



## **REPUBLIC OF KENYA**

### **IN THE ENVIRONMENT & LAND COURT AT MURANGA**

#### **ELC NO 438 OF 2017**

**ISAAC MURIGI MUIRURI (Suing as the administrator of  
the estate of MUIRURI NJIRI (Deceased).....PLAINTIFF /APPLICANT**

**VS**

**FRANCIS KARUME.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ANDREW NG'ANG'A.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**STANLEY MUTURI GATHERI.....3<sup>RD</sup> DEFENDANT/ RESPONDENT**

#### **RULING**

1. The Plaintiff /Applicant claims a beneficial interest over all that parcel of land known as Land Parcel No. LOC.1/THUITA/160 (herein referred to as the suit land). By a Notice of Motion dated 28.08.2017 the Plaintiff/Applicant suing as the administrator of the estate of Muiruri Njiri(deceased) moved this Court seeking the following orders;

- a. That the Defendants by themselves be prohibited by an injunction order from trespassing on, disposing, wasting transferring, alienating, charging and or selling any portion or all that parcel of land known as Land Reference No. LOC.1/THUITA/160 without involving the Plaintiff/Applicant pending the hearing and determination of this application.
- b. That the Defendants by themselves be prohibited by an injunction order from trespassing on, disposing , wasting transferring, alienating, charging and or selling any portion or all that parcel of land known as Land Reference No. LOC.1/THUITA/160 without involving the Plaintiff/Applicant pending the hearing and determination of the main suit.
- c. That this Honourable Court be pleased to order for revocation and or cancellation of the Grant in Thika Magistrates' Court Succession Cause Number 419 of 2014
- d. That the officer in-charge Kirwara police station to ensure peace and tranquility is observed in enforcement of this order.
- e. That costs be in the cause.

2. The application is premised on the following grounds;

- a. That the Plaintiff/Applicant is the administrator of the estate of Muiruri Njiri (Deceased)
- b. That prior to his demise the said Muiruri Njiri (Deceased) bought all that parcel of land known as LOC1/THUITA/160 from one WANGANGA WANGOMBE who is now deceased.
- c. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Respondents have illegally and fraudulently disposed the said parcel of land to 3<sup>rd</sup> Defendant Respondent.
- d. That the Defendants' Respondents are determined towards deprived the Plaintiff/Applicant his rights over the suit land.
- e. That if the Defendant are out stopped form disposing off the suit land by this Court the Plaintiff and his siblings may lose the suit land through misrepresentation on the part of the Defendants.

3. Isaac Murigi Muiruri in his supporting affidavit deposes that he is the administrator of the estate of one MUIRURI NJIRI having obtained Grant ad Litem vide Murang'a CMCC Cause No. 292 of 2016. He claims that prior to his demise the deceased had purchased the suit land from one WANGANGA WANGOMBE now deceased who was the original registered owner of the suit land. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the administrators of the estate of WANGANGA WANGOMBE and claims that both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have illegally and fraudulently disposed the suit land to the 3<sup>rd</sup> Respondent with a motive of depriving the Applicant and his sibling their rights over the suit land. He avers that he was brought up in the suit land together with his siblings, that they have made various developments on the suit land and have even buried their loved ones on the suit land. He maintains that the actions of the Respondents are fraudulent and illegal and that unless they are stopped by orders of this Court he and his siblings stand to lose the suit land hence suffer irreparably. He affirms that fraud is sufficient ground to revoke a title to land.

4. The application was opposed as the Respondent jointly filed their replying affidavit dated 01.12.2017. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant confirm that they are the administrators of the estate of the WANGANGA WANGOMBE now deceased. They contend that the application is ill advised and abuse of Court process. They affirm that the suit land belonged to WANGANGA WANGOMBE now deceased subsequently they were appointed the legal representatives of his estate having been granted a certificate of confirmation of Grant by the Thika Magistrate's Court on 07.12.2015. That it was after obtaining the Grant that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent transferred the suit land to the 3<sup>rd</sup> Respondent. They fault the Applicant for failing to provide any documentary evidence to prove that the suit land was indeed sold as claimed. They challenge the photographs annexed by the Applicant as they do not show they were taken from the suit land and claim to be strangers to them. They aver that the alleged sale and transfer never took place and that the Applicant is misleading the Court and contend that the Plaintiff and their descendants did not have any legal right of ownership to the suit land hence they are of the view that the application should be dismissed.

