



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 740 OF 2017**

**LUCY WANJIKU NYAMU.....PLAINTIFF**

**VERSUS**

**COUNTY LAND REGISTRAR KAJIADO.....1<sup>ST</sup> DEFENDANT**

**SILINKAI OLE MPIDAKI.....2<sup>ND</sup> DEFENDANT**

**PERIS NYABISI ANYONA.....3<sup>RD</sup> DEFENDANT**

**JASON KERANDI NYANTINO.....4<sup>TH</sup> DEFENDANT**

**AND**

**NATIONAL HOUSING CORPORATION.....INTERESTED PARTY**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion dated the 15<sup>th</sup> March, 2017 brought pursuant to Order 51 Rule 1, Order 40 Rules 1, 2 & 4 of the Civil Procedure Rules, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, and all the other enabling provisions of the law. It is premised on the following grounds, which in summary is that the suit land herein was a subdivision of land reference number KAJIADO/KISAJU/1628 that was initially owned by SILINKAI OLE MPIDAKI who is the 2<sup>nd</sup> Defendant herein. In March 1998, the 2<sup>nd</sup> Defendant sold land reference number KAJIADO/KISAJU/1693 hereinafter referred to as the 'suit land', to ARTHUR NYAMU WAMWIRI who was the Plaintiff's husband. That the said ARTHUR NYAMU WAMWIRI died on 14<sup>th</sup> February, 2002 and the Plaintiff including her son ANTHONY WAMWIRI NYAMU vide Nairobi High Court Succession Cause No. 2903 of 2002 were granted a Certificate of Confirmation of Grant in respect of the deceased estate, with the suit land thereafter being registered in the Plaintiff's name on 14<sup>th</sup> May, 2008. The Plaintiff has had in her possession the original title deed and was shocked to discover in the year 2011 that the 2<sup>nd</sup> Defendant had illegally and fraudulently interfered with the registration of the suit land at the 1<sup>st</sup> Defendant's office culminating in the generation of a new Green Card including issuance of a title deed. Further that the new Green Card indicated that the 2<sup>nd</sup> Defendant initially owned the suit land which he transferred to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who then Charged it with the Interested party. The 2<sup>nd</sup> Defendant has since been charged vide Kajiado Chief Magistrates' Court Criminal Case No. 791 of 2011 for obtaining land registration by false pretence contrary to section 320 of the Penal Code. The Plaintiff is convinced the fraudulent preparation of the Green Card over the suit land was generated by the 2<sup>nd</sup> Defendant in collusion with the 1<sup>st</sup> Defendant and or his agents working in the Lands Registry at Kajiado in an attempt to dispossess her of the land which she has legally acquired.

The application is supported by the affidavit of LUCY WANJIKU NYAMU the Plaintiff herein where she reiterates her claim and deposes that she is apprehensive that unless orders sought are granted, the 2<sup>nd</sup> Defendant shall not hesitate to dispose off the suit land and/or act in any manner adverse to her title and she will suffer irreparable loss as well as damage which shall be irrecoverable and/or irreplaceable.

The application is opposed by the 2<sup>nd</sup> Defendant SILINKAI OLE MPIDAKI who filed a replying affidavit where he deposes that he was allocated land parcel number KAJIADO/KISAJU/1628 by his late father KANKOI PITIK PARKEITO which he subdivided and sold the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. He denies selling the said land to ARTHUR NYAMU WAMWIRI as claimed by the Plaintiff and refutes having had any dealings with him. He contends that the allegations that he sold land to the late ARTHUR NYAMU WAMWIRI is false and any title purportedly issued in his name is a forgery. He is baffled by the Plaintiff's allegation that he colluded with the 1<sup>st</sup> Defendant to generate a fraudulent Green Card, yet he does not work at the Land Registry. He confirms that the Plaintiff reported him to the police on allegation of forgery and obtaining by false pretence and he has been charged vide Kajiado Chief Magistrate's Court Case Number 1093 of 2011 which case is yet to take off. He insists he only sold the suit parcel of land to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

The 3<sup>rd</sup> and 4<sup>th</sup> Defendants also opposed the application and filed a replying affidavit sworn by the 4<sup>th</sup> Defendant JASON KERANDI NYANTINO where he deposes that on 30<sup>th</sup> July, 2009 they conducted a search at the Kajiado Land Registry which confirmed that the 2<sup>nd</sup> Defendant was the owner of the suit land. He claims on 31<sup>st</sup> July, 2009 they entered into Sale Agreement between the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant to purchase the suit land. Further, that together with the 3<sup>rd</sup> Defendant, they went through the normal transfer procedures and were eventually issued with a title deed of the suit land on 24<sup>th</sup> September, 2009, which title was later Charged to the National Housing Corporation on the 4<sup>th</sup> January, 2011. He insists he is an innocent purchaser for value and therefore cannot be faulted for any purported wrong by the 2<sup>nd</sup> Defendant. He reiterates that it would be a travesty of justice if the 3<sup>rd</sup> Defendant and himself were enjoined from dealing with the suit land which they have occupied for a period of time.

The Interested party also opposed the application and filed a replying affidavit sworn by MARTIN SHIVERE who is its Accountant where he deposes that the Corporation created and registered a charge over the suit land as security for the repayment of a loan of Kshs. 3 million advanced to the 4<sup>th</sup> Defendant herein. He confirms that before the creation of the said Charge, the Corporation had procured an official search on the title to the suit land, which showed that it was registered in the joint names of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively. He states that the Charge was lawfully registered on 4<sup>th</sup> January, 2011 and that the consent to Charge was obtained from the relevant Land Control Board. He reiterates that the Corporation took a Charge over the suit land as security for repayment of the loan advanced to the 4<sup>th</sup> Defendant in the ordinary course of business, in good faith and without any notice of the alleged defect in the title to the suit land. He insists the Plaintiff has no case against the Interested Party.

The 1<sup>st</sup> Defendant never filed a response to the application despite being duly served.

All the parties except for the 1<sup>st</sup> Defendant filed their respective written submissions which I have considered.

### **Analysis and Determination**

Upon perusal of the application together with the supporting affidavit, the replying affidavits and the parties' submissions, at this juncture the only issue for determination is whether the interim injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

**"First, an 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 would 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."**

In line with this principle, the Court will proceed to interrogate whether the Plaintiff has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the Plaintiff has demonstrated a prima facie case with probability of success, it is her contention that she is the proprietor of the suit land and the 2<sup>nd</sup> Defendant fraudulently colluded with the Kajiado Land Registry and procured a new Green Card and transferred the suit land to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 2<sup>nd</sup> Defendant claims he was allocated land parcel number KAJIADO/KISAJU/1628 by his late father KANKOI PITIK PARKEITO which he subdivided and sold the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. He denies selling the suit land to the late ARTHUR NYAMU WAMWIRI. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that they are innocent purchasers for value, as they conducted due diligence at the Kajiado Land Registry which revealed that it is the 2<sup>nd</sup> Defendant who was the proprietor of the suit land, after which they entered into a Sale Agreement and obtained the necessary consent to transfer. The Interested party insists the Plaintiff has no claim against it as the suit land was charged by the 4<sup>th</sup> Defendant to secure a loan of Kshs. 3 million. Further that at the time of registering the Charge, the Corporation had conducted due diligence which revealed the suit land belonged to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, after which they obtained the necessary consents to Charge.

Looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Plaintiff over the suit land is not baseless. Although several issues are curious about how both the Plaintiff and the 2<sup>nd</sup> Defendant retained their respective titles to the suit land, with the 2<sup>nd</sup> Defendant later selling the said land to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. I note the Plaintiff's title deed is dated the 14<sup>th</sup> May, 2008 and as per the Certificate of Official Searches dated the 6<sup>th</sup> June 2013 and 22<sup>nd</sup> January, 2014 respectively it indicated she was the proprietor of the suit land while the one dated the 24<sup>th</sup> June, 2011 stated that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were the proprietors, while the one dated the 30<sup>th</sup> July, 2009 showing the land was owned by the 2<sup>nd</sup> Defendant. I further note that the 2<sup>nd</sup> Defendant was issued with a title deed dated the 13<sup>th</sup> February, 1998. The Plaintiff avers that the deceased bought the suit land from the 2<sup>nd</sup> Defendant who has denied the claim and stated that he only sold the suit land to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. However, these are issued best heard and determined at a full trial and not at this interlocutory stage. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants' on the other hand contend that they undertook due diligence and innocently entered into a Sale Agreement with the 2<sup>nd</sup> Defendant and purchased the suit land which they subsequently Charged. It is against the foregoing that I find that the Plaintiff has established a prima facie case with a probability of success.

On the second principle as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' claim ownership of the suit land that has now been Charged to the Interested Party to secure a loan. There are also allegations of fraud by both parties who admit that there is a criminal case against the 2<sup>nd</sup> Defendant who has been charged with obtaining land registration by false pretence, which case is still pending before the Chief Magistrate's Court at Kajiado.

In the case of **UCB Vs Mukoome Agencies (1982) HCB22** it was held that **'where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'**.

In the instant case I find that it would be pertinent if both the Plaintiff and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were granted an opportunity to be heard to enable the court make a determination on the ownership of the suit land. I further find that since the Plaintiff claims to have title over the suit land which she inherited from her late husband, she will indeed suffer irreparable harm if the orders sought are not granted.

On the question of balance of convenience, it was held in the case **Paul Gitonga Wanjau V Gathuthi Tea Factory Company Ltd & 2 other (2016) eKLR** that: **'the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the applicant has a strong case on the merits or there is significant irreparable harm., it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.'**

From the evidence presented by the parties, I am not in doubt that in the current scenario where several parties are claiming title over the suit land, if the said title is not preserved, it may be wasted away.

Since both the Plaintiff as well as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are staking claim over the suit land, with the sanctity of the title being in dispute, the Court finds that these are issues best determined at a full trial, I will decline to grant the orders as sought in the Plaintiff's Notice of Motion dated the 15<sup>th</sup> March, 2017 which I find merited but proceed to make the following order:

1. Current status quo be maintained pending the outcome of the suit.
2. An inhibition order be and is hereby registered by the Land Registrar Kajiado as against land parcel number KAJIADO/KISAJU/1693 measuring approximately 4.05 hectares, of any dealings, lease or charge pending the hearing and determination of the suit.

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

**Dated signed and delivered in open court at Kajiado this 20th day of February, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**

**Present:**

Cc Mpoye

Mwangi for Plaintiff

N/A for Respondents