



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 467 OF 2017

JOHN WAWERU WACHIRA (Suing as a legal Representative

of the Estate of the Deceased Wachira Ngibe

alias DANIEL WACHIRA GIBE)1st PLAINTIFF/APPLICANT

HERMAN KINYANJUI.....2nd PLAINTIFF/APPLICANT

VERSUS

MARY NJOKI WARIRI (Sued as the Administrator

of the Estate of

GEOFFREY WAIRERI NUNUA).....1st DEFENDANT/RESPONDENT

PETER NDUATI NUN.....2nd DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 10th July 2017 filed under Order 40 Rules 1(a),2(1) and 3 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act and all other enabling provisions of the Law where the Plaintiff/Applicants' seeks orders that:-

i. Spent

ii. Spent

iii. That this honourable court be pleased to issue temporary orders of injunction restraining the Defendant/Respondents herein either by themselves, their servants, Agents and or any other persons acting on their behalf from alienating, transferring, transmitting, subdividing or doing such acts as would interfere with the current position of land parcels No. Nyadanrua/Ol Kalou South/2035 and 2034 which was originally Parcel No. Nyadanrua/Ol Kalou South/73 or any subdivision that may have been made from these two parcels until the case herein is heard and determined.

iv. That the orders herein be served upon the OCS Ol Kalou Police station to ensure compliance.

v. That costs of this Application be provided for.

2. The said application was supported by the grounds on the face of it and an Affidavit, sworn on the 10th July 2017 by John Waweru Wachira the legal Representative of the Estate of the late Daniel Wachira Ngibe alias Wachira Ngibe.
3. That on the 27th July 2017 counsel for the Applicant appeared before me and sought for a date for the hearing of the application inter parties wherein the court gave a date for the 30th October 2017 and directed for the status quo to be maintained.
4. On the hearing date the counsel for the Defendants were absent and Counsel for the Applicant sought for leave to file a further replying affidavit in response to the filed affidavits of the respondents. He also submitted that the application be disposed of by way of written submissions. The court obliged him
5. The court set the matter for hearing on the highlight for the 16th January 2018 on which day the court was informed that whereas the Applicant had filed and served their written submissions, yet the Respondents had not done so. The court was further informed that parties were ready to take a date for ruling by which time the Respondents would have filed their written submissions.
6. It is on record that the Applicants written submissions were filed on the 20th November 2017 whereas the 1st Respondents written submissions were filed on the 7th February 2018. By the time I was writing this ruling, the 2nd Respondent had not filed his written submission.
7. I have read the application dated the 10th July 2017 as well as the written submissions by both parties and the cited authorities and the relevant law therein.
8. The Applicants' claim is to the effect that he is entitled to the whole of half of the suit parcel of land currently registered in the names of the Respondents herein.
9. That both the Respondents hold the suit parcel in trust for themselves and for the family of the deceased Daniel Wachira Ngibe alias Wachira Ngibe.
10. The Applicant's submission was to the effect that the respondents herein were Administrators of the Estate of Geoffrey Waireri Nunua alias Wairiri Nunua.
11. That prior to the death of deceased Daniel Wachira Ngibe alias Wachira Ngibe, he lived with his family in Kericho within Nandi County where they worked on the tea plantations.
12. That subsequently his family and the family of Wairiri Nunua, his brother in law, moved from Kericho and settled on the late Wachira Ngibe's plots No. 50 and 51 Silanga Scheme in Ol Kalaou area. As evidenced by the letter from the lands and settlement officer marked as JWW4.
13. That he subsequently relinquished this plots to Chiera Muchwe and moved to settle on new allocated plots as evidenced in annexure marked as JWW5 being land parcel No. Nyadanrua/Ol Kalou South/73, where upon his death, he was buried on that parcel of land where his remains are to date.
14. The Applicant gave a history of how the deceased came into possession of plot No. 50 and 51 Silanga Scheme in Ol Kalaou area as follows.
15. That the deceased Wachira Ngibe together with three other persons namely Chiera Muchwe, Marko Kinyajui and Junius Ndungu contributed money and bought plots No 50 and 51 Silanga Scheme.
16. That thereafter a dispute arose between them wherein the matter was settled by the Lands settlement officer vide an agreement made on the 20th March 1967 and marked as JWW6 (a) and (b) wherein it was directed that Chiera Muchwe refund the monies contributed by the other three persons and remain on Plot No 50 and 51 Silanga scheme wherein they would be allocated other plots.

