



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 37 OF 2016

NANCY WAMBUI MBAU (Suing as the Administrator of the Estate of

PETER MBAU MBURU.....PLAINTIFF

VERSUS

FRANCIS RATIA GATHUMBI.....1ST DEFENDANT

STEPHEN J. MBURU NJOROGE.....2ND DEFENDANT

LAND REGISTRAR KERUGOYA.....3RD DEFENDANT

RULING

The un-disputed facts of this case are that on 4th December 1978, the 1st defendant as the registered proprietor of land parcel No. KIINE/GACHARO/460 entered into a sale agreement with the deceased **PETER MBAU MBURU** for the purchase of three (3) acres at a consideration of Ksh. 8.300 per acre making a total of Ksh. 24.900. A sum of Ksh. 9,200 was paid to the 1st defendant upon execution of the agreement while the balance was to be paid once the relevant consent to transfer had been obtained from the Land Control Board. The deceased took possession and the consent was granted. The portion occupied by the deceased became parcel No. KIINE/GACHARO/1344 (the suit land).

At that point however, the parties parted ways.

The plaintiff who filed this suit as the administratrix of the deceased's Estate claims that the 1st defendant proceeded to fraudulently sell the suit land to the 2nd defendant particulars of which are pleaded in paragraphs seven (7) of her plaint in which she seeks the following orders:

- a. That the plaintiff is the bona fide owner of land parcel No. KIINE/GACHARO/1344.***
- b. That the Honourable Court do cancel the registration of land parcel No. KIINE/GACHARO/1344 in the names of STEPHEN J. MBURU and do register the said land in the names of the plaintiff.***
- c. Costs of the suit.***

The 1st defendant's case however is that the deceased refused to clear the balance of the purchase price once the consent of the Land Control Board had been obtained and so on 23rd June 1998, he deposited the consideration received from the deceased with the firm of **RUGAITA & CO. ADVOCATE**. The suit land was subsequently transferred to the 2nd defendant at a consideration of Ksh. 87,000 vide an agreement dated 15th March 1988 and a title deed thereto was issued to him.

I now have for my determination the plaintiff's Notice of Motion dated 24th March 2016 in which she seeks the following orders:

- 1. Spent.***
- 2. That the defendants, their agents, servants or anyone claiming under them be restrained from occupying or taking possession, selling, disposing or alienating parcel No. KIINE/GACHARO/1344 and/or a restriction be issued restraining any further dealings and/or registration on the said land pending the hearing and determination of this suit.***
- 3. That costs be provided for.***

The application is premised on the grounds set out therein and supported by the affidavit of **NANCY WAMBUI MBAU** the plaintiff herein the gravamen of which I have already summarized above.

The 1st defendant **FRANCIS RATIA GATHUMBI** and the 2nd defendant **STEPHEN J. MBURU NJOROGE** have separately filed replying affidavits to the application contents of which I have already referred to above.

The application was canvassed by way of written submissions which have been filed by **MUHOHO GICHIMU & CO. ADVOCATES** for the plaintiff and **IGATI MWAI & CO. ADVOCATES** for the 1st and 2nd defendants. The 3rd defendant did not file any response to the application.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

An application such as this one is to be determined in line with the now well settled principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are that:

- 1. The Applicant must show that he has a prima facie case with a probability of success at the trial.**
- 2. A temporary injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not otherwise be adequately compensated for by an award of damages.**
- 3. If the Court is in doubt, it will decide such an application on the balance of convenience.**

A prima facie case was defined in **MRAO VS FIRST AMERICAN BANK OF KENYA LTD AND TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)** as:

“..... a case which on the material presented to the Court, a 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”.

In the case of **NGURUMAN LTD VS JAN BONDE NIELSEN AND OTHERS 2014 e K.L.R**, the Court of Appeal stated as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion..... All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been threatened with violation The Applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as is otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it, the Applicant’s case is more likely than not to ultimately succeed”.

Finally, in **FILMS ROVER INTERNATIONAL LTD VS CANNON FILMS SALE LTD 1986 3 ALL. E.R 772**, it was held that the Court considering such an application should consider taking the course that appears to carry the lower risk of injustice should it turn out to have been wrong.

