



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO. 177 OF 2018

RICHARD TWIGS NYAGA NDWIGA (Suing as the Deputy for

Property and affairs for David Ndwiga.....APPELLANT

-VERSUS-

1. MWAKA NDUNGU KIRUU

2. DUNCAN KINGORI MUCHEMI.....RESPONDENTS

RULING

1. By Notice of Motion dated 3rd July, 2018, and brought under Order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act, the Appellant/Applicant seeks orders of temporary injunction to restrain the Respondents' by themselves, their servants, representatives, employees and/or agents from developing, selling, or in any way alienating Appellant's PLOT NO. MOMBASA MWEMBELEGESA/1320 pending the hearing and determination of this application and the appeal.

2. The application is supported by the affidavit of Richard Twigs Nyaga Ndwiga and the following grounds:

a) **The appellant is a Resident in Canada and son of David Ndwiga and also the Deputy for the Property and Affairs for David Ndwiga which order was entered on 15/1/2016 in the United Kingdom.**

b) **The said David Ndwiga did purchase PLOT NO. MOMBASA/MWEMBELEGEZA/1320 from the 1st Respondent on 16/1/2002, and paid to her the full purchase price of Kshs.250,000/=**

c) **The 1st Respondent did issue David Ndwiga with her title documents, pin number, Identity Card and all documents to enable him transfer the said property in his name but he was unable to effect the transfer as he developed Dementia on 18/3/2013.**

d) **The Appellant was appointed Deputy for the Property and affairs for David Ndwiga on 15/1/16 and did enter a Caretaker Agreement with the 1st Respondent on 13/2/17 and the Appellant began processing the title at the Lands Office Mombasa.**

e) **Upon engaging a valuer, the Appellant was informed that the property had been re-sold to the 2nd Respondent for the sum of Kshs.1,500,000/-.**

f) **The appellant contends that the subsequent acquisition and the title by the 2nd Respondent was illegal, fraudulent, arbitrary, without colour of right and in breach of the Appellant's rights and therefore null and void.**

g) **The appellant seeks conservatory orders to wit that the 2nd Respondent does not develop, re-sell, use, alienate or in any way interfere with the said property until the finalization of the Appeal.**

h) **Unless the orders sought herein are granted the Appellant is likely to suffer irreparable harm and/or loss of the property to his detriment which property was acquired lawfully by the Appellant.**

3. The Appellant avers that he filed plaint on 16/2/18 and an application seeking preservative orders of the property until the suit is heard and finalized but the court made a ruling on 18/5/18 dismissing the said application. The Appellant then filed this appeal. The Appellant has

deposed that he is concerned that by the time the matter is finalized the 2nd Respondent may have developed or sold off the property to another third party.

4. In response to the application, the 1st Respondent filed a replying affidavit sworn on 2nd November 2018 in which she admits selling the suit property to David Ndwigwa on 10th January 2002 and was in the process of assisting the Appellant to register the transfer when it was learnt that the property was registered in the name of the 2nd Respondent. The 1st Respondent avers that the 2nd Respondent is a stranger to her and states that any sale agreement and/or transfer between her and the 2nd Respondent is fraudulent on the part of the 2nd Respondent, and therefore illegal, improper and void *ab initio*. The 1st Respondent has denied selling the subject property to the 2nd Respondent. The 1st Respondent therefore supports the application.

5. In opposing the application, the 2nd Respondent filed a Replying Affidavit sworn on 12th July, 2018 in which he deposed inter alia, that he purchased the suit property from the 1st Respondent on 22nd August 2017 after his advocates conducted due diligence on the property which confirmed that the property was free of any encumbrances and that the property is now registered in his name. He avers that he is an innocent purchaser for value without notice and urged the court to dismiss the application with costs as it is an abuse of the process of court.

6. The application was canvassed by way of written submissions which were duly filed by the advocates for the applicant, the advocates for the 1st Respondent and the advocates for the 2nd Respondent.

7. I have considered the application, the affidavits in support and against and the rival submissions filed. I find that the issue for determination by this court is whether the applicant herein should be granted an order of injunction to restrain the Respondents from developing, selling or in any way alienating the property known as Plot no. MOMBASA/MWEMBELEGEZA/1320 pending the hearing and determination of the appeal. Order 42 Rule 6 (6) of the Civil Procedure Rules states as follows:

(6) “Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the subordinate court or tribunal has been complied with”

8. It should be noted from the above provisions of the law, this court has the power to grant injunction when exercising its appellate jurisdiction. The application herein is brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Act and Section 1A, 1B and 3A of the Civil Procedure Act. Order 40 Rule 1 and 2 provide that this court may grant an order of injunction while Section 3A of the Act provides that nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends to justice or to prevent abuse of the process of the court.

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

10. In the instant case, the dispute is over the property known as PLOT NO. MOMBASA/MWEMBELEGEZA/1320. The Applicant claims to be the lawful owner of the suit property having purchased it from the 1st Respondent. The 2nd Respondent also claims to be lawful owner of the same property having purchased it from the 1st Respondent. The 1st Respondent however has supported the Applicant’s averments and disowned the agreement and transfer in favour of the 2nd Respondent, terming it fraudulent. In this case, it is clear that the main dispute is who between the Applicant and the 2nd Respondent is the true owner of the suit property. The appeal is against the order dismissing the application for an injunction that was filed by the Applicant before the subordinate court. At this interlocutory stage, pending the substantive canvassing of the appeal, the Applicant seeks injunctive relief to the extent that the suit may not be pre-empted through alienation or sale or the change of its status or character through development. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined.

11. 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 Applicant has met the threshold for grant of interlocutory injunction. It is my finding that the applicant has established a *prima facie* case with a probability of success. It is clear that the Applicant has shown his interest over the suit property and his position is supported by the 1st Respondent who is the original registered proprietor of the suit property. I also take the view that should the suit property be sold or developed, no doubt the Applicant will suffer, irreparable loss which may not be quantified in damages as the property may change hands rendering the appeal nugatory or its character may be materially changed through developments.

12. Arising from the above reasons, I find merit in the application. Accordingly, I allow the Notice of Motion dated 3rd July 2018 in terms of prayer 3 thereof. The applicant will have costs of the application to be borne by the 2nd Respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 9th day of December 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Onyango holding brief for Ms. Okata for Appellant and for Ms. Okech for 1st Respondent.

Nyanga holding brief for Gakuo for 2nd Respondent.

Yumna Court Assistant

C.K. YANO

JUDGE