



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 12 OF 2019

DAVID KAMUNYA RUNO.....1st PLAINTIFF/APPLICANT

WILSON WAMBUGU NDERITU.....2nd PLAINTIFF/APPLICANT

VERSUS

ELISHIBA MUTHONI MURIITHI.....1st DEFENDANT/RESPONDENT

RICHARD MURAGE.....2nd DEFENDANT/RESPONDENT

LUCY NJERI.....3rd DEFENDANT/RESPONDENT

SAMWUEL MWANGLI.....4th DEFENDANT/RESPONDENT

ALICE NYAWIRA.....5th DEFENDANT/RESPONDENT

HELLEN MURINGI.....6th DEFENDANT/RESPONDENT

JOSEPH MURIITHI.....7th DEFENDANT/RESPONDENT

LAND REGISTRAR, LAIKIPIA COUNTY.....8th DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL.....9th DEFENDANT/RESPONDENT

RULING

1. The Applicants in their application under certificate of urgency, dated and filed on the 7th March 2019, seek for temporal injunctive orders against the Respondents restraining them, their proxies, employees, servants and agents or any one claiming under them, from interfering with the Applicants' two distinct parcels of land namely Marmanet/Marmanet Block 1/535, measuring 0.936 hectares each, which parcels of land were previously registered separately as Marmanet/Marmanet Block 1/530 and 531 respectively, pending the hearing and determination of the suit
2. The said application was premised on the grounds on the face of it as well as their supporting affidavits of the 7th March 2019 and supplementary affidavit of 3rd April 2019.
3. On the 19th March 2019, the Hon the Attorney General entered their Memorandum of Appearance and a Replying Affidavit on behalf of the 8th and 9th Respondent.
4. On the 21st March 2019, when the matter came up for hearing, parties were not ready to proceed and the same was rescheduled for hearing for the 4th April 2019 on which date the State Counsel, on behalf of the 8th and 9th Respondent submitted that, as per their sworn affidavit of the 3rd April 2019, and filed on the 4th April 2019, the Land Registrar and the Hon Attorney General had no input in the matter as it was basically a family dispute. That from the pleadings, nothing impugned the actions of the Land Registrar. They thus sought to be excused from the proceedings.
5. The court found that by virtue of paragraphs 14 -16 of the Plaintiff's pleadings, that the 8th and 9th Respondents/defendants were properly sued. That having been said, by consent, parties agreed to have the application disposed of by way of written submissions which prayer was

granted.

6. In the meantime, since the court had established that 4th Defendant/Respondent was currently residing on the suit land, neither party was to engage in any activities that would interfere with the status of the suit property as at the 21st March 2019, so as to preserve the same, pending the hearing and determination of the application.

7. Whereas the 8th and 9th Respondents did not file their written submissions, the Applicant/Plaintiffs as well as the 1st to 7th Respondents filed their written submissions on the 2nd and 22nd May 2019 respectively, which submissions I have considered as herein under.

Applicants' submission.

8. The Applicants' submission and while relying on their application was to the effect that on the 9th November 2018 the 1st Respondent, who happens to be their mother, and proprietor of parcel of land No. Marmanet/Marmanet Block 1/177 expressed her wish to have the said parcel of land shared amongst her children wherein she proceeded to subdivide it into 5 pieces thus creating parcels No Marmanet/Marmanet Block 1/530-534.

9. That later the 1st Respondent obtained the necessary consents which were executed and parcels No.350 and 351 were transferred to the 1st and 2nd Applicants respectively as a gift who then acquired proprietary rights, beneficial rights, as well as equitable interest over their respective parcels of land wherein they had taken possession of their respective land parcels and had proceeded to develop and improve them by renovating the old residential house, fencing their respective parcels of land, erecting gates and ploughing the same.

10. That it was later, after a kidnapping incidence on the 27th January 2019, of the 1st Respondent by the 2nd to 7th Respondents, that the 1st Respondent amalgamated all the resultant subdivisions of parcel No Marmanet/Marmanet Block 1/177 being No. Marmanet/Marmanet Block 1/530-534 resulting into Marmanet/Marmanet Block 1/535.

11. That the said amalgamation was unlawful and illegal since parcels No. Marmanet/Marmanet Block 1/530 and 531 were not available for amalgamation with other parcels of land.

12. The Applicants' further submission was that although the 1st to 7th Respondents alleged that the transfer of land parcels No. Marmanet/Marmanet Block 1/530 and 531 to the Applicants was obtained without the 1st Respondent's consent and knowledge and that she had been made to sign documents whose contents she did not know and therefore the transfer of the said parcels of land was fraudulent, yet the Respondents had not demonstrated that the executed documents herein attached to the application were forgeries.

13. That since the Application was for a temporal injunction, pending the hearing and determination of the main suit, the Applicants had established a prima facie case that the amalgamation of the amalgamated all the resultant subdivisions of parcel No Marmanet/Marmanet Block 1/177 being No. Marmanet/Marmanet Block 1/530-534 resulting into Marmanet/Marmanet Block 1/535 was un-procedural, unlawful, illegal and invalid in the first instance. In so submitting, the Applicant while making reference to authorities herein attached, went into the substance of the suit herein which with due respect was premature at this stage.

14. The Applicant's further submission was that the said amalgamation of parcels No. Marmanet/Marmanet Block 1/530-531 having been illegal, infringed on their respective beneficial rights as well as equitable interest in the said parcels of land wherein there was real injury occasioned to them to the effect that adequate remedy for damages could not arise in the circumstance.

15. That it was therefore in the best interest of justice and in order to preserve the subject suit herein that orders of status quo do issue in as far as the two parcels of land being No Marmanet/Marmanet Block 1/530 and 531 were concerned, because in the absence of such orders there would be nothing to stop the Respondents from transferring the said parcels of land hence defeating the essence of this case and causing the Applicants greater injustice.

16. That since the essence of the application was to preserve the suit land from being wasted, the balance of convenience tilted in the Applicants' favour that a status quo be maintained.

17. Lastly, it was the Applicants' submission that although the 8th and 9th Respondents chose to distance themselves for the suit herein yet the impugned amalgamation, registration and title to parcel No Marmanet/Marmanet Block 1/535 were all undertaken and issued by the 8th Respondent herein, title which they Applicants have sought, in their Plaint, to be cancelled.

1st -7th Respondents Submission.

18. The Respondents, while opposing the Applicants' submission, submitted that it was not in contention that the 1st Respondent herein was both the Applicants mother as well as the 2nd, 3rd, 4th, 5th, 6th, and 7th Respondents respectively.

19. It was also not in contention that the said 1st Respondent was the proprietor of land parcel No. Marmanet/Marmanet Block 1/177 currently registered as Marmanet/Marmanet Block 1/535, land which she was allotted by the Laikipia West Farmers Company Limited and has been in possession since 1976 up to the year 2014 when she moved to the 1st Applicant's house due to her failing health.

20. That although the 1st Respondent had attended a meeting at the office of the Assistant County Commissioner, Marmanet Division on the 9th November 2018, the said meeting had been organized by the 1st Applicant and further that she had not expressed her desire to sub divide

her land No. Marmanet/Marmanet Block 1/177 amongst her 5 sons nor had she appeared before any land control Board, signed any documents for the transfer of the same or executed any documents before any Advocate. That if she had executed any documents, its contents had not been explained to her. She also denied having gifted the two parcels of land, the subject suit herein, more so land where her house stood, to the Applicants.

21. It was the 1st Respondent's submission that after discovering that her land had been illegally sub divided and two portions therein transferred by the 1st Applicant, that she had lodged a complaint with the 8th Respondent with the result that all the resultant subdivisions had been amalgamated into one portion and registered in her name as parcel No. Marmanet/Marmanet Block 1/535.

22. That although the court was being asked to grant restraining orders in the manner proposed by the Applicant, yet the Applicants had not satisfied the principles laid down in the **Giella vs Caseman Brown & Co. Ltd [1973] E.A 358** in that first and foremost they had not established a prima facie case to warrant issuance of such orders for reasons that the parcel of land No. Marmanet/Marmanet Block 1/530 and 531 the suit property for which the said orders are sought, do not exist as distinct parcels of land and therefore an order for injunction cannot issue in respect to a parcel of land that has not been legally demarcated and thus not clearly identifiable.