Guided by the above principles, it is not in dispute that the transaction involving the deceased and 1st defendant was consented to by the Land Control Board on 4th January 1979. The plaintiff’s case, which is also not controverted, is that the deceased took possession of the suit land in 1978 soon after the sale agreement in 1978 and she adds further that the deceased is buried thereon. The 2nd defendant has deponed in his replying affidavit however that in 1999, he obtained orders in **MURANGA SRM CIVIL CASE No. 490 of 1999** preventing the plaintiff from burying the remains of the deceased on the suit land. It is not indicated whether or not that order was complied with. What is clear however is that the plaintiff’s averments that the deceased is buried on the suit land have not been rebutted and that further, the plaintiff is on the suit land because in paragraph nine (9) of her supporting affidavit, she has deponed that people have been visiting the suit land and that the 2nd defendant is in the process of selling it. As the registered proprietor of the suit land, the 2nd defendant is of course entitled to the protection of his title as provided under **Section 26 (1) of the Land Registration Act**. That title can however be impeached if it was obtained through fraud, misrepresentation or through a corrupt or illegal scheme. This Court cannot at this stage interrogate how the 2nd defendant obtained the title to the suit land because the allegation of fraud levelled against him by the plaintiff will only be determined at the trial through evidence. What I find curious, however, is that whereas the deceased appended his signature to the sale agreement between himself and the 1st defendant on 4th December 1978, the acknowledgment slip dated 27th July 1998 in which he acknowledged the refund of the purchase price of Ksh. 30,000 from the firm of **RUGAITA & CO. ADVOCATES** bears the deceased thumb print. Further, the purchase price was Ksh. 24,900 and so it is not clear why a sum of Ksh. 30,000 was being refunded to the deceased. In any case, according to paragraphs seven (7) and eight (8) of the 1st defendant’s replying affidavit, the deceased adamantly refused to pay the balance of the purchase price and that is why the suit land was sold to the 2nd defendant. Since the purchase price was Ksh. 24,900 of which Ksh. 9,200 was paid upon execution of the sale agreement, the balance was Ksh. 15,700. Again, it is not clear why the sum of Ksh. 30,000 was being refunded. Could it be that infact the deceased had met his part of the bargain and that the 1st defendant fraudulently sold the suit land to the 2nd defendant? Those are no doubt issues that will engage the trial Court. For now, I am satisfied that the plaintiff has established a prima facie case with a probability of success and is therefore entitled to the order of temporary injunction sought in her Notice of Motion.

On the issue of irreparable injury that cannot otherwise be compensated for by an award of damages, the plaintiff deponed, and it was not rebutted, that the deceased was buried on the suit land. If she is denied the order of injunction and is evicted but subsequently regains the suit land after full trial, it is not certain what will have become of the deceased’s burial place. Whatever will have happened, in my view,

cannot easily be compensated for by an award of damages. In addition, as the plaintiff is currently in possession of the suit land, the denial of the order of injunction will expose her to the threat of eviction. That is clear from paragraph eight (8) of the 2nd defendant's replying affidavit where he has deponed as follows:

“That the Applicant has only brought this case as a delay to avoid being evicted as a notice has already been issued to her”

Given those circumstances, an order of temporary injunction pending trial is well merited. Even if this application was to be determined on the balance of convenience, the scales would tilt in favour of the plaintiff.

Ultimately therefore and having considered all the evidence herein, I allow the plaintiff's amended Notice of Motion dated 24th March 2016 and make the following orders:

1. The defendants, their servants, agents or anyone claiming under them are hereby restrained from occupying, taking possession, selling, disposing, alienating or in any manner interfering with the plaintiff's possession of land parcel No. KIINE/GACHARO/1344 pending the hearing and determination of this suit.

2. The parties shall comply with the pre-trial directions so that this case is determined in the next twelve (12) months otherwise the order of temporary injunction shall lapse automatically unless extended further by Court upon application.

3. From the pleadings herein, it appears to me that the suit can be determined by the subordinate Court and I invite the parties to address me on that before I make an order of transfer.

4. Costs shall be in the cause.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018

Ruling dated, delivered and signed in open Court this 23rd day of February 2018 at Kerugoya

Mr. Ngigi for Mr. Gichimu for Plaintiff present

Mr. Mwai for Defendants absent

1st Defendant present

2nd Defendant present.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018

MR. NGIGI: We could take a mention date on the issue of transfer of the case.

COURT: Mention on 7th March 2018 so that counsels can address me on that before I make orders.

Mention notice to issue.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018