



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 35 OF 2019

MARY WAMBUI WARUI.....1ST PLAINTIFF

AGNES AHOMA WARUI.....2ND PLAINTIFF

(Suing as Legal Representative of ELIUD WARUI)

LUCY NYAMBURA KARUCHI.....3RD PLAINTIFF

JAMES RUIRIE WARUI.....4TH PLAINTIFF

FAITH MUTHONI MUNENE.....5TH PLAINTIFF

(Suing as a Legal Representative of CYRUS MUNENE MWENJE)

VERSUS

JOHN NJAMA MWANGI.....1ST DEFENDANT

GEOFFREY MAINA KIHARA.....2ND DEFENDANT

(Suing on their own capacity as Legal Representative of FRANCIS MWANGI KANIA)

RULING

The application before me is the Notice of Motion dated 28th August 2019 brought under **Order 40 Rule 1 & 2 CPR**. The applicant is seeking for a temporary injunction restraining the defendants/respondents by themselves and/or their servants and/or agents from interfering with their quiet possession, use and enjoyment of land parcel Number MUTITHI/CHUMBIRI/975, 976, 977 and 978 and/or selling, disposing, charging or alienating land parcel No. MUTITHI/CHUMBIRI/493 pending the hearing and determination of this suit. The application is supported by the affidavit sworn by Faith Muthoni Munene, the 5th plaintiff herein. According to her, the suit property land parcel No. MUTITHI/CHUMBIRI/493 was initially registered in the name of one Francis Mwangi Kuria (deceased) and on 2nd February 1998, the said Francis Mwangi Kuria transferred the same to one Eliud Warui at a consideration. The applicant further deposed that on 20th January 2000, the said Eliud Warui caused the suit land to be sub-divided into land parcel Nos MUTITHI/CHUMBIRI/975, 976, 977 and 978. Thereafter, he sold land parcel Nos MUTITHI/CHUMBIRI/975 and 978 to Lucy Nyambura Karuchi and James Ruirie Warui (3rd & 4th plaintiffs). The remaining parcels Nos MUTITHI/CHUMBIRI/976 and 977 remained in his name. The applicant further stated that Eliud Warui subsequently sold the remaining portions namely MUTITHI/CHUMBIRI/976 and 977 to Cyrus Munene Mwenje and the titles were issued on 15th March

2013. The applicant also stated that the 1st and 2nd plaintiffs/applicants later sold land parcels Nos MUTITHI/CHUMBIRI/975 and 978 to Cyrus Munene Mwenje and the respective titles were issued to him on or about 2nd December 2014. The 1st defendant/respondent sued Eliud Warui in Mwea Land Disputes Tribunal alleging that he had fraudulently obtained the original land parcel No. MUTITHI/CHUMBIRI/493 from his father Mwangi Kania. He stated that the Land Disputes Tribunal held that Eliud Warui had defrauded the land. The plaintiffs/applicants contend that the Land Disputes Tribunal did not have jurisdiction to adjudicate on matters of ownership of land and that the Land Disputes Tribunal award issued thereto is null and void having been issued in contravention of the **Land Disputes Tribunal Act No. 18 of 1990** (now repealed). The applicants further stated that by the time the said tribunal case award was being filed and award given on 2nd December 2004, the land parcel No. MUTITHI/CHUMBIRI/493 was not in existence. The title having been closed on sub-division on 20th January 2000 and as such, the same could not be executed.

The applicants also deponed that the defendants/respondents have fraudulently obtained title to the original land parcel No. MUTITHI/CHUMBIRI/493 which was closed on sub-division on 20th January 2000 and have started interfering with the 5th plaintiff's possession of land parcel No. MUTITHI/CHUMBIRI/975, 976, 977 and 978. Consequently, the applicants sought to restrain the respondents from interfering with the 5th applicant's/plaintiff's possession of the suit properties being L.R. No. MUTITHI/CHUMBIRI/975, 976, 977 and 978.

On the other hand, the respondents filed a replying affidavit sworn by John Njama Mwangi on 8th October 2019 opposing the application. According to the said John Njama Mwangi, he is the registered owner of land parcel No. MUTITHI/CHUMBIRI/493 which was awarded to his late father FRANCIS MWANGI KARIA vide Arbitration Case No. 31 of 2004 at Wanguru after the Land Registrar Kirinyaga District was ordered to revoke the ownership of Eliud Warui the deceased's title deed of the same land. He further stated that the said Eliud Warui (deceased) appeared before the High Court at Kerugoya vide Misc. Application No. 22 of 2013 which was later dismissed leaving Francis Mwangi Kania (deceased) as the sole proprietor of land parcel No. MUTITHI/CHUMBIRI/493. Finally, the Respondents contend that the applicants are total strangers with no legal claim or genuine allegations against them over the suit land capable of being protected by a Court of law and that the same ought to be dismissed with costs.

ANALYSIS AND DETERMINATION

This is an application for grant of a temporary injunction. The principles of the grant of a temporary injunction are well settled as enunciated in the celebrated case of **Giella Vs Cassman Brown (1973) E.A at page 358**. The Court is guided by these principles and I need not reinvent the wheel. From the pleadings and the affidavits both in support and in opposition to the application, there are two sets of arguments being presented by both sides. According to the applicant, the 5th plaintiff is the registered proprietor of land parcel Nos MUTITHI/CHUMBIRI/975, 976, 977 and 978 which are sub-divisions of land parcel Numbers MUTITHI/CHUMBIRI/493. The respondents position is that the titles obtained by the applicants were fraudulent and that the title registered in the names of ELIUD WARUI was ordered to be revoked and the Land Registrar ordered to rectify the Land Register in favour of the original owner one FRANCIS MWANGI KARIA vide Arbitration Case No. 31 of 2004 at Wanguru. The two parties have presented arguments and evidence to the effect that they possess superior right over the suit property. The respondents' argument is that the plaintiffs title was revoked vide a Land Disputes Tribunal No. 3 of 2004 (Wanguru). The question for determination by this Court is to which of the two interests is superior than the other? Having carefully examined and analyzed the arguments by both sides, I find that the doctrine of **lis pendens** should be applied to this case to restrain the respondents from disposing or otherwise dealing in the suit property in a way that may otherwise defeat the interest of the applicant should it turn out after the full hearing that their rights are more superior than those of the respondents.

Black's Law Dictionary 9th Edition defines '**Lis Pendens**' as the jurisdictional power or control acquired by a Court over property while a legal action is pending. **Lis pendens** is a common law principle. In **Bellamy Vs Sabine (1857) 1 D e s 566, Turner L.S.** held as follows:

“It is a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings”.

Again in *Bernadette Wangare Muiru Vs National Social Security Fund Board of Trustees & 2 others (2012) e K.L.R*, Hon. Lady Justice Nambuye (as she then was) held as follows:

“The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the Court cannot be gain said, particularly for as expediency as well as efficacious disposal of justice. Having said that, with the repeal of Section 52 of the ITPA by the Land Registration Act (L.R.A) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the L.R.A which provides the saving and transitional provisions of this Act, and which stipulates:

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act”.

I agree with the decision by the learned Judge. In the upshot, I find the application dated 28th August 2019 merited and the same is allowed in terms of prayer No. 3 thereof. The costs of this application shall be costs in the cause.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 13th day of December 2019.

.....

E.C. CHERONO

ELC JUDGE

13TH DECEMBER, 2019

In the presence of:

- 1. Mr. Munene holding brief for Ms Wangechi Munene for the Plaintiffs*
- 2. 1st and 2nd Defendants – present*
- 3. Mbogo – Court clerk – present*