23. That since the 1st Respondent had been allotted parcel No. Marmanet/Marmanet Block 1/177, the original suit land, she had been registered as the sole proprietor of the said land and issued with a title deed wherein the said registration had not created any trust in favour of her children, both the 2nd to 7th Respondents and the Applicants included.

24. That the title deed held by the 1st Respondent was prima facie evidence that she was the absolute and indefeasible owner of the parcel of land originally registered as Marmanet/Marmanet Block 1/177 and currently registered as Marmanet/Marmanet Block 1/535 which ownership has never been challenged by the Applicants.

25. That the issue of the 1st Respondent gifting the Applicants with the sub- divided parcels of land being Marmanet/Marmanet Block 1/530 and 531 has been denied as she neither voluntarily applied for the consent to transfer the suit subject nor signed the transfer of the land in favour of the Applicants. Thus the conditions on making a gift inter vivos as was enumerated in the case of **Re Estate of the late Gideon Manthi Nzioka (Deceased) [2015] eKLR** were not fulfilled. Secondly it cannot be said that the 1st Defendant voluntarily gifted the 1st Applicant or any other person parcel No. Marmanet/Marmanet Block 1/530 as that was land where her home stood.

26. It was further the Respondents submission that the amalgamation of parcels of land No. Marmanet/Marmanet Block 1/530-534 to create parcel No. Marmanet/Marmanet Block 1/535 was within Section 22(1) of the Land Registration Act keeping in mind that the process the Applicants had used to sub divide the 1st Respondent's parcel of land was flawed and has been challenged by the Respondents.

27. That the mere fact that the Applicants had developed the parcel of land by renovating the 1st Respondent's house and erecting a gate and fence thereon has not been supported by any evidence of receipts of the said expenditure. What the Applicants did was just to change the locks of the house and gate, which had always been there, to keep out everybody, the 1st Respondent included.

28. That from the facts herein, it was clear that this was a family feud where the 1st Respondent's children's desire was to inherit their aged and ailing mother's property during her life time. That not only did the Applicants have no cause of action against the 1st to 7th Respondents but that they also had not discharged the principles bestowed on them to be granted injunctive orders. The Respondents sought for the Application to be dismissed with costs.

Determination.

29. I have considered the Application herein filed, both the Applicants' and the Respondent's written submissions as well as the annexures and authorities so cited.

30. The often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

31. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicants, 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.

32. In the present case there is no dispute that the 1st Respondent herein is the mother to the Applicants as well as the 2nd to 7th Respondents herein. Coupled with that, there is further no dispute that the 1st Respondent was the legal proprietor of the original parcel of land being No. Marmanet/Marmanet Block 1/177 which land was sub divided and later amalgamated giving rise to the current parcel No. Marmanet/Marmanet Block 1/535 measuring 4.047 hectares (approximately 10 acres) which was registered in the 1st Respondent's name meaning that as it stands at the moment, the 1st Respondents is the registered proprietor of the said parcel of land the suit lands inclusive.

33. The suit land having been registered on 14th February 2019, was governed by the Land Registration Act, Act No. 3 of 2012, which constitutes the 1st Respondent as an absolute proprietor and confers on her all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act.

34. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows.

Section 25 (1) provides:-

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by 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 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.*

35. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship section 26 (1) provides:-

“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 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”.*

36. The Applicant has argued and asserted that the 1st Respondent's title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence that the Government has recalled and/or revoked the title. Both the Land Registration Act section 26 (1) that provide for the indefeasibility of title and Article 40 (6) of the Constitution envisage that where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

37. The 1st Respondent was entitled to observance of due process to have her title cancelled, revoked and/or annulled. The Applicant did not follow due process to have the Respondent's title impugned for any reason.

38. The 1st Respondent having demonstrated that she was the registered owner of the suit property namely No. Marmanet/Marmanet Block 1/535 and having been issued with a title, prima facie her title is indefeasible and the burden shifts to the Applicants to show or demonstrate that the title is challengeable within the provisions of the law.

39. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 1st Respondent's title but the mere proof that the 1st Respondent holds 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.

40. 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”.

41. Consequently, I dismiss the application dated 7th March 2019 with costs to the 1st to 7th Respondents. The interim orders are herein vacated.

42. Parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

Dated and delivered at Nyahururu this 15th day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE