



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 40 OF 2017

JAMES IRUNGU NJERU PLAINTIFF/APPLICANT

-VERSUS-

WILLY KARUIRU KIMARU 1ST DEFENDANT

ESBON MWANGI GAKUU 2ND DEFENDANT

LAND REGISTRAR,

NYERI COUNTY 3RD DEFENDANT

RULING

1. The notice of motion dated **14th March, 2017** was filed by **James Irungu Njeru**, the plaintiff/applicant herein. He seeks the following orders:-

1. Spent

2. Spent

3. That a temporary injunction do issue restraining the defendants, his agents or any one claiming under him from evicting the plaintiffs from Title Number Konyu/Baricho/ 4334 pending hearing and determination of the suit herein.

4. That the costs of the application be provided for.

2. The grounds which the application is premised are found in the body of the application and in the supporting affidavit sworn by the applicant on **14th March, 2017**.

3. The 1st and 2nd respondents opposed the application vide replying affidavits sworn on **27th March, 2017**.

4. The brief facts of this case are that the 2nd respondent is the registered owner of **LR. NO. Konyu/Baricho 4334** (hereinafter referred to as the suit property) which land parcel was transferred to him by the 1st respondent having purchased the same from Joseph Njeru Wakiuru (a grandchild to the applicant's father). The suit parcel is one of the resultant parcels after subdivision of Konyu/Baricho/445

which initially belonged to the applicant's father.

5. It is the applicant's case that his family has lived on the suit property since time immemorial and both his parents are buried therein; that the transfer of the suit property to the 1st defendant and thereafter to the 2nd defendant was fraudulent as the same was done without the knowledge of the estate of the deceased or the applicant.

6. The 1st respondent admits that he transferred the suit property to the 2nd respondent but denies having obtained it fraudulently. He claims to have purchased the suit property from a grandson of the deceased who had been given the suit property as a gift by his grandfather. He states that the applicant had been

given his own portion of land which he sold to strangers and thereafter started squatting on the suit property.

7. The 2nd respondent claims to have purchased the suit property free of encumbrances and with vacant possession; that he took possession, fenced the land but the applicant illegally entered into the suit property and started living there.

8. The conditions upon which an interlocutory injunction may be granted are well settled. The conditions were set out in the case of **Giella vs Cassman Brown & Co. Limited** (1973) E.A 358 as follows;

1. The applicant must demonstrate that he has a prima facie case with a probability of success.

2. An interlocutory injunction will normally not be granted unless the applicant will suffer irreparable loss that cannot adequately be compensated in damages.

3. If the court is in doubt, it will decide the application on a balance of convenience.

9. At this stage, the court is not required to make any final findings on the facts. That will be for the main hearing. The issue to be determined is therefore whether the applicant has satisfied the above conditions.

10. From the material before the court, it is common ground that the 1st respondent purchased the suit property from Joseph Njeru Wakiuru as evidenced by the sale agreement dated 27th July, 2016 and marked W3. It is also not in dispute that the 1st respondent sold the suit property to the 2nd respondent on 1st November, 2016 as evidenced by the sale agreement marked W1 the 2nd respondent was registered as proprietor on 25th January, 2017.

11. The question that arises is whether the applicant has shown any interest in law that can justify the granting of the orders sought.

12. In determining this question, I begin by stating that **Section 26(1)** of the Land Registration Act, 2012 imposes an obligation on this court to take a certificate of title issued by the Registrar upon registration, as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the land. This registration confers upon the 2nd respondent certain rights under **Section 24** and **25** of the Land Registration Act, 2012 subject to the overriding interest in **Section 28** of the same Act.

13. I also take note of the allegation by the applicant that the title held by the 2nd respondent (transferred to him by the 1st respondent) was obtained fraudulently. With regard to that allegation, no evidence whatsoever has been provided by the applicant capable of proving the said allegation. As such, the

allegation is incapable of forming the basis of issuance of any order in favour of the applicant or interfering with the 2nd respondent's right to the suit property.

14. Under **Section 107(1)** and **(2)** of the Evidence Act, Cap 80, the burden is on the applicant to prove that the facts exist. The aforesaid Sections provide;

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

15. Having considered the provisions of **Section 26(1)** of the Land Registration Act 2012 and having found the applicant to have failed to prove the allegation of fraud, I find the applicant has not shown any interest in law that can justify the granting of the orders sought.

16. Will the applicant stand to suffer irreparable damage if the injunction is not granted?

Although it is not in contention that the applicant is in occupation of the suit property, since the applicant did not controvert the allegation by the respondents that his mode of entry into the suit property was illegal, (that he entered the suit property after he had sold his own portion without consent of the registered owner), and the subject matter of the suit being land whose value can easily be assessed in damages and the applicant can be compensated if it is found during trial that he is entitled, I find the applicant will not suffer irreparable damage which cannot be adequately compensated by way of damages.

17. Having found that he applicant has failed to satisfy the first two conditions to be granted an injunction, on a balance of convenience, discretion must favour the respondents and I have said why.

18. For the above reasons, I find no merit in the notice of motion dated 14th March, 2017 and I hereby dismiss it with costs to the respondents.

Dated, signed and delivered at Nyeri this 3rd day of January, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff

N/A for the defendants

Court assistant - Esther