



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**ELC NO. 50 OF 2017**

**ESTHER WANJIRU MWANGI.....1<sup>ST</sup> APPLICANT**

**NGURE GITAU.....2<sup>ND</sup> APPLICANT**

**RAHAB WANJIRU NJUGUNA.....3<sup>RD</sup> APPLICANT**

**(suing in their capacity as officials of apostolic congregation ministries)**

**VS**

**ZACHARIA KAMAU MWANGI.....DEFENDANT**

**RULING**

1. The Plaintiffs filed suit against the Defendant for fraudulently selling to them a portion of LR No Loc 2/Kangari/4373 and 4374 (suit lands). That he knew or ought to have known that he had no proprietary interest in the suit lands. That the High Court in Nyeri HCCC P & A Appeal No.1 of 2006 determined that the suit lands be cancelled and reverted to the original Loc 2/Kangari/4250 and transmitted it to Hannah Njeri Mwangi, Virginia Wangari Mwangi and Miriam Njoki Mwangi. As a result of the alleged fraudulent misrepresentations, the Plaintiff lost Kshs 3.4 Million in terms of the purchase price as well as mesne profits in relation to the suit lands. Further and in the alternative the Plaintiffs averred that the only property that the Defendant has an interest in is LR No Loc 2/Kangari/4252 and therefore the same should be subdivided into 2 plots of equal measurement with the cancelled LR No Loc 2/Kangari/4373 and 4374 and transferred to them in compensation for their loss of the two plots. He denied owing the Plaintiffs any monies in the sum of Kshs 3.4 Million or any alternative plots as claimed.

2. In his statement of defence the Defendant insisted that titles for LR No Loc 2/Kangari/4373 and 4374 transferred to the Plaintiffs were genuine and that he fulfilled his obligations under the contract of sale. He blamed Hannah Njeri for the Plaintiff's woes for allegedly instigating the cancellation of the suit lands by the High Court in Nyeri.

3. On the 13/11/17 the Plaintiffs/Applicants filed a Notice of Motion seeking a temporary injunction restraining the Defendants, his servants and /or agents from selling/transferring disposing of in any manner alienating or interfering in any manner with the parcel of land known as LR No Loc 2/Kangari/4252.

4. The application is premised on the supporting affidavit of the 2<sup>nd</sup> Plaintiff as well as grounds *inter alia* that the Defendant falsely and wrongly obtained Kshs 765,000/- each pretending that he would sell two plots LR No Loc 2/Kangari/4373 and 4374 to them, which titles were later cancelled by the High Court in Nyeri in P&A Appeal No. 1 of 2006. That by then the Plaintiff had constructed a permanent building, thus occasioning them loss and damages.

5. The 2<sup>nd</sup> Plaintiff in his affidavit filed on the 13/11/2017 on his own behalf and on that of that of the other two Plaintiffs stated that the only asset that is registered in the name of the Defendant is Loc 2/Kangari/4252 for which they claim alternative compensation in form of a plot of equal measurement as the cancelled plots. That the Defendant is in the process of disposing it to a third party and hence the need to injunct him and preserve and protect the asset until the determination of the suit. That the Plaintiffs did apply to registered a caution on the said piece of land on 13/10/16. A copy of the undated and unregistered application for caution is annexed.

6. In response the Defendant stated that No Loc 2/Kangari/4252 does not belong him as it is registered in his name as a trustee for Samuel Mwangi and Martha Waitherero and therefore any injunction granted on the said No Loc 2/Kangari/4252 would be amount to an illegal interference with private property. He insisted that he is not liable to pay the purchase price nor is he under any obligation to compensate the Plaintiffs with comparable parcels of land. He maintains that there was no fraud and the Plaintiffs received good titles in their names.

7. The parties chose to file written submissions which I have considered. The Court directed the parties to file their written submissions by close of business on the 19/1/18. The Court notes that the Plaintiffs filed their submissions out of time and without seeking the leave of the Court. Advocates being officers of the Court ought and must obey Court orders for the efficient administration of justice. This is unacceptable. The Court has considered them and noting that no prejudice is occasioned on the Defendant that cannot be compensated with costs.

8. The issue for determination is whether or not the Plaintiff has established a prima facie case to entitle them the equitable relief of an injunction.

9. In deciding whether to grant the temporary injunction sought by the Applicant, reliance is placed on the precedent setting case of **Giella Vs. Cassman Brown (1973) EA 358** in which the conditions for the granting of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

10. In **Mrao Vs First American Bank of Kenya Limited & 2 Others C.A. No. 39 OF 2002 (2003 eK.L.R )**, 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.”

11. Applying the threshold of granting interlocutory injunction is as set in the case of **Giella Vs. Cassman Brown (1973) EA 358**, the Plaintiffs have annexed a copy of the green card which indicate that the registered owner is the Defendant in trust for Samuel Mwangi Kamau and Martha Waitherero Kamau. The Plaintiffs have also alleged that the Defendant has fraudulently registered a trust in favour of his children to disguise his true ownership of the property. The Defendant responded that he is only a trustee holding in trust for Samuel Mwangi and Martha Waitherero. I have examined the copy of the green card which indicates that the Defendant became registered owner of No Loc 2/Kangari/4252 on the 3.4.2009 vide Succession cause No 59/2003 at Kigumo. It would appear that this is the succession cause in which the original No Loc 2/Kangari/259 was subdivided into many plots, *inter alia*, No Loc 2/Kangari/4250 and 4252. It would also appear that subsequently 4250 was further subdivided into No Loc 2/Kangari/4373 and 4374 which were sold to the Plaintiffs by the Defendant but which were later determined to be cancelled by the orders of the High Court on appeal in P&A NO 1 of 2006. The Plaintiffs have not placed any material before this Court to support the allegations that the Defendant became registered as a trustee fraudulently.

12. Further, the nature of trust notwithstanding, it is trite law that a Trustee is merely a paper owner on behalf of another. Firstly, the Defendant is registered as trustee for Samuel Mwangi Kamau and Martha Waitherero Kamau, therefore he has no interest in the land. Secondly the beneficiaries are neither parties to the contract nor to the suit in Court. A party cannot be condemned unheard. Thirdly the claim of the Plaintiffs is based on contract which contract was in relation to the sale of Loc 2/Kangari/4373 and 4374 and not Loc 2/Kangari/4252. What the Plaintiffs have urged the Court to injunct is ultra vires the contract; not part of the contract. It is the Courts view that a prima facie case has not been established on that account.

13. As regards the second limb stated above, it is on record that the Plaintiffs have quantifiable their loss in the sum of Kshs 3.4 Million and therefore have demonstrated to the Court that their loss is adequately compensable by an award of damages. Lastly the balance of convenience tilts in favour of not granting the injunction.

14. The upshot is that the application is dismissed with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT MURANG'A, THIS 8<sup>TH</sup> MARCH 2018**

**J. G. KEMEI**

**JUDGE**