



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 54 OF 2016

STEPHEN MBOGO NJERU.....PLAINTIFF

VERSUS

MARGERY WAWIRA MWANIKI.....1ST DEFENDANT

MERCY MUTHONI MWANIKI.....2ND DEFENDANT

GRACE WEVETI MWANIKI.....3RD DEFENDANT

LAWRENCE KARIUKI MWANIKI.....4TH DEFENDANT

NAFTALI IRERI MWANIKI.....5TH DEFENDANT

WINCATE MAITHA MBOGO.....6TH DEFENDANT

NAOMI MARTHA MBOGO.....7TH DEFENDANT

RULING

1. By a plaint dated and filed on 16th August 2016, the Plaintiff sought the following reliefs against the Defendant;

a. A declaration that the L.R. No. Ngandori/Kirigi/11614 belongs to the Plaintiff.

b. A permanent injunction be issued restraining the Defendants, their agents, servants or anyone claiming through them from trespassing, encroaching, cultivating or in any way dealing with L.R. No. Ngandori/Kirigi/11614.

c. Mesne profits.

d. Damages for trespassing and destruction of crops. (sic)

e. Costs of the suit.

2. The Plaintiff pleaded that sometime in 2010, he purchased the suit property from the 1st and 2nd Defendants and that after due process the sale was completed and he was registered as owner of his

portion and a title deed issued to him.

3. It was further pleaded that the Defendants had wrongfully forced their way into his said parcel of land, destroyed his barbed wire fence and commenced cultivating it without the consent of the Plaintiff or other lawful excuse.

4. Simultaneously with the filing of the suit, the Plaintiff filed a notice of motion dated 16th August 2016 under Order 40 Civil Procedure Rules seeking an interlocutory injunction against the Defendants on account of their alleged actions. Although the said application was certified as urgent by Hon. Justice Boaz Olao on 17th August 2016, it was never prosecuted to its logical conclusion.

5. The record shows that the Defendants entered an appearance to the suit in person on 30th August 2016 but there is no statement of defence on record. There is also no indication on record that the Defendants ever appointed an advocate to act on their behalf.

6. However, on or about 22nd May 2017 the Defendants filed a notice of motion of even date under certificate of urgency seeking some interim orders against the Plaintiff through the firm of Kiratu Kamunya & Co Advocates. The application was grounded on Order 40 and Order 50 of the Civil Procedure Rules, sections 1A and 3A of the Civil Procedure Act (Cap 21) and all other enabling provisions of the law, seeking the following orders;

a. Spent

b. Spent

c. That this honourable court be pleased to grant a temporary injunction against the Respondent by himself, his agents, servants, employees and/or other person(s) whomsoever acting on his behalf, restraining them from interfering, dealing, constructing, erecting structures, developing or continuing with the construction, of the structures on parcel of land known as LR. No. Ngandori/Kirigi/11614 the suit property within that area commonly known as Embu County pending the hearing and final determination of ELC suit No. 54 of 2016 and succession cause No. 434 of 2011.

d. That costs of this application be provided for.

7. The said application was supported by the supporting affidavit of the 1st Defendant sworn on 22nd May 2017. She stated that the Defendants are the true beneficiaries of the suit property and that the property had been fraudulently and illegally transferred to the Plaintiff. It was contended that the Plaintiff had trespassed into the suit property and destroyed crops thereon and started developing it. The court was urged to grant the orders sought.

8. The Plaintiff filed a replying affidavit sworn on 1st September 2017 in opposition to the said application. The Plaintiff stated that on 11th August 2010 he entered into a sale agreement with the 4th and 5th Defendants for the purchase of 0.5 acres of land from them. The said land was part of their share from their father's estate.

9. The Plaintiff further stated that he also entered into a separate sale agreement with one Kenneth Muriithi Mwaniki, another beneficiary of the said estate, for the purchase of 0.5 acres of land. He annexed copies of the relevant sale agreement.

10. It was the Plaintiff's case that he was awarded his share of one (1) acre out of *Title No. Ngandori/Kirigi/1357* in Embu Succession Cause No. 434 of 2011 and later on obtained an order for the Deputy Registrar to sign all the necessary documents to facilitate his acquisition of the land he had purchased. He annexed a copy of the relevant court order.

11. The Plaintiff further stated that sometime in 2017, he embarked upon construction of residential apartments on the suit property when he was served with an *ex-parte* order of injunction. He, therefore, urged the court to dismiss the Defendants' said application for injunction as lacking merit.

12. The Defendants' said application came up for hearing severally but could not proceed for one reason or the other. When the said application was last listed for hearing on 15th November 2017, the advocates for the parties agreed to dispose thereof through written submissions. The Defendants' advocate was to file and serve his submissions within 7 days whereas the Plaintiff's advocate was to file and serve his within 7 days of service. The matter was thereupon fixed for ruling on 8th March 2018.

13. By the time of preparation of this ruling, however, the parties had not filed any submissions. The court, nevertheless, decided to proceed to determine the said application on the basis of the affidavits and documents on record.

14. The main question for determination is whether or not the Defendants have satisfied the requirements for the grant of an interim injunction as set out in the case of *Giella Vs Cassman Brown & Co Ltd [1973] EA 358*.

15. Whereas the Plaintiff asserts to be registered owner of the suit property, the Defendants contend that the Plaintiff was fraudulently and illegally registered as proprietor of the suit property. The Defendants did not plead any particulars of the alleged fraud and illegality at all. The Defendants further stated that the issue of ownership was still pending in Succession Cause No. 434 of 2011.

16. The Plaintiff exhibited a copy of a certificate of confirmation of grant which indicated that he was to get 1 acre out of *Title No. Ngandori/Kirigi/1357*. The Defendants did not provide any evidence of what else could be pending in the succession cause. There was no indication if the said certificate of confirmation had been revoked or that it was a forgery.

17. The court has also noted that the Defendants have not challenged or controverted the Plaintiff's averments and documents annexed to his replying affidavit sworn on 1st September 2017, since no further affidavit was filed by the Defendants. In those circumstances, the court accepts the evidence of the Plaintiff as a purchaser for valuable consideration who obtained the suit property through succession proceedings.

18. In the premises, the court finds and holds that the Defendants have failed to establish a *prima facie* case with a probability of success at the trial hereof. In the event, it is not necessary to consider the 2nd and 3rd principles for the grant of an injunction. The Defendants' application is simply a non-starter.

19. The court finds that the Defendants were not candid and honest in their application for injunction. They feigned ignorance of all past transactions and proceedings concerning the suit property and created the impression that the Plaintiff was just a trespasser who had invaded their land. They were guilty of non-disclosure of material facts.

20. The upshot of the foregoing is that the court finds no merit in the Defendants' notice of motion dated 22nd May 2017 and the same is hereby dismissed with costs of Kshs 10,000/- to be paid within 30 days from the date of ruling. In default of payment, the Plaintiff shall be at liberty to execute for the costs.

21. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **3rd** day of **MARCH 2018**

In the presence of Ms Mbwiria holding brief for Mr Kathungu for the Plaintiff and Mr Kamunya for the Defendants.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

08.03.18