



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 236 OF 2017**

**KITIRI FARMERS CO-OPERATIVE SOCIETY.....PLAINTIFF/APPLICANT**

**VERSUS**

**CHIEF LAND REGISTRAR.....1<sup>st</sup> DEFENDANT/RESPONDENT**

**SETTLEMENT FUND TRUSTEES.....2<sup>nd</sup> DEFENDANT/RESPONDENT**

**WILSON MAINA MUTAHI.....3<sup>rd</sup> DEFENDANT/RESPONDENT**

**JOSEPH MBURU MIHANGO.....4<sup>th</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 18<sup>th</sup> May 2016 brought under *Order 40 Rules 1,2,3, and 4 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and all other enabling provisions of the Law* where the Applicant seeks:

i. Spent.

ii. Spent

iii. Spent

iv. That the 2<sup>nd</sup>,3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents, their agents, servants, employees, assigns or any persons acting under their direction or instructions or otherwise howsoever or any of them restrained by an Order of temporary injunction from trespassing on Land Reference Number NYANDARUA/KITIRI/419 or in the alternative Land Reference Numbers NYANDARUA.KITIRI/7918– 7930 (being the unlawful subdivisions of Land reference Number NYANDARUA/KITIRI/419 and which are registered severally in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents either jointly or individually), or interfering, in any way, with the Plaintiff's ownership, quiet enjoyment, possession and use of the Suit Premises, and from offering for sale, selling, transferring alienating or in any way disposing the Suit Premises situate in the Engineer Township in the County of Nyandarua and the developments thereon pending *inter-partes* hearing and determination of this suit.

v. that the Honorable Court be pleased to Order the Inspector General of Police and the Officer Commanding Police Station, Engineer Police Station to avail all necessary assistance in enforcing the temporary Order of injunction

vi. that the costs of the Application be borne by the Defendants/respondents in any event.

2. The application is predicated upon the grounds on the face of the application as well as on the annexed affidavit of Simon Kamau Ngugi the chairman of the Plaintiff/Applicant herein, sworn on the 18<sup>th</sup> May 2016 and filed on the 19<sup>th</sup> May 2016.

3. It is worth noting that after the Applicant filed the present application and submissions, he subsequently filed a Notice of Motion dated 21<sup>st</sup> April 2017 brought under *Order 40 Rule 3(1)(2) and (3), of the Civil Procedure Rules, Section 3A of the Civil Procedure Act*, seeking that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein be detained in prison for a term not exceeding six months for disobeying the court orders granted on 20<sup>th</sup> February 2017, barring them for interfering with the suit land, a ruling which was delivered on the 4<sup>th</sup> October 2017 dismissing the same.

4. The present application dated the 18<sup>th</sup> May 2016 was canvassed by way of written submission and thereafter parties through their counsel highlighted the said submissions on the 22<sup>nd</sup> November 2017.

5. Upon considering the application, Affidavits, annexures and the submissions filed by both parties, I would summarize their cases as follows:

6. The applicant's contention is that it is the registered proprietor of land parcel No Nyandarua/Kitiri/419 the suit property herein, together with all the buildings and improvements situated in the county of Nyandarua, having purchased the same from the 2<sup>nd</sup> Defendant/Respondent in 1968.

7. That having acquired the suit land from the 2<sup>nd</sup> Respondent, the Applicant took possession of the same and charged it to the 2<sup>nd</sup> Respondent as a security for a loan to finance a water project.

8. That subsequently on or about the 22<sup>nd</sup> May 2014, the Applicant discovered that with the connivance of the 2<sup>nd</sup> Respondent, the 3<sup>rd</sup> and 4<sup>th</sup> Respondent had illegally and fraudulently acquired a title deed to the said suit land by a transfer from the 2<sup>nd</sup> Respondent.(see search certificate marked as SNK-3)

9. That upon learning of this illegal transfer, the Applicant placed a caution (marked as SKN-4) on the land which had now been subdivided into several parcels of land being Nyandarua/Kitiri/7918 through to 7930 as evidenced by annexure marked as SKN-6.

10. That when the Applicant tried to inquire how the suit land had been transferred yet there had been a caution placed on it, he was informed that the said situation arose from an award issued by the North Kinangop District Land Tribunal case No. 020 of 2005 which was adopted at the Nyahururu Principle Magistrate's Court in Land Dispute Case No. 17 of 2005.

11. The Applicant's submission was that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's action of subdividing the suit land, being Nyandarua/Kitiri/419, into subsequent parcels of land and further registering the same in their individual names was a move aimed to deprive it the use of the suit land.

12. It was further the Applicant's submission that after the institution of the present suit herein, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents forcefully entered into the suit premises and forcibly removed the Applicant's tenants thereon and commenced construction in the suit premises wherein it necessitated the Applicant to file another application dated the 14<sup>th</sup> February 2017 to verify the present application as being very urgent.

13. That unless restrained by the court, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein will continue with their unlawful acts therefore interfering with the Plaintiff's ownership, quiet enjoyment, possession and use of the property and consequently interfere with the subject matter of the Applicant's application.

14. The Applicant submitted that they had established a prima facie case by proving that they had legal right over the suit land which right needed protection through a temporal injunction, pending the hearing and determination of the suit.
15. Further that although the Applicant was in actual and constructive possession of the suit land, the actions of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents of entering the suit premises and forcibly removing the Applicant's tenants thereon and thereafter commencing construction, if not restrained by the court would cause it to suffer irreparable loss and damages if the injunction was not issued.
16. The Applicant also submitted that on a balance of convenience, it would suffer grave injustice if the injunction is not granted as compared to the Respondents. The Applicant hence submitted that it had established all the principles required of issuance if a temporal injunction as was stipulated in the celebrated case of **Giella vs Cassman Brown** and prayed that their application be allowed.
17. In opposition to the application, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents through their Counsel submitted on the history of how they came to be the registered proprietors of the suit land to the effect that;
18. On 1<sup>st</sup> September 1995, vide a letter annexed as WMM1, the chairman of the Applicant wrote to the Director of Lands Adjudication and Settlement seeking to subdivide P1 419 in Kitiri scheme, Nyandarua District so as to dispose of the resultant plots to members in order to raise funds to service a loan advanced to the society.(see annexure WMM2)
19. That subsequently the society sub-divided the P1 into thirteen plots which were advertised for sale and regularized vide a sale agreement (marked as WMM3) drawn by the society's advocate and executed by the committee members.
20. That subsequently the Defendants purchased the plots but when the Applicant failed to adhere to the terms of the agreement, members wrote to the applicant vide letter marked as WMM4 to protest but when their letter elicited no response they decided to escalate the matter to the North Kinangop District Land Disputes Tribunal who on the 31<sup>st</sup> March 2005, vide their award, directed the District Settlement officer Nyandarua to release the discharge of charge to the claimants as they had purchased the suit land being plot No 419 from the Applicant and that secondly that the Land Registrar Nyandarua do register the said suit plot to the purchasers, 3<sup>rd</sup> and 4<sup>th</sup> Defendants being some of the purchasers.
21. The Award was adopted and a decree herein marked as WMM6, was issued at the Nyahururu Principle Magistrate's Court in Land Dispute Case No. 17 of 2005.
22. That the 3<sup>rd</sup> and 4<sup>th</sup> Defendants then applied for and were allocated the suit land vide a letter dated the 28<sup>th</sup> June 2012, marked as WMM7, on condition that they paid the usual charges and settled the loan owed by the Applicant to the Settlement Fund Trustee.
23. On fulfilling the conditions contained in the allotment letter, the Respondents were issued with the discharge of charge and transfer letter. That it was upon the receipt of these documents that the Applicant lodged a complaint before the Nyandarua Land Management Board.
24. The matter was heard and the Board again decided in favor of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who then approached the Land Registrar for issuance of their respective title deeds, only to be served with a caution hearing letter herein marked as WMM9, dated the 26<sup>th</sup> January 2016, in respect of parcels No. Nyandarua/Kitiri/7918 through to 7930.
25. That the caution hearing proceeded on the 6<sup>th</sup> April 2016 (proceedings marked as WMM10) before the Land Registrar Nyandarua/ Samburu wherein it was held that the caution could not stand and the same be removed unless there was a court order prohibiting the same.

26. That subsequently consent was issued by the Land Board to the Respondents to facilitate the transfer, registration and issuance of title deeds to the respective owners.

27. Based on this sequence of events, the Respondents submitted that the Applicant had not established a prima facie case for it had not proved proprietorship of Nyandarua/Kitiri/419 but rather, it was the respondents who had proved that the interest in the suit land was vested in them and others as purchasers for value who were in possession of the suit premises.

28. That since their Registration was the first, their rights were protected under Section 80 of the Land Registration Act which states as follows:

*(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.*

*(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.*

29. That their interest and rights had been upheld in the proceedings that had been conducted before the North Kinangop District Land Disputes Tribunal as well as the before the Nyandarua Land Management Board.

30. The Respondents submitted that they were in actual possession of the suit premises and if the orders sought were to be issued, then it would amount to an eviction whereby they would suffer irreparable harm as they would lose their source of livelihood and be rendered destitute.

31. The Respondents also submitted that the Applicant were guilty of non-disclosure of material facts to the effect that they represented to the court that its members were in occupation of the suit land as rightful owners of the same to create the impression that its members were in use of the land so as to be granted orders wherein in actual sense the Respondents were the ones in possession of the said suit land.

32. They submitted that since the Applicant was guilty of non-disclosure, they were not entitled to the equitable remedy of injunction so sought.

33. The issue for determination by this court is whether the Applicant has established a case to enable this court grant it the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

*The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants 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. (E.A. Industries v. Trufoods, [1972] E.A. 420)."*

34. Has the Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

*"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is 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."*

35. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicant, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.
36. The first issue that I need to consider for determination is whether the Applicant has established a prima facie case as is required in the **Giella vs. Cassman Brown** herein supra.
37. In consideration of the Applicant's submission that it is the proprietor of the suit land, I have considered all the material facts placed before me and find that there is no doubt that the suit land once belonged to the 2<sup>nd</sup> Respondent herein.
38. That although it is not clear how the suit land was transferred to the Applicant yet what is not in dispute is that the Applicant herein took a loan from the 2<sup>nd</sup> Respondent and subsequently charged the suit land to the 2<sup>nd</sup> Respondent as a security for a loan
39. It is also not in doubt that the Applicant did not service its loan and that is when the present issue at hand cropping up wherein the current proprietorship of the suit land in issue, a matter that cannot be dealt with at this preliminary stage.
40. That although the Applicant has claimed ownership of the suit land, I find that there has been no supporting evidence provided by it proving proprietorship of the suit land. What is on record as stated by the Applicant is that it purchased the suit land same from the 2<sup>nd</sup> Defendant/Respondent in 1968 and later charged the same to the 2<sup>nd</sup> Respondent who then fraudulently transferred the same to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
41. No supporting evidence has been provided however by the Applicant to prove the allegation that the 3<sup>rd</sup> and 4<sup>th</sup> Respondent had illegally and fraudulently acquired a title deed to the said suit land. Indeed by a copy of the official search dated 3<sup>rd</sup> February 2005 and annexed to the 3<sup>rd</sup> Respondents' affidavit dated the 2<sup>nd</sup> November 2016, the suit land was still registered in the 2<sup>nd</sup> Respondent's name up to the year 2005 when the parties in the present suit went before the North Kinangop District Land Disputes Tribunal.
42. The Applicant having failed to establish proprietorship of the suit land, I find that it has failed to establish that there existed a right to the suit property which right was apparently infringed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein. I therefore find that the Applicant herein has failed to establish a prima facie case.
43. On the second issue of determination as to whether the Applicant will suffer irreparable damages if the injunctive orders are not issued, there is evidence on record that both the Respondents are in actual possession of the suit land. By issuing the orders so sought by the Applicant, the same would amount to eviction orders which are mandatory in nature.
44. The standards and principles for the grant of an interlocutory positive (mandatory) injunction are slightly different from those of an interlocutory negative (prohibitory) injunction. As was held in the case of **Kenya Breweries Ltd –vs.- Washington Okeyo [2002] 1EA 109**, there must be special circumstances over and above the establishment of a prima facie case for a mandatory injunction to issue and even then only in clear cases where the court thinks that the matter ought to be decided at once.
45. Having so found it would not be in in the best interest of justice to issue injunctive orders at this stage as the same would amount to granting a final order which is inappropriate at this stage.
46. Accordingly, taking into account all the circumstances of this matter the balance of convenience would tilt in favor of the Respondents.

47. The last issue that I must determine is whether the Applicant herein is in actual possession of the suit land or the present application was filed to hoodwink the Court into granting an injunctive order which would subsequently amount to an eviction.

48. The Court finds that the Applicant herein is guilty of material non-disclosure and did not come to Court with clean hands. An injunction being an equitable relief, the applicant ought to have come to Court with clean hands. The court held, in the case of *Jane Achieng Onyango Vs Giro Commercial Bank, Kisumu HCCC No. 339 of 1999*, that :-

*“an injunction being an equitable remedy, the party seeking it must come to Court with clean hands.*

49. In the case of *David Kamau Gakuru Vs National Industrial Credit Bank Ltd, Civil Appeal No 84 of 2001*, the Court held that:

*“An Injunction being, an equitable remedy cannot be granted to a party who has demonstrated openly by his conduct that he is undeserving of the equitable relief”*

50. Arising from all of the above reasons, I find that the Plaintiff/Applicant has not reached the threshold for grant of an interlocutory injunction. I therefore dismiss this Application dated the 18<sup>th</sup> May 2016. Costs shall be in the cause. Parties to maintain the status quo until the hearing and determination of the suit.

**Dated and delivered at Nyahururu this 14th day of February 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**