



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 286 OF 2018

FRANCIS NDIRANGU MWANGI.....PLAINTIFF

VERSUS

WILLIAM KIPLANGAT SIGILAI.....1ST DEFENDANT

SAMWEL SANG.....2ND DEFENDANT

KEVIN SANG.....3RD DEFENDANT

RULING

1. Proceedings herein commenced through plaint filed on 26th September 2018. The plaintiff averred that he purchased the parcel of land known as **Nakuru Municipality Block 29/30** from the 1st defendant through sale agreement dated 14th July 2006. The 1st defendant was the administrator of the estate of Sowe Arap Titany (deceased) at the time of execution of the sale agreement pursuant to a grant issued on 31st January 2006 and confirmed on 16th June 2006. The plaintiff later subdivided the parcel into 8 new parcels being **Nakuru Municipality Block 29/2347 to 2354**. He added that the 2nd and 3rd defendants encroached on **Nakuru Municipality Block 29/2348** and erected a two roomed structure on it. He further stated that he fears that the said defendants will equally encroach on the remaining parcels **Nakuru Municipality Block 29/2347 and 2349 to 2353**. He therefore sought a permanent injunction to restrain the defendants inter alia from entering, leasing out, occupying, alienating or interfering with the said parcels. He also sought eviction of the defendants and demolition of their structures.

2. The 1st defendant filed a defence in which he admitted selling **Nakuru Municipality Block 29/30** to the plaintiff as an administrator of the deceased's estate. He however denied being aware of the allegations of trespass against the 2nd and 3rd defendants.

3. The 3rd defendant reacted to the suit by filing a defence and counterclaim in which he averred that the grant to the plaintiff was revoked on 11th September 2012 and that therefore both the sale of **Nakuru Municipality Block 29/30** to the plaintiff and its subsequent subdivision to **Nakuru Municipality Block 29/2347 to 2354** were null and void. He among other sought nullification of the resultant titles, eviction of the plaintiff and a declaration that **Nakuru Municipality Block 29/30** and the resultant parcels belong to the deceased.

4. Alongside the plaint, the plaintiff filed Notice of Motion dated 25th September 2018 seeking the following orders:

1. Spent.

(i) Spent.

(ii) *THAT this Honourable court be pleased to restrain the Defendants by way of temporary injunction jointly and severally by themselves, their servants, agents, employers and/or family member from entering, leasing out, renting out, occupying, interfering, alienating, selling, further developing and/or in any way adversely dealing with all those parcels of land known as NAKURU/MUNICIPALITY BLOCK 29/2348, 2349, 2350, 2351, 2352 and 2353 respectively pending the hearing and determination of the suit.*

2. *Costs of this application be borne by the Defendants/Respondents*

5. Not to be left behind, the 3rd defendant reacted by filing Notice of Motion dated 16th October 2018 in which he seeks the following orders:

1. Spent.

2. Spent.

3. THAT this Honourable court be pleased to issue an order against the respondents, inhibiting the registration of any transfer, lease, charge or any other instrument whatsoever in respect of land parcel No. NAKURU/MUNICIPALITY BLOCK 29/30 now subdivided into various portions being NAKURU/MUNICIPALITY BLOCK 29/2348, 2349, 2350, 2351, 2352 and 2353 belonging to the estate of Sowe Arap Titany, pending the hearing and determination of the suit.

4. Spent.

5. THAT this honourable court be pleased to grant an order of temporary injunction against the 1st respondent herein Francis Ndirangu Mwangi, either by himself, his agents, employees and/ or servants from trespassing, entering, subdividing, allocating, occupying, selling, leasing, charging, transferring, fencing, erecting any structures or dealing in any way with the parcel of land known as No. NAKURU/MUNICIPALITY BLOCK 29/30 now subdivided into various portions being NAKURU/MUNICIPALITY BLOCK 29/2348, 2349, 2350, 2351, 2352 and 2353 pending the hearing and determination of the suit.

6. THAT costs of this application be provided for.

6. Notice of Motion dated 25th September 2018 is grounded on a supporting affidavit and a supplementary affidavit, both sworn by the plaintiff. The 3rd defendant opposed it through his replying affidavit sworn on 16th October 2018.

7. On the other hand, Notice of Motion dated 16th October 2018 is supported by an affidavit sworn by the 3rd defendant. The plaintiff opposed it through his replying affidavit sworn on 5th November 2018.

8. This ruling is in respect of the two Notices of Motion. Both applications were heard together through written submissions. The plaintiff and the 3rd defendant filed submissions. The 2nd defendant neither entered appearance nor responded to the applications. He equally did not participate in the hearing of the applications. The 1st defendant did not file any response or submissions.

9. I have considered the applications, the affidavits and the submissions. In essence, the plaintiff and the 3rd defendant seek interlocutory injunctions against each other. The principles applicable when considering an application for an interlocutory injunction are settled. The Court of Appeal recently reiterated them in **Joseph Ntombura v Godfrey Simiyu & 4 others [2018] eKLR** thus:

24. The threshold for an interlocutory order is well stated in the case of Giella - v- Cassman Brown & Co. Limited [1973] E.A. 358. First, an applicant must show a prima facie case with a probability of success; second, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and third, if the court is in doubt, it will decide an application on the balance of convenience. Those principles were further considered by this Court in the case of Nguruman Limited -v- Jan Bonde Nielsen & 2 others [2014] eKLR, as follows:-

“These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd - v - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If Prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap frogging” by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

10. From the material on record, there is no dispute that the plaintiff purchased the parcel of land known as **Nakuru Municipality Block 29/30** from the 1st defendant through sale agreement dated 14th July 2006 and that the 1st defendant was at that time the administrator of the estate of Sowe Arap Titany (deceased) pursuant to a grant issued to him on 31st January 2006 in **Nakuru High Court Succession Cause No. 633 of 2005**. The grant was confirmed on 16th June 2006. The plaintiff later subdivided the parcel into 8 new parcels being **Nakuru Municipality Block 29/2347 to 2354** and title deeds dated 5th June 2014 were issued to him.