5. The Applicant then filed a further affidavit in reply to the Respondents' replying affidavit in which he affirms that the suit land was indeed sold by WANGANGA WANGOMBE now deceased to Muiruri Njiri (deceased) and annexed a copy of sale agreement dated 24.07.1990 in kikuyu language signed by both parties and a translation of the same with a translator's certificate. He avers that there was material disclosure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents while obtaining the Grant from Thika Magistrate's Court.

6. Parties canvassed the application by way of written submissions. I have considered the application on totality the rival submissions in determining the application.

7. It is now trite law that the conditions of granting interlocutory injunction as stated in the case of **Giella vs Cassman Brown and Co. Ltd (1973) EA 358** are:

“that firstly, an Applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.”

8. The Court of Appeal in **Mrao vs First American Bank of Kenya Ltd & Two Others C.A. No. 39 OF 2002 (2003 ECLR )** defined a prima facie case in the following terms;

“A prima facie case in a civil application include 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”.

9. In the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 others ECLR** the Court of Appeal stated as follows;

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion....All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation....The Applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it, the Applicant's case is more likely than not to ultimately succeed.”

10. It is not in doubt that the suit land is registered in the name of the 3<sup>rd</sup> Defendant. Under section 25 of the Land Registration Act such registration confers upon the registered owner of the land all the rights and privileges appurtenant thereto. However, such registration does not relieve such proprietor from any obligations under section 28 that is to say overriding interests on land that need not be registered thereon.

11. The Applicant has claimed that the land was sold to his father Muiruri Njiri and has presented a copy of the agreement in writing. He has also annexed pictures showing their occupation of the suit land on the ground. He has also averred that they have been in possession of the suit land together with his siblings and that they were brought up on the land as well as burying their loved ones on the land. This evidence has not been controverted by the Respondents other than to state that they have an indefeasible title.

12. Going by the definition of a prima facie case stated above, it is clear that the Applicant though not registered as owner of the suit land has demonstrated right on the land accrued by way of possession. Section 28(h) of the Land Registration Act provides for overriding interests in land. Possessionary rights in land are rights that are capable of being protected in law. He has presented an agreement of sale dated 24.7.1990 as well as pictures of overgrown trees and old dwelling houses which are consistent with long occupation. The Applicant has stated that he is entitled to the land pursuant to a purchase by the deceased father from the late Wanganga Wangombe. Whether or not that will be upheld by the Court is a matter to be determined on evidence during trial. For now, all the Applicant needs to show and satisfy the Court is that he has a

prima facie case with a probability of success. Looking at the circumstances of this case the Court is satisfied that the Applicant has established such a case.

13. With regard to the adequacy of damages as compensation this Court associates itself with the Court of Appeal in the case of **Muiruri Vs Bank of Baroda (Kenya) Limited 1 KLR 183** when it stated as follows

“besides disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.”

14. Having not been in doubt and doing the best I can in the circumstances and fortified by section 63 (e) of the Civil Procedure Act and order 40 rule 1 the justice of this matter is in the granting the orders as follows;

a. That the Defendants by themselves be prohibited by an injunction order from trespassing on, disposing, wasting transferring, alienating, charging and or selling any portion or all that parcel of land known as Land Reference No. LOC.1/THUITA/160 without involving the Plaintiff /Applicant pending the hearing and determination of the main suit.

b. An inhibition be and is hereby ordered to be registered on the suit land inhibiting registration of all dealings on the suit land until the determination of this suit and/or further orders of this Court.

c. Each party to bear the costs of the application.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 19<sup>TH</sup> DAY OF APRIL 2018.**

**J.G. KEMEI**

**JUDGE**