property.

v. If the sale and transfer of the suit property proceeds the Plaintiff will suffer substantial and irreparable loss and damage.

vi. The Plaintiff has a prima facie case with probability of success.

3. The Application is supported by the affidavit of Divyanshu Ravinshanker Panchal the Applicant sworn on 11th September 2017. The Applicant depones that he is the proprietor of the suit property having purchased the same from the 1st Defendant/Respondent vide an agreement entered consensually on 26/8/13 at a price of Kshs.6,000,000/=. The Applicant avers that the 1st Defendant, together with the other beneficiaries to the estate of the late Juma Gandaza were the beneficial owners of the suit property prior to adjudication, and as beneficiaries entered into an agreement for sale of the suit property prior to adjudication. He states that it was a term of the agreement that upon adjudication and ascertainment of the 1st Defendant and her co-beneficiaries interest the property would be registered in the Plaintiff's name by virtue of the consideration received by the 1st Defendant and her co-beneficiaries. The Applicant avers that pursuant to the said agreement the 1st Defendant gave the Applicant a power of attorney in respect of the suit property. The Applicant further avers that the 1st Defendant lodged an objection with the 2nd Defendant on 28.8.2013 against the Applicant which was determined in the Applicant's favour. The Applicant avers that in July 2017 he discovered that the 1st Defendant had fraudulently obtained title deed from the 3rd Defendant in her name and was in the process of disposing off the land to a 3rd party. The Applicant has attached copies of the agreement, power of attorney, and objection proceedings and beseeched the court to grant the orders sought herein.

4. The Attorney General, on behalf of the 2nd, 3rd and 4th Defendants filed a Replying Affidavit sworn by John Karanja on 24th September 2018 in support of the application.

5. The 5th, 6th, 7th and 8th Defendants opposed the Application and filed a Replying Affidavit sworn by Pwani Mohamed Juma, the 5th Defendant on 22nd March 2019. They deny that the Plaintiff was at any time the proprietor of TITLE NUMBER KWALE/TSUNZA/1166 and/or that he purchased it from the 1st Defendant as alleged. They aver that the suit property is family property belonging to the beneficiaries, heirs and survivors of the late Juma Ganadza (deceased) for which the 1st Defendant was nominated as the trustee and thus the same was incapable of being sold without the consent of all the beneficiaries, heir and survivors of the estate of the said deceased. They contend that if the purported sale between the Plaintiff and the 1st Defendant was executed, the same was null and void *ab initio*. They further state that the agreement executed between the Plaintiff and the 1st Defendant was by the letter dated 19th June 2015 cancelled and/or terminated by the Plaintiff who thereupon demanded refund of the monies paid by him to the 1st Defendant, and argue that the only recourse the Plaintiff had and still has is to sue for the money allegedly paid to the 1st Defendant, and that at least Kshs.1,000,000/= has been refunded by the 1st Defendant which the Plaintiff declined. They further aver that the Plaintiff caused the 1st Defendant to be charged with the offence of conspiracy to defraud in Kwale Criminal Case No. 532 of 2018 wherein the 1st Defendant is alleged to have fraudulently obtained Kshs.2,843,000/= with regard to the suit property. They state that the 1st Defendant was registered as owner of the suit property and issued with Title Deed for the same in her capacity as the Trustee for the beneficiaries, heirs and survivors of the deceased who have in turn sold it to the Interested Party. It is their contention that the Plaintiff has not established a *prima facie* case to warrant issuance of the orders sought in the application, adding that damages will be sufficient remedy.

6. The interested Party opposed the Application and filed a replying affidavit sworn on 13/11/17. He depones inter alia, that on satisfying himself that the Plaintiff had rescinded/cancelled the agreement and that the title to the suit property was clean, he entered into an agreement on 29th July 2015 to purchase the suit property from the 1st Defendant with concurrence/consent of the family members and complied with the obligation in the said agreement including payment of the purchase price in the manner stipulated in the contract. He stated that he has already paid about Kshs.14 million by way of bank transfers, cheques and M-pesa, and has taken possession of the suit property and even planted trees, coconuts and a shelter. That the 1st Defendant has executed a transfer and an irrevocable power of attorney and have obtained consent for sale from the Land Control Board. The Interested Party avers that he duly paid stamp duty for the intended transfer of the suit property into his name. He avers that the application does not meet the threshold required for grant of the orders sought and urged the court to dismiss the application.