11. As long as the plaintiff remains a registered proprietor, the court is duty bound under **Section 26** of the **Land Registration Act** to accept his certificate of title as proof of ownership. The section provides:

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

12. Until the plaintiff's title is nullified, and that can only happen upon the hearing of the suit, he is entitled **Section 25** of the Act to all the privileges that the law accords a registered proprietor. The section provides:

25. Rights of a proprietor

(1) *The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

(a) *to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

(b) *to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

(2) *Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.*

13. In response to the plaintiff's accusation that the 2nd and 3rd defendants have encroached on **Nakuru Municipality Block 29/2348** and erected a two roomed structure on it, the 3rd defendant stated categorically that he is occupying a portion of the parcel of land formerly known as **Nakuru Municipality Block 29/30** as a grandchild of the deceased and a beneficiary of his estate. The 2nd defendant has remained mum. In view of that admission and the 2nd defendant's silence, I am satisfied that the plaintiff who is the registered proprietor has demonstrated a *prima facie* case.

14. Although the plaintiff claims not to be aware, there is evidence that the grant to the 1st defendant was revoked on 11th September 2012 pursuant to a ruling delivered on that date by H.A. Omondi J. in **Nakuru High Court Succession Cause No. 633 of 2005**. I note that in the ruling, a copy of which was annexed by the 3rd defendant and which is reported as **RUTH TAPUTANY V WILLIAM KIPLANGAT SIGILAI [2012] eKLR**, the parcel of land known as **Nakuru Municipality Block 29/30** was mentioned as being subject of criminal proceedings wherein one ELIJAH KIPLAGAT was charged with making a false document contrary to section 347(a) of the Penal Code and the particulars of the charge stated that the fraudulent document was Title Deed for **Nakuru Municipality Block 29/30**. The judge stated in part as follows:

The applicant's counsel submits that the grant issued should be revoked because it was issued without consent of all the beneficiaries and particularly the applicant who was out of the country for treatment. He argues that the grant was obtained fraudulently and many of the beneficiaries were left out – meaning the Respondent concealed material facts when he appeared before the court.

It is further pointed out that FRANCIS NDIRANGU was included in the letters of administration before he bought the said parcel of land – which parcel is subject of criminal prosecution pending in court. ...

... The only inference I can draw from this exclusion of names of beneficiaries is mischievous concealment – especially because EMILY TITANY'S house is left out completely, the applicant does not directly benefit from the distribution and the argument being used is that her son is benefitting on her behalf – may be if the court had been made aware of the existence of the other beneficiaries the outcome would have been different.

... The grant was confirmed before the lapse of six months, and according to the affidavit sworn by the Respondent, the reason for this was that he needed to sell a portion of land in KERICHO/KONGOTIK/598 to enable him pay fees for his two children. There was no mention of hospital bills or the land in Ronda, so the now turn around and claim that the land had to be sold to take care of medical expenses, is in my view being dishonest. From the foregoing there is no other way of achieving a proper result, I find that the grant made and confirmed on 16th June 2006 must be revoked and I so order. ...

15. In effect therefore, the court withdrew the authority which had earlier on been given to the 1st defendant to deal with the estate of the deceased. There is no dispute that the parcel of land known as **Nakuru Municipality Block 29/30** was part of the deceased's estate. As can be seen in the captioned portion of the ruling, the plaintiff was at the core of the dispute that led to revocation of the grant. In the circumstances, there is a valid point to be determined whether the plaintiff who is a registered proprietor obtained good title from the 1st defendant. The 3rd defendant therefore has a *prima facie* case against the plaintiff.

16. As noted earlier, the plaintiff and the 3rd defendant herein are seeking interlocutory injunctions against each other. They have both established a *prima facie* case against each other. I do not think that damages can be an adequate remedy to any of them. The matter has to be resolved on the basis of balance of convenience. The convenient approach in this matter is to preserve the suit property to await

determination of the dispute at the hearing of the suit. This is in line with **paragraph 32 of Gazette Notice No. 5178** titled “**Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts**” which encourages preservation of the suit property. It provides:

During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.

17. The overriding interest of justice herein is that the suit property be preserved to enable the court determine validity of the titles involved and the parties’ rights in respect to the suit property. So as to preserve the suit property while not upsetting the *status quo*, I will endeavour to make such orders as will not result in eviction or disruption of the current use of the suit property.

18. In view of the foregoing, I make the following orders:

a) An inhibition be registered against land parcels No. NAKURU/MUNICIPALITY BLOCK 29/30 as well as the resulting subdivisions being NAKURU/MUNICIPALITY BLOCK 29/2348, 2349, 2350, 2351, 2352 and 2353 pending the hearing and determination of this suit.

b) An injunction is hereby granted restraining the plaintiff and the defendants either by themselves, their agents, servants or representatives from alienating, subdividing, selling, leasing, charging or transferring the parcel of land known as No. NAKURU/MUNICIPALITY BLOCK 29/30 as well as the resulting subdivisions being NAKURU/MUNICIPALITY BLOCK 29/2348, 2349, 2350, 2351, 2352 and 2353 pending the hearing and determination of this suit.

c) Costs of both applications shall be in the cause.

19. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30th day of October 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the defendants

Court Assistants: Beatrice & Lotkomo