



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.238 OF 2018

HANNAH WANJIHIA NJENGA & JOSEPHMUCHAI (Suing as the Administrators of the

Estate of the late PETER KIMARI KAMIRA.....PLAINTIFFS/APPLICANTS

VERSUS

PETER KIARIE WARUI.....1ST DEFENDANT/RESPONDENT

GEORGE NJAGI KIMANI.....2ND DEFENDANT/RESPONDENT

THE DISTRICT LAND REGISTRAR KIAMBU COUNTY.....3RD DEFENDANT/RESPONDENT

FAMILY BANK LIMITED.....4TH DEFENDANT/RESPONDENT

CONSOLIDATED BANK OF KENYA.....5TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion** Application dated **24th September 2018**, by the Plaintiffs/Applicants seeking for orders that:-

1. That this Court be pleased to grant an order of injunction restraining the Defendants whether by themselves, agents, servants and/or employees from selling, transferring, charging or in any way dealing with the parcels of land known as Title No.Ndumberi/Riabai/5335,5336,5337 and 5338 pending the hearing and determination of this suit.

2. That the costs of this application be in the cause.

The Application is premised on the ground that **Peter Kimari Kamira (deceased)** who died intestate on the **4th of January 2005**, was the registered owner of the property known as **Ndumberi/Riabai/101**, and the Plaintiffs being the Administrator of his Estate are in possession of the title deed issued to him. That the Plaintiffs/Applicants realized on the **24th of July 2013**, that the suit property was illegally closed and subdivided by the 1st, 2nd and 3rd Defendants into **Ndumberi/ Riabai/5335, 5336, 5337 and 5338** and registered in the names of the 1st and 2nd Defendants/ Respondents and some of them have been charged to secure banking facilities with the 4th and 5th Defendants and on default the suit properties may be sold to third parties. Further that the Defendants/Respondents may transfer the suit properties to Plaintiffs'/Applicants' detriment. Further the Applicants and the deceased family may be denied possession and the suit would be rendered nugatory and it is only fair that the interim measures of protection be granted.

In her **Supporting Affidavit**, **Hannah Wanja Njenja** reiterated the contents of the grounds on the face of the affidavit and averred that they conducted a search for purposes of filing a Petition for Grant of Letters of Administration and found out that the title to the suit property had fraudulently been closed and the property subdivided. That however at the time of subdivision and transfers, no Letters of Administration intestate had been obtained with regard to the deceased Estate. It was her contention that the beneficiaries of the deceased had been in occupation since allocation and they have been residing and cultivating the suit property.

The Application is opposed and the 1st Defendant **Peter Kiarie Warui**, filed a **Replying Affidavit** sworn on the **9th of October 2018**, and averred that he is the current registered owner of **Ndumberi/Riabai/5336, 5337 and 5338**. That having established that the property was lawfully owned by **George Njangi Kimani, David Njenja Kimani, and Mary Wahu Kimani**, he entered into a **Sale Agreement** wherein he paid the full purchase price and lodged the transfer documents with the Lands office and he was lawfully, registered as the proprietor and he has been in possession since **2013**. It was his contention that having been lawfully registered, he is protected by the law that prevents

revocation of title against a *bonafide* purchaser. He averred that he was informed by the 2nd Defendant that he legally obtained the property lawfully through a court process and the land subdivided through a Court case being **Civil Case No.149 of 1989**, and that the Applicants ought to have filed an appeal against the Judgment in the said case and that the Applicants, have filed the instant suit in order to litigate again and therefore abusing the Court process.

The 4th Defendant/Respondent through its Legal Officer swore a **Replying Affidavit** on the **29th April 2019** and averred that on the **13th of August 2013**, the 1st and 2nd Defendants opened accounts at their Kiambu branch and on **24th April 2014**, one **Stephen Warui Kiarie** applied and was granted a credit facility on condition that the same would be secured by **L.R Ndumberi/Riabai/5336** in the name of the 1st Defendant/

Respondent. That it carried due diligence and a valuation was duly carried out. Further that the borrower cleared the repayment of the facility and it applied for discharge and that it does not hold any property subject title as security and it shall be applying at the earliest to be struck out from the suit.

The Application was canvassed by way of written submissions to which the Court has now carefully read and considered.

The Plaintiffs/Applicants have sought for injunctive orders. There have been further allegations on whether or not the 1st Defendant/Respondent acquired the suit property lawfully and their registration is indefeasible. Since the Applicants are seeking for injunctive orders, this Court cannot conclusively deal with the disputed issues as the Court is only called upon to determine whether they are deserving of the injunctive orders. The principles for grant of temporary injunction have been long settled in the case of **Giella ...Vs... Cassman Brown Co. Ltd (1973)EA 358**, where it was held:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might 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. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”

It is therefore this Court’s opinion that for the Plaintiffs’/Applicants’

Application to succeed, they must be able to establish that they have satisfied all the three grounds that have been enumerated above.

1. Whether the Applicants have established a prima facie case.

The court in the case of **Eldo City Limited v Corn Products Kenya Ltd & Another [2013] eKLR**, defined a ‘*prima facie*’ case as:-

“Prima facie case has been defined in *Black’s Law Dictionary 2nd Edition* as:-

“At first sight; on the first appearance; on the face of it.....A prima facie case is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced on the other side”

Further in the case **Mrao –vs- First American Bank Ltd & 2 Others (2003) KLR 125**, the Court of Appeal defined ‘*prima face*’ case as ;

“a case where on the material presented to the court, a tribunal properly directing itself will conclude that there was a right that had been breached by the other party as to call for a rebuttal.”

Further in the case **Director of Public Prosecutions ...Vs... Justus Mwendwa Kathenge & 2 Others [2016] eKLR**, where the Court held that;

“Traditionally the basis of application of the equitable remedy of injunction has been section 63 of the Civil Procedure Act and Order 40 (previously 39) of the Civil Procedure Rules. Today Article 23 of the Constitution specifically identifies an order of injunction as one of the reliefs that a court can grant if it is satisfied that a person’s right or fundamental freedom under the bill of rights has been denied, violated or infringed or is threatened. Needless to emphasize, the remedy of temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established, so as to prevent the ends of justice from being defeated. Order 40 recognizes that a temporary injunction will be sought where a property in dispute is in danger of being wasted, damaged, or alienated, or wrongfully sold in execution of a decree, or where a party threatens or intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. An injunction may also be applied for to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court.”

In line with the above decisions, the Court will therefore seek to look at whether the Plaintiffs/Applicants have demonstrated that there is a right that has been breached by the Defendants/Respondents.

The Plaintiffs/Applicants have averred that they are the Administrators of the Estate of one **Peter Kimari Kamira** and to this effect, they have produced letters of Administration. It is not in doubt that the said deceased was the registered owner of the **L.R No.Ndumberi/Riabai/**

101, and that vide a Court decision, the Court ordered that the property should to be subdivided into two equal parts. It is the Applicants contention that the Defendants/Respondents sought to subdivide the property into four parts and that the property was registered into the names of persons who were not beneficiaries of the said **Peter Kamiria**.

From the above decided cases it is clear that for a party to establish a *prima facie* case, the party needs to establish that there is a right that has been breached or that has been threatened, The Plaintiffs/Applicants are the legal Administrators of the Estate of the deceased. It would therefore mean that they are entitled to all the rights, privileges and interests that appertain to the suit property. The Plaintiffs/Applicants have further claimed that the 1st & 2nd Defendants took the part of the suit property that belonged to them and the same was granted to persons who were not beneficiaries of the Estate of the deceased. If indeed the said property was registered to persons who are not beneficiaries of the Estate of the deceased, it would mean that the same is a violation of the Applicants' right to own property and that their rights had been breached. Therefore the Court finds and holds that the Plaintiffs/Applicants have established prima facie case as they have proved that they have interest over the suit property.

On the second limb of if order not granted, the Applicants can adequately be compensated by an award of damages, this Court will echo the findings in the case of **Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR**, wherein the Court held that:-

“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction there must be evidence of immediate danger to property or sale or other disposition.”

It is trite that a crystalized right which is violated cannot be equated to compensation by damages. See the Case of **Niaz Mohammed Janmohammed...Vs...Commissioner for Lands & 4 Others (1996) eKLR**, where the Court held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought”.

Equally in this case, the Court finds that if the Applicants' rights have been infringed, no amount of money can compensate such infringement. Therefore the Court finds that the Applicants have established that they are likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages. This is so because the suit property may be transferred to third parties.

On the third limb, the Court is not in doubt. However, if the Court is to decide on a balance of convenience, the same will tilt in favour of maintaining the *status quo* and the *status quo* herein is directing the Respondents to desist from carrying out any dealings with the suit properties until the suit is heard and determined. Thus the *status quo* herein should remain what was in existence before the Respondents allegedly unlawful actions. See the case of **Agnes Adhiambo Ojwang...Vs... Wycliffe Odhiambo Ojjo, Kisumu HCCC No.205 of 2000**, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

Having now carefully considered the available evidence, the Court finds that the Plaintiff's/Applicant's **Notice of Motion** applications dated **24th September 2018**, is merited. The Court allows the said application entirely. The Applicant is also entitled to costs of the Application.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of December 2019.

L. GACHERU

JUDGE

19/12/2019

In the presence of

No appearance for Plaintiffs/Applicants

No appearance for 1st Respondent

No appearance for 2nd Respondent

No appearance for 3rd Respondent

Mr. Mageto holding brief for Mr. Olende for 4th Respondent

Mr. Mageto holding brief for Mr. Okello for 5th Respondent

Lucy - Court Assistant.

L. GACHERU

JUDGE