17. That since Wachira Ngibe was ailing at the time, he requested Wairiti Nunua vide a letter dated 20th March 1967 and marked as annexure 7(a) and (b) to collect his share of the money for him.
18. That subsequently, Wachira Ngibe got plot no 73 Ol Kalou South, Marko Kinyajui got plot No. 60 Ol Kalou South, Junius Ndungu got plot No. 43 Ol Kalou South as seen in annexure JWW4.
19. That despite Wairiti Nunua having been asked by Wachira Ngibe to represent him as per annexure 6(a) and (b) he got the money and went and registered himself as the allottee of plot No 73 as is evidenced in annexure JWW7.
20. That from the documents annexed it emerged that the said Wairiti Nunua was not one of the persons who had contributed to but plot No. 50 and 51 Silanga scheme and neither was he one of the persons to benefit from alternative plots after the refund of the money to plots for plots 50 and 51 Silanga scheme upon being compensated by Chiera Muchwe.
21. That the said Wairiti Nunua fraudulently misrepresented himself s a person whose name was to be registered and got registered as the alottee of plot No 73 without the knowledge of the deceased Wachira Ngibe who never recovered from his illness and died on the 25th September 1969 and his body was interred on that land.
22. That the respondents filed succession cause case No 380 of 2007 in the Nakuru high court wherein they fraudulently transmitted parcel No. Nyadanrua/Ol Kalou South/73 to themselves without disclosing that the land belonged to the estate of Wachira Ngibe. The copy of confirmation of grant was attached as annexure JWW8.
23. That in the process of transmitting the above captioned land, they caused it to be subdivided into two hence resulting into Land parcels No. Nyadanrua/Ol Kalou South/2035 and 2034.
24. That following the said action, and when the filing of the succession cause was brought to the attention of the applicant, he placed a caution on the land for 60 days which was removed early June 2017 and the Applicant was apprehensive that the Respondents will dispose it of as they are in the process of further sub dividing it.
25. In summation, the Applicant submitted that the late Wairiti Nunua held the suit land in trust for the late Wachira Ngibe.
26. The Applicant submitted that they had satisfied the principles laid down in the **Giella vs Cassman Brown** case in that they had established a prima facie case with high chances of success to be granted the orders so sought.
27. The Application was opposed by the 1st Respondent whose response was to the effect that the deceased Daniel Wachira Ngibe for whom the Applicant represents died on the 27th September 1969 making it 49 years ago. That it was not until the 30th March 2017 that the Applicant obtained letters of administration that the Applicant is guilty of leaches and the orders sought cannot therefore be granted.
28. That the family of the deceased also move out of the suit land immediately the deceased passed away.
29. That on the 14th December 2016 the Land Registrar at Nyahururu gave the Applicant 60 days to file suit but the Applicant failed to do so because he had no locus standi to do so. That unlike the Applicant, the 1st Respondent had supporting documentary evidence marked as MNW1-MNW 5 which clearly showed their legitimacy over the suit land right from when it was allocated on the 17th December 1966 to the discharge and issuance of title in 1982.
30. That 1st respondent's further submission was that the Applicant had no proof that the deceased Geoffrey Wairiti Nunua held the suit land in trust for the deceased Daniel Wachira Ngibe nor that he had

jointly owned or contributed to the purchase of it. That the only document that the Applicant had was for parcel of land Known as plot No. 50 and 51 Silanga scheme in which Geoffrey Wairiti Nunua had no interest in.

31. The 1st Respondent also submitted that orders cannot be issued in vain as the Applicant is not clear which property he has interest in, whether it is 2030, 2034, 2035 or 2040 of which the 1st Respondent is a stranger to the 1st 2nd and 4th properties. To this effect thereof the Application is defective.

32. That the Applicant had not established a prima facie case as was expected by virtue of the **Giella vs Cassman Brown case** as there was no evidence of proprietary rights established by the Applicant, further no loss or damage would be suffered by the Applicant if the orders sought were not granted. The 1st Respondent further submitted in conclusion, that there was no chance of success in the first instance and that the application ought to be dismissed with costs to the Respondent.

33. Although the 2nd Respondent did not file his submissions yet I have looked at his replying affidavit to the Application where he deponed that he knew both the Applicant and the 1st Respondents herein.

34. That he is the brother to the late Geoffrey Wairiti Nunua and that as long as he can remember both his brother and the late Daniel Wachira Ngibe lived on parcel of land No. Nyadanrua/Ol Kalou South/73 wherein they both had established their respective homesteads.

35. That the late Daniel Wachira Ngibe was buried on the said suit land but that he the 2nd Respondent moved out of the suit land in 2010 and was not involved in his brother's Succession Cause hence he had no land to give to the Applicant. And that although he was made aware through the court proceedings that he had a share in the suit land, he has not received the title deed to the parcel No. Nyadanrua/Ol Kalou South/2034 and has not even been shown the land parcel nor the beacons therein.

36. That he had no objection to the Applicant's family getting a share in land parcel No. Nyadanrua/Ol Kalou South/73 since both the deceased's' families lived thereon since 1967.

37. The often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

38. In the present case there is no dispute going by annexure marked as MMW 3(b), that the late Geoffrey Wairiti Nunua whose Estate is represented by the 1st Respondent herein was the registered proprietor of the suit land being land parcel No. Nyadanrua/Ol Kalou South/73.

39. The suit land having been registered in 1982, was governed by the repealed **Registered Land Act, Cap 300 which then** constituted the 1st Respondent as an absolute proprietor and conferred on him all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act (**section 28**).

40. The current land regime is set out in the Land Registration Act, Act No. 3 of 2012, and the Land Act, Act No. 6 of 2012.

41. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows.

Section 25 (1) provides:-

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-

a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and

b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

42. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship section 26 (1) provides:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except

a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

43. The Applicant has argued and asserted that the 1st Respondent’s title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence that the Government has recalled and/or revoked the title. Both the Land Registration Act section 26 (1) that provide for the indefeasibility of title and Article 40 (6) of the Constitution envisage that where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

44. The 1st Respondent was entitled to observance of due process to have her title cancelled, revoked and/or annulled. The Applicant did not follow due process to have the Respondent’s title impugned for any reason.

45. The 1st Respondent having demonstrated that her deceased husband was the registered owner of the suit property namely No. Nyadanrua/OI Kalou South/73 and having been issued with a title, Prima facie their title is indefeasible and the burden shifts to the Applicant to show or demonstrate that the title is challengeable within the provisions of the law.

46. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 1st Respondent’s title but the mere proof that the 1st Respondent hold a duly registered certificate which on the face of it was properly acquired is sufficient to lead the court to hold that the Applicant has not established that there is a prima facie case.

47. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

48. Consequently, I dismiss the application dated 10th July 2017 with costs to the Respondents.

49. Parties to comply with the provisions of order 11 within the next 21 days for the hearing of the main suit herein.

Dated and delivered at Nyahururu this 13th day of March 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE