



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.181 OF 2017

TERESIA NJUHI KINYANJUI.....PLAINTIFF/APPLICANT

-VERSUS-

FRANCIS WAINAINA NGIGI.....1ST DEFENDANT/RESPONDENT

FRANCIS HENRY WAINAINA KIHORO...2ND DEFENDANT/RESPONDENT

JOSEPH KANYINGI KAMAU.....3RD DEFENDANT/RESPONDENT

RULING

By a *Notice of Motion* application dated 23rd February 2017, brought under various provisions of law, the Applicant *Teresia Njuhi Kinyanjui* has sought for the following orders:-

1) Spent.

2) Spent.

3) That there be a temporary injunction order restraining the 1st, 2nd and 3rd Defendants by themselves, their agents, servants, employees, proxies and/or any person claiming ownership under them from trespassing, alienating, selling, transferring, charging, trading on, and/or interfering in any manner with the plot No.Ruiru Kiu Block 2/Githunguri/2734 situated at Ruiru within Kiambu county, pending the hearing and determination of this suit.

4) That the OCS Ruiru Police Station do supervise and enforce the order.

5) That the costs of this application be provided for.

6) That such other and/or further orders be made as this Honourable Court may deem fit and just.

The application is premised on the following grounds:-

i. The Plaintiff is the legal owner of land parcel known as Ruiru Kiu Block 2/Githunguri/2734 situated at Ruiru and the administrator of the Estate of Lawrence Kinyanjui Kamiti.

ii. The late Kinyanjui Lawrence Kamiti is the husband to the Plaintiff and was the owner of Plot No. Ruiru Kiu Block 2/Githunguri/2734, situated at Ruiru within Kiambu County.

iii. The Plaintiff's late husband Lawrence Kinyanjui Kamiti was a share holder of Githunguri Constituency Ranching Co. Ltd and had been allocated the suit land by the land buying Company who issued him with an ownership Certificate which is currently held under the Plaintiff's name having inherited the same.

iv. The 3rd Defendant has trespassed into the Plaintiff's suit plot, claiming ownership, fraudulently and illegally obtained a title deed with the assistance of the 1st and 2nd Defendants.

v. The 3rd Defendant had secured loan facilities with Kenya Commercial Bank using the said parcel of land as security despite the fact that he is aware of the fraud and he had no good title.

vi. The Defendants have now subdivided the suit parcels and advertised the same for sale to 3rd parties despite the pending criminal case.

vii. Plaintiff stands to suffer and continues to suffer irreparable loss due to the actions of the Defendants.

It is also supported by the *Affidavit* of **Teresia Njuhi Kinyanjui**, the Applicant herein who averred that she is the administrator of the Estate of her late husband, **Kinyanjui Lawrence Kamiti**, who died on **4th February 2014**. That the suit land was originally owned by one **Grison Kamiti Kinyanjui**, who was a shareholder of **Githunguri Ranching Co. Ltd via Certificate No.5475** issued on or around **1973 marked TMK-2**. That upon the demise of **Grison Kinyanjui**, his share was transferred to her husband **Kinyanjui Lawrence Kamiti**, and her late husband was issued with **Certificate of Ownership** on **24th September 1993** by **Githunguri Ranching Co. Ltd** being **No.B.316 annexure TWK-4**. Further that her husband applied for clearance certificate and filed transfer forms which were submitted to **Githunguri Constituency Ranching Company** in **September 2005**, annexure **TNK-5**. However, her husband died on **4th February 2014**, before the title deed had been issued. She also averred that the suit property was invaded by third parties on **14th March 2014**, and she reported the matter to DCIO Ruiru. It was her further averment that the 3rd Defendant appeared before the DCIO with an original title deed to prove ownership. That when she conducted a search on the suit land, she confirmed it was registered in favour of the 3rd Defendant, **Joseph Kanyingi Kamau**, who had been issued with a title deed and had taken two loans with **Kenya Commercial Bank** using the land as security – **annexture TNK-9**.

However, on **4th April 2014**, the Chairman of **Githunguri Constituency Ranching Company** wrote to the DCIO Ruiru and confirmed that according to their records, the land belongs to the Applicant **annexture TNK-10**. Further that investigations revealed that the 1st Defendant illegally obtained a title deed on **23rd January 2003**, with the assistance of 2nd Defendant who was one of the **Directors** of **Githunguri Ranching Co. Ltd** and they used forged documents and sold the same to 3rd Defendant who was issued with a title deed on **9th April 2009**, as per **annexture TNK-11**.

Thereafter, the 1st and 2nd Defendants were charged with various criminal counts at **Thika Chief Magistrate's Court** which is still pending, as per **annexture TWK-12**. However, the 3rd Defendant had secured a loan with **Kenya Commercial Bank** and charged the said land despite the Criminal charges pending in court. The Applicant further deposed that on **13th February 2017**, she visited the suit property and noted that the 3rd Defendant had subdivided the parcel of land into small plots which had been advertised for sale. That they removed the beacons and advert but the Defendants have returned them and thus this suit and application. She urged the Court to allow her application.

The application is opposed by the 1st and 2nd Defendants. The 1st Defendant **Francis Wainaina Ngigi**, filed his **Replying Affidavit** on **10th July 2017** and averred that he is a *bonafide* purchaser for value of the suit land herein **Ruiru Kiu Block 2/Githunguri/2734** without Notice of any alleged **fraud, mistake** or **illegality** is alleged. He also averred that before purchase, he verified ownership documents from the Directors of **Githunguri Constituency Ranching Co. Ltd**, who confirmed that they were genuine. They also confirmed that the vendor was one of their members. He alleged that he purchased the suit land from **Samuel Mwangi Kimani** on **13th September 2012** and paid all the charges and was issued with **Share Certificate No.D3080**. He later sold the suit land to 3rd Defendant in the **year 2005** and the transfer was effected in the **year 2009** as per **annexture F4(a)&(b)**. He contended that the suit is a non-starter and an abuse of the court process and he urged the Court to dismiss the instant application with costs.

The 2nd Defendant, **Henry Wainaina Kihoro** also filed his **Replying Affidavit** on **3rd July 2017** and averred that Plaintiff has no *locus standi* to institute this suit as the **Letters of Administration Ad-Litem** obtained in **Probate Case No.501 of 2014**, did not state which suit the Applicant was to prosecute. Further that the suit is a non-starter as **no Confirmation of Grant** has been issued stating that the property belonged to the deceased. It was his further averments that he had been informed by his advocate on record that the transfer of the Shares by **Githunguri Constituency Ranching Co. Ltd**, from **Kinyanjui Lawrence Kamiti** to **Teresia Njuhi Kinyanjui** was **illegal** and a **nullity** as no authority of the Court had been obtained. He also contended that the Criminal case commenced against him being **Cr.Case No.1182 of 2015** at **Thika Chief Magistrate's Court** was **dismissed under Section 202 of the Criminal Procedure Code** and **accused person was acquitted**. Therefore the Plaintiff has no case against the 2nd Defendant and he urged the Court to dismiss the instant application with costs.

The application was canvassed by way of **written submissions** which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto and it renders itself as follows;-

According to the *Certificate of official Search TNK-9*, the suit property herein *Ruiru Kiu Block 2/Githunguri/2734* is registered in the names of *Joseph Kanyingi Kamau*, the 3rd Defendant herein. The said suit land was registered in the name of 3rd Defendant on *31st March 2009*, as is evident from the copy of the Green-card attached to the pleadings. Prior to the suit being registered in the name of 3rd Defendant, it was registered in the name of the 1st Defendant, *Francis Wainaina Ngige* on *23rd January 2003*. There is no documentary evidence attached by the Applicant to show any registration of the suit land in her name apart from the Share Certificate.