7. The application was canvassed by way of written submissions. The Plaintiff filed his submissions on 18th March 2019, while the 5th, 6th, 7th and 8th Defendants filed theirs on 10th April 2019 and the Interested Party filed on 10th May, 2019. I have considered the Application, the affidavits in support and against and the rival submissions made as well as the authorities relied on. The principles to be applied when considering an application for injunction such as this are well settled. In the case of **Giella –v- Cassman Brown & Co. Ltd (1973)EA 358**,

the Plaintiff must show that he has a prima facie case with a probability of success; that he stands to suffer irreparable damage which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt it will decide the matter on the balance of convenience.

8. In the case of **Mrao Ltd –v- First American Bank of Kenya (2003)KLR 125**, a *prima facie* case was said to be one in which on the material presented to the court or 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 opposite party.

9. In the instant case, the dispute is over PLOT NUMBER KWALE/TSUNZA/1166. The Plaintiff's main contention is that he purchased the suit property for valuable consideration from the 1st Defendant on 26/8/2013. The Plaintiff avers that the 1st Defendant is offering the suit land to the Interested Party despite the Plaintiff having purchased it and having made partial payment of the purchase price. It is the Plaintiff's contention that the alienation of the suit property will further complicate this dispute.

10. The 5th, 6th, 7th and 8th Defendants aver that the suit property was family land for which the 1st Defendant was nominated as the trustee and thus the property was incapable of being sold without their consent as heirs and beneficiaries. They contend that the sale between the Plaintiff and the 1st Defendant was null and void *ab initio*, and that in any event, the said sale agreement has been cancelled by the Plaintiff who has demanded for a refund of the monies paid. They argue that the Plaintiff's recourse is to sue for the outstanding balance of the consideration paid. It is admitted that the 1st Defendant has sold the suit property to the Interested Party and is in the process of finalizing the transfer in favour of the Interested Party.

11. It is apparent that the suit property has been sold by the 1st Defendant, first to the Plaintiff and later to the Interested Party. It is therefore apparent that in this case, both the Plaintiff and the Interested Party are claiming the Suit Property. Both the Plaintiff and Interested Party were sold the suit property by the 1st Defendant who is stated to be the trustee of the 5th, 6th, 7th and 8th Defendants. The main dispute is who between the Plaintiff and the Interested Party entered into a valid agreement with the 1st Defendant. That, in my view, is an issue that can only be ascertained at the trial. Until that is established, it is only fair that the status quo prevailing be maintained.

12. The courts have accepted that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the **Giella –v- Cassman Brown** case. The court may look at the circumstances of the case generally and the overriding objective of the law. In **Suleiman –v- Amboseli Resort Ltd (2004) KLR 589** Ojwang Ag. J.(as he then was) at page 607 delivered himself thus:

“.....counsel for the Defendant urged that the shape of the law governing the grant of injunction relief was long ago in Giella –v- Cassman Brown, in 1973 cast in stone and that no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law as always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at page 770-781. A fundamental principle of....that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”.... Traditionally, on the basis of the well accepted principles set out by the court of appeal in Giella –v- Cassman Brown the court has had to consider the following questions before granting injunctive relief.

iv) is there a prima facie case...

v) does the Applicant stand to suffer irreparable harm.....

vi) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice...”

13. In that case the court granted an injunction on the general principle that it is better to safeguard and maintains the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales. Both the Plaintiff and the Interested Party are claiming the suit property. At this interlocutory stage, pending the substantive canvassing of the case, in relation to the prayers sought, seeks injunctive relief to the extent that the suit may not be pre-empted through alienation, disposal or waste. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined.

14. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is the view of the court that the Plaintiff has established a prima facie case with a probability of success against the Defendants. In my view, it is clear that the Plaintiff has shown his right over the suit property. As regards irreparable damage, I take the view that should the suit property be alienated, disposed off or wasted, the Plaintiff will suffer irreparable loss which may not be quantified in damages. The balance of convenience would tilt in favour of the Plaintiff in order to safeguard the current status quo of the subject matter pending hearing and determination.

15. Arising from all the above reasons, I find merit in the application. Accordingly, I allow the Notice of Motion dated 11th September 2017 in terms of prayers (c) and (d). Considering the circumstances of this case, I order that each party shall bear their own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 31st day of July 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Omwenga for 1st Defendant

Tindika for 5th – 8th Defendants and holding brief for Sang for Interested Party.

Makuto for 2nd, 3rd and 4th Defendants

Esther Court Assistant

C.K. YANO

JUDGE