



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO 498 OF 2017

JANE WAIRIMU NGURE.....PLAINTIFF/APPLICANT

(Suing as administrator of the

Estate of Peter Tharao Ngure (deceased)

VS

NATIONAL BANK OF KENYA LTD....1ST DEFENDANT/RESPONDENT

DAVID WAIGANJO NGURE.....2ND DEFENDANT/RESPONDENT

GRACE NJERI GITHUKA.....3RD DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 24/7/12 the Applicant approached this Court seeking the following orders; -

- a) Spent
- b) Spent
- c) That pending the hearing and determination of this suit there be a temporary injunction restraining the defendants either by themselves, their servants, agents employees or any person acting under the defendant's instructions from advertising for sale, alienating, selling, transferring, disposing or in any way dealing with the Plaintiff's property known as Loc.20/Githuri/1937.
- d) Costs for the application

2. That application was premised on the following grounds interalia;

- a) The Plaintiff is the administrator of the estate of Peter Tharao Ngure (deceased) who was the registered owner of the property known as Loc.20/Githuri/937 which was charged in favour of the 1st Respondent to secure a loan advanced to the 2nd Respondent.
- b) The 2nd Respondent having allegedly defaulted in making payment caused the 1st Respondent to realize the security and sell the property by way of an alleged public auction to the 3rd Respondent which action neither the Plaintiff nor the deceased was aware of.
- c) The 3rd Respondent is now the registered owner of the suit land.
- d) While the suit is pending the Respondents have by themselves or through their agents, invited 3rd party purchasers to the suit property with the intention of selling the suit property.
- e) The Plaintiff/Applicant herein has been and is still in possession of the property and has been farming on the said property as a way of providing for the deceased's family.
- f) The defendants are determined to sell the suit property which is the subject matter in the main suit herein and unless the orders

sought are granted it shall be difficult to prosecute the instant suit or further that the Applicant and her family shall be dispossessed of the suit land which is their only source of livelihood.

g) That the Applicant/Plaintiff has a prima facie case and she shall suffer irreparable loss if the intended sale proceeds.

3. Jane Wairimu Nguire the Applicant herein in her supporting affidavit reiterates the grounds on the face of the application and adds that her husband secured a loan from the 1st defendant for the 2nd defendant (his brother) and then the 2nd defendant allegedly defaulted in repayment forcing the 1st Defendant to realize the security. That the suit property was then sold through a nonexistent auction to the 3rd defendant. That the main suit herein had initially been filed by her late husband and later she was substituted in his place as the legal representative and with leave of the Court she filed and served the amended pleadings. That she is in possession and use of the suit land to date. That the 2nd and 3rd Respondents are her relatives by virtue of being her in laws and they have colluded to dispose of her matrimonial home.

4. The application was opposed through a replying affidavit of the 3rd Respondent filed on 11/9/17. Grace Njeri Githuka deposes that she is the registered owner of the suit land and claims to have purchased the same at an auction by the 1st Respondent in the year 1995. That it is unfair for the Applicant to seek to injunct her from utilizing a property she owns and has owned for 18 years before filing of the suit. She faults both the Applicant and her late husband for sitting on their alleged claim for over 18 years. She claims to have been in possession and use of the suit land until last year when the Applicant invaded the suit land and started planting crops thereon. That the Applicant went on to lodge a caution over the suit land which the 3rd Respondent applied to be removed. That the Applicant has not established a prima facie case. She contends that the Applicant can be compensated by way of damages in the unlikely event she succeeds and that the balance of convenience falls to dismissing of the application.

5. In her supplementary affidavit the Applicant states that the 3rd Respondent has not denied her intention to dispose off the suit land hence the need to preserve it pending determination of the suit. That the issues raised on the delay in filing the suit herein are res judicata on account of the ruling of this Honourable Court delivered on 12/5/16 in regard to the 1st Respondent's application dated 01/04/14. She takes great exception with the averment by the 3rd Respondent that the Applicant can be compensated by way of damages and avers that the same is made in bad faith as it would suggest that illegalities between banks and prospective purchasers can be cured through pecuniary compensation. She maintains that no prejudice will be visited upon the 3rd Respondent as she, the Applicant has been in continued possession of the suit property.

6. The Applicant had been allowed to file written submissions but none are in the file at the time of writing this ruling whilst the Respondents had indicated they would rely on the replying affidavit of the 3rd Respondent on record. The 1st Defendant filed no response to the application

7. The Applicant's application is mainly for preservative orders against the suit property which is the subject matter of the main suit herein. She has demonstrated a beneficiary interest in the suit property through being duly appointed as the legal representative of her late husband's estate. She claims in her pleadings that the 3rd Respondent is determined to dispose off the suit land and has even invited 3rd party purchasers to the suit property with the intention of frustrating the subsisting suit. That position was not challenged by the 3rd Respondent in her reply. The said suit property is the subject matter in the main suit herein. It is her claim that the said suit property was sold in unclear circumstances to the 3rd Respondent through a non-existent auction. She has also claimed collusion on the part of the 2nd and 3rd defendants who are her relatives by virtue of being her in laws to dispose of her matrimonial home. She avers that on the suit property is a matrimonial home that she has been in possession and use the whole time even before it was charged to the bank and her only source of livelihood to fend for her family.

8. In determining the merits or otherwise for an application for interlocutory orders the Court addresses itself to the three fold requirements as set out in the case of **Giella vs. Cassman Brown (1973) EA 358** which principles were restated by the Court in **NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS, CA NO. 77 OF 2012**, together with the mode of their application as follows:

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) if any doubts as to (b) by showing that the balance of convenience is in his favour.

9. As to what constitutes a prima facie case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** stated 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.”

10. Has the Applicant established a prima facie case? It is not in dispute that the 3rd defendant is the registered proprietor of the suit land having acquired from the 1st Defendant pursuant to the aforesaid auction. It is her contention that she worked on the land since acquisition 18 years ago until last year when the Applicant allegedly invaded the suit land and commenced farming activities. On the other hand the Applicant avers that though the suit land is now registered in the name of the 3rd defendant illegally, she has been residing on the suit land farming and fending for her family for years. Clearly there are two competing interests for the ownership of the suit land which can only be

determined on trial. It would also appear that this is not an issue at the interlocutory stage.

11. The Applicant claims that her husband's land was sold through a non-existent auction without the knowledge of both of them. While the 3rd Respondent contends that the auction actually happened during which she purchased the suit property and hence became the registered owner. The Applicant has challenged the manner in which the auction was conducted and has pleaded fraud. Whether or not she will succeed is a matter for the trial Court to determine. What this Court concerns itself is whether there is a genuine and arguable case. This Court is satisfied that on the basis of the documents and evidence on record the Applicant has established a prima facie case with a likelihood of success.

12. Is there any irreparable harm on the Applicant if the injunction is denied? In respect to adequacy of damages as compensation the Court of Appeal in the case of **Muiruri Vs Bank of Baroda (Kenya) Ltd 2001 e K L R 183** had this to say;

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

The Applicant claims that the suit property is on the verge of being disposed off by the 3rd Respondent which would cause her to lose her matrimonial home and her only source of livelihood, in the event that happens she would suffer irreparably. The Applicant however did not place material evidence, at least, at the interlocutory stage to support this averment. The 3rd Defendant did not deny the averment. Though the 3rd defendant has alluded that she and the 1st defendant could easily compensate the Applicant in the unlikely event that Plaintiff suit does not succeed, she did not give any firm commitment in form of undertaking to meet the damages. The Applicant has established that damages would not be adequate compensation unless the orders sought are granted.

13. The balance of convenience leads this Court to exercise its discretion to grant preservative orders pending the hearing and the determination of the suit. The application is hereby allowed in the following terms;

a) That pending the hearing and determination of this suit there be a temporary injunction restraining the defendants either by themselves, their servants, agents employees or any person acting under the defendant's instructions from advertising for sale alienating, selling, transferring, disposing or in any way dealing with the Plaintiff's property known as Loc.20/Githuri/1937.

b) Costs be in the cause.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF MAY 2018.

J G KEMEI

JUDGE