As a registered proprietor and as provided by Section 26(1) of the Land Registration Act, then the said 3rd Defendant is deemed to be an **absolute and indefeasible owner** of the said suit property. The above Section states as follows:-

***“The certificate of title issued by the Registrar upon registration, or to a purchase 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 proprietor shall not be subject to challenge.*”**

However, the exceptions in (1) (a)&(b) provide that the said Certificate of title can be challenged if the same was acquired through **fraud, misrepresentation, illegally, unprocedurally or through corrupt scheme**. Section 26(1) (a)&(b) of the Land Registration Act provides:-

***“The certificate of title issued by the Registrar upon registration, or to a purchase 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 proprietor shall not be 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.*

The applicant has alleged that the Defendants herein caused the suit property to be registered in their favour through **fraud or misrepresentation**. She also alleged that 2nd Defendant was even charged with a Criminal offence over registration of the suit property. However it is evident through annexture 2 of the 2nd Defendant, that though he had been charged with a Criminal offence in Cr.Case No.1182 of 2015, of Obtaining Registration of Land by False Pretences Contrary to Section 320 of the Penal Code, he was later **acquitted** on **30th November 2015** under Section 202 of the Criminal Procedure Code.

Therefore there is no pending case against the 2nd Defendant. The 3rd Defendant is the registered proprietor of the suit property. However the Plaintiff has alleged that the said registration was obtained fraudulently. On whether the 3rd Defendant obtained registration herein fraudulently or not is not a matter to be determined at this juncture. The said determination will have to await the calling of evidence at the main trial. There is also no evidence that the Plaintiff has been in possession and occupation of the suit property. Therefore the Court finds that the Plaintiff has failed to establish that she has a *prima-facie* case with probability of success at the trial as was held in the case of Giella...Vs...Cassman Brown Co. Ltd 1973 EA 358.

On whether the Applicant will suffer irreparable loss which cannot be compensated with an award of damages, it is evident that the Plaintiff has not been in occupation of the suit property. The suit property is identifiable and can be quantified. The suit property can therefore be quantified and compensated in damages or monetary terms in the event that the Plaintiff/Applicant turns out to be the successful litigant at the end of the trial. See the case of Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322, where the Court held that:-

***“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.*”**

On the third limb of if the Court is in doubt to decide on a balance of convenience, the Court finds that it is indeed in doubt as to whether the Applicant’s alleged property is the suit property which is in the name of the 3rd Defendant. Having found that the Court is in doubt, it will decide this application on a balance of convenience. The balance of convenience herein tilts in favour of maintaining the *status quo* to preserve the suit property.

The *status quo* herein is that the 3rd Defendant is the registered owner of the suit property and he should remain so. However, the 3rd Defendant is **restrained from subdividing, alienating and transferring** the suit property to any third party/ies or any one person whatsoever pending the hearing and determination of the main suit.

However, the Court finds no reasons to issue any restraining orders against the 1st and 2nd Defendants herein.

Having now carefully considered the available evidence, the Court finds that the orders that commends herein is that *status quo* to be maintained and the *status quo* is that ;-

i. The 3rd Defendant is the registered owner of the suit property but he is restrained from sub-dividing, alienating or transferring the suit property to any third party/ies or any other person whatsoever pending the hearing and determination of the main suit.

ii. Further no restraining orders should attach to the 1st and 2nd Defendants herein.

iii. Parties to set down the main suit for hearing expeditiously.

iv. The earlier interim orders issued are hereby discharged and/or vacated.

v. Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Thika this 27th day of April 2018.

L. GACHERU

JUDGE

In the presence of

M/S Chege holding brief for Kariuki Njiri for Plaintiff/Applicant

Mr. Ajika holding brief for Mr. Muthoni for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Mr. Mureithi for 3rd Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

27/4/2018