



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.458 OF 2017

EMMANUEL KAMONI KABAKI.....PLAINTIFF/APPLICANT

-VERSUS-

EMMA WANGARI WANGUI.....1ST DEFENDANT/RESPONDENT

WILLIAM NDUNGU MUCHAI.....2ND DEFENDANT/RESPONDENT

CO-OPERATIVE BANK OF KENYA LTD.....3RD DEFENDANT/RESPONDENT

THE LAND REGISTRAR,

THIKA LAND REGISTRY.....4TH DEFENDANT/RESPONDENT

RULING

Coming up for determination is the Plaintiff's/Applicant's **Notice of Motion** application which has been brought under various provisions of law among them Order 40 Rules 1,2 & 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicant has sought for the following orders:-

1) That this Honourable Court be pleased to issue an order of injunction to restrain the Defendants, their servants, workmen, licensees, agents or any other persons acting on their own behalf or on behalf of the Defendants from howsoever trespassing, entering, encroaching, remaining in, selling, subdividing, taking over, dispossessing, alienating, reclaiming, fencing, cultivating charging or further charging and or harassing the Plaintiff or interfering with his peaceful entitlement and possession of title No.Ruiru East Block 1/1778 pending the hearing of the suit.

2)That this Honourable Court be pleased to issue an order of inhibition restraining any dealings of any nature whatsoever on title No.Ruiru East Block 1/1778 without the express approval and consent of the Plaintiff pending the hearing of this suit.

3) That the OCS-Ruiru Police Station does assist in enforcement of any orders issued herein.

4) That the costs of this application be borne by the Defendants.

This application is premised upon the following grounds:-

a) That the Plaintiff has just discovered that his property being title No.Ruiru East Block 1/1778 has since been fraudulently transferred to the 1st and 2nd Defendants and is now charged to the 3rd Defendant.

b) That the Plaintiff has never sold his subject property to any party or signed any document to transfer to the 1st Defendant or any other party.

c) The Plaintiff has been in peaceful and uninterrupted occupation and possession of the subject property.

d) That upon discovery of the fraud, the Plaintiff has reported the matter to Ruiru Police Station who are undertaking the investigations.

e) *There is imminent danger that the Defendants may attempt to dislodge the Plaintiff from the possession of the land and or take adverse actions to the Plaintiff's claim and entitlement.*

f) *It is in the interests of justice that the instant application be considered and allowed.*

Further, the application is supported by the affidavit of **Emmanuel Kamoni Kabaki**, who averred that he purchased the suit property **Ruiru East Block 1/1778**, from **Samuel Kimani Kuria** on **16th June 2008** after carrying out a Search and due diligence. He attached a **Sale Agreement** as **EKK-1**. That after the said purchase and completion of succession process, a **Land Control Board Consent** was obtained and the suit property was transferred to the Plaintiff and title deed was issued in his name on **9th September 2009** being **EKK-4**. He contended that he took possession of the said property and has been in such occupation without any interruption from anyone and has planted trees and fenced the said land. He confirmed that he caused a Search in **August 2011**, while paying rates and at that time, the suit land was in his name as evident from **annexture EKK-5**.

It is his contention that his architect carried a Search on **7th April 2017**, and noted that the property had been charged to the **3rd Defendant** by **2nd Defendant**. That when he carried a further Search, he was shocked to note from the Green Card that the suit land was transferred to **1st Defendant** who in turn transferred it to **2nd Defendant** and **2nd Defendant** charged it to **3rd Defendant**. The copy of the **Green Card** was attached as **EKK-8**. He denied ever transferring this suit property to **1st Defendant** nor did the **2nd Defendant** and he further state that he did not know them. The deponent contended that this transfer was fraudulently done as he never sold the land to anyone nor signed any sale agreement. He was therefore apprehensive that the **3rd Defendant** might auction the said property or take any action that might be adverse to his interest or the suit property.

He urged the Court to allow the instance application as the **1st Defendant** had no proper legal title to transfer to the **2nd Defendant** and therefore **2nd Defendant** has no good title to charge to **3rd Defendant**.

The application is contested by the **1st, 2nd and 3rd Defendants/ Respondents** herein who filed their respective Replying Affidavits and urged the Court to dismiss the instant application.

The **1st Defendant/Respondent Emma Wangari Wangui** swore her **Replying Affidavit** on **25th September 2017**, and averred that the application herein is based on material non-disclosure by the Plaintiff/Applicant and who is not telling the truth about his ownership interest on the suit land. It was her contention that the suit property was initially owned by **Sera Nduta Gathu**, who is now deceased but it was transmitted to **Samuel Kimani Kuria** through Succession Cause. It was her contention that as per the agreement between **Samuel Kimani Kuria** and the Plaintiff herein, the Plaintiff paid a sum of **Kshs.200,000/=** as deposit and was left with a balance of **Kshs.440,000/=** which was to be paid upon transfer of the property to his name. She also averred that after the completion of the Succession Cause, the suit property was registered in the name of the Plaintiff/Applicant but he failed to pay the balance of the purchase price. Therefore the said **Samuel Kimani Kuria** sold the suit property to the **1st Defendant/Respondent** for a consideration of **Kshs.1,300,000/=** as per the Sale Agreement dated **16th January 2013**.

It was her further contention that the Plaintiff/Applicant failed to disclose that he never completed paying the purchase price. She also contended that thereafter, she sold the suit property to **2nd Defendant** and who later charged it to **3rd Defendant**. That she had equally been issued with a title deed for the said suit property. She urged the Court to dismiss the instant application.

On his part, **2nd Defendant/Respondent William Ndungu Muchai** also swore his Replying Affidavit on **6th July 2017** and averred that he innocently purchased **LR.No.Ruiru East Block 1/1778**, from the **1st Defendant** for value without Notice of any other persons interest over the said property. He annexed the **Sale Agreement** as **WNM-1**. That before the purchase, he had conducted a Search and carried due diligence and noted the suit land was registered in the name of the **1st Defendant/Respondent**. Further that he purchased the suit land for **Kshs.11,300,000/=**, wherein he paid **Kshs.4,600,000/=** to the **1st Defendant/Respondent** and the balance of **Kshs.6,900,000/=** was financed by **3rd Defendant/Respondent** and a charge was registered in favour of the **3rd Defendant/Respondent** to secure their interest as financiers. It was his contention that he bought the suit land from the **1st Defendant/Respondent** for value without Notice of any other persons interest over the suit property.

He also contended that the **4th Defendant/Respondent** lawfully issued him with the Official Search which guaranteed that no other person had an interest over the suit property. He was lawfully issued with a title deed by the **4th Defendant** who also registered a charge over the said property in favour of the **3rd defendant** without any objection. It was his further contention that before the purchase, he had visited the suit property severally with the **1st Defendant/Respondent** and found it vacant. He even fenced the suit property after purchase and there was no objection from anyone. He therefore contended that he is a stranger to the Plaintiff's/ Applicant's claim and that the said Applicant is not entitled to the orders sought. He urged the Court to dismiss the instant application.

On its part, the **3rd Defendant** filed a **Replying Affidavit** through **Joseph Mbugua**, a **Business Banker** with the **3rd Defendant/Respondent Wakulima Branch**, who averred that indeed the **3rd Defendant** offered the **2nd Defendant/Respondent** a loan facility of **Kshs.6,900,000/=** and a legal charge was registered over the suit property **Ruiru East Block 1/1778**, as security. That the said property was registered in the name of **Emmah Wangari Wangui**, but after the legal charge was registered and loan facility advanced, the property was transferred to the borrower **William Ndugu Muchai**, the **2nd Defendant/Respondent** herein. The title deed in the name of **2nd Defendant/Respondent** was issued on **13th January 2017**, by the **Land Registrar, Thika**. Thereafter a charge was executed and registered in the favour of the **3rd Defendant** to secure the loan facility and the said charge was registered after all the necessary consents had been sought and granted and relevant statutory payments made. He contended that the **2nd Defendant/Respondent** acted diligently in ascertaining the authenticity of the title before registering a charge over the suit property. Therefore the charge is properly registered in favour of **3rd Defendant** who is the Chargee. The **3rd Defendant** urged the Court to dismiss the Plaintiff's/Applicants application.

The Plaintiff/Applicant filed a further affidavit and attached a sworn affidavit of **Samuel Kimani Kuria** who averred that he sold the suit property to the Plaintiff/Applicant herein only and not to **Emmah Wangari Wangui**, the 1st Defendant as alluded by her.

The Court directed the parties to file their respective written submissions to canvass the instant **Notice of Motion**. The parties complied accordingly. Therefore the Court has now carefully read and considered the rival written submissions and the cited authorities thereon. The Court too has carefully considered the pleadings in general and the annexures too. Further, the Court has considered the cited provisions of law and it makes the following findings:-

The Plaintiff/Applicant has sought for temporary and prohibitory orders of injunction over the suit property **Ruiru East Block 1/1778**. The Plaintiff alleged that he is the registered owner of the suit property and he attached a Certificate of title issued in his favour on **9th September 2009**. However, it is evident that the suit property was registered in favour of the 1st Defendant on **10th May 2016**, as per the Certificate of title attached to the pleadings and later issued in favour of the 2nd Defendant in **January 2017**, who later charged the said property in favour of 3rd Defendant as security for a loan facility of **Kshs.6,900,000/=** granted to the 2nd Defendant herein.

The application herein is anchored under **Order 40 Rule 1(a)** of the **Civil Procedure Rules**, which order gives the court discretion to grant temporary injunction in instances where any property in dispute is in danger of being **wasted, damaged or alienated**. As usual the said discretion must be exercised judicially. See the case of **David Kamau Gakuru...Vs...National Industrial Credit Bank Limited, Civil Appeal No.84 of 2001** where the Court held that:-

“It is trite that the granting of interim injunction is an exercise of judicial discretion and an Appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially”.

Further, the application is anchored among other provisions of the law, under Section 3A of the Civil Procedure Act, which donates to court the inherent power to issue such orders that are necessary in ensuring the end of justice is met and also prevent abuse of the court process.

Since the orders sought herein are temporary in nature and at the interlocutory stage, the court will be alive to the fact that it is not supposed to determine the disputed facts conclusively, especially relying on the affidavit evidence. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999**, where the Court held that:-

“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

This Court is only supposed to determine whether the Applicant is deserving of the orders sought basing that on the usual criteria, which was laid down in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973 E.A 358**. These criterias are:-

- a) **The Applicant must establish that he has a *prima facie* case with probability of success.**
- b) **That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c) **When the Court is in doubt, to decide the case on a balance of convenience.**

Further in determining whether to grant the inhibition order or not, the Court will be guided by the principles laid down in various decided cases. In the case of **Japhet Kaimenyi M'Ndatto...Vs...M'Ndatto M'Mbwiria (2012) eKLR**, the Court held that:-

“In an application for orders of inhibition in my understanding, the Applicant has satisfy the following conditions:-

That the suit property is at risk of being disposed off or alienated or transferred to the detriment of the Applicant unless preservative orders of inhibition are issued.

That refusal to grant orders of inhibition would render the Applicant's suit nugatory.

That the Applicant has arguable case.

Therefore, this Court will now juxtapose the above stated principles together with the available evidence to arrive at a finding as to whether the Applicant is deserving of the orders sought.

The applicant needed to establish that he has a prima-facie case with probability of success at the trial. The definition of prima-facie was given in the case of **Mrao Ltd...Vs...First American Bank Ltd & 2 others (2003) eKLR 125**, to mean:-

“so what is a prima facie case----- In civil cases it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

It is evident that the suit property herein was initially in the name of **Sela Nduta Gathu (now deceased)**. After a **Succession Cause**, the suit property was transmitted to one **Samuel Kimani Kuria**, who in turn sold the said suit property to **Emmanuel Kamoni Kabaki**, the Plaintiff/Applicant herein. The **Sale Agreement** is dated **16th June 2008**, and title deed in favour of the Plaintiff/Applicant was issued on **9th September 2009**, under Cap 300 (now repealed). As provided by **Section 27(a) of Cap 300, (now repealed)**, the said **Emmanuel Kamoni Kabaki** acquired all rights appurtenant thereto. The said Section provides:-

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

Further **Section 28** of the said **Cap 300 (now repealed)** provided that the registered owners right cannot be defeated unless as provided by the Act.

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever”.

Therefore with the said registration, the Plaintiff/Applicant became the **absolute** and **indefeasible** owner of the suit property and that proprietorship could only be defeated as provided by the law.

The Plaintiff/Applicant alleged that he took over ownership of the suit property and even started paying land rates. However, he discovered in **2017**, that this suit property was registered in the name of the **1st Defendant** without his knowledge and/or consent. The said **1st Defendant** transferred the suit property to the **2nd Defendant** who later charged it to **3rd Defendant/Respondent**. That chain of events has not been disputed by the **1st, 2nd and 3rd Defendants/Respondents**. The Plaintiff has alleged fraud in the above stated transactions. Though allegations of fraud are issues of fact which can only be determined at the main trial, it is evident on the face of it that the Plaintiff's suit property was transferred to other parties without his knowledge and/or consent. He is still holding his original title deed which was issued before the **1st Defendant's** title was issued. The said **Samuel Kimani Kuria** who allegedly sold the suit property has denied in an affidavit to have ever sold the same to the **1st Defendant**. However it is evident that the Plaintiff/Applicant who was the initial title holder has his parcel of land transferred to other parties and even charged to **3rd Defendant**. In the event that the **2nd Defendant** defaults in payment of the loan facility, then there is a danger that the suit property might be **sold** and/or **alienated**. Therefore the Court finds that the Plaintiff has established that he has a *prima-facie* case with probability of success at the trial.

On the second limb of irreparable loss which cannot be compensated by an award of damages, it is evident that the suit property has now been used as security for a loan facility that was advanced to **2nd Defendant** by the **3rd Defendant**. A legal charge has been registered over the said property. In the event the **2nd Defendant** is in default, then the **3rd Defendant** has a right to realize the security held and that would mean even selling the suit land by public auction. That would be done before the Plaintiff's right over the suit land has been determined. It would therefore not be proper to find and hold that the Plaintiff's right can be equated to compensation by way of damages. This is a land matter and land is emotive and is always held sentimentally by the proprietors. No monetary compensation can equate a proprietor's right to ownership which right is suspected to have been illegally breached. See the case of **Olympic Sport House Ltd...Vs...School Equipment Centre Ltd HCC No. 190 of 2012**, where the court held that:

“Damages are not and cannot be substitute for the loss which is occasioned by a clear breach of the Law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an Order of Injunction”

On the balance of convenience, the Court finds that the same tilts in favour of the Plaintiff/Applicant herein who was the first registered owner of the suit property. However, the Court finds that the suit property has already been charged in favour of the **3rd Defendant/Respondent**. Therefore the issue of charge has already been overtaken by events. The Court can only **restrain further charge** but not **first charge** as that is already done.

On the issue of inhibition, it is evident that an order of inhibition is equivalent to prohibitory injunction. It is evident that the suit property is already charged and if there is default, there is a danger of the same been auctioned in the event the **3rd Defendant/Respondent** would choose to exercise its Statutory Power of Sale. Further if the **3rd Defendant** would exercise its Statutory Power of Sale, then the Plaintiff's/Applicant's suit would be rendered nugatory. Again the Plaintiff/Applicant has alleged that he never sold the suit property to anyone and the registration of the same to **1st Defendant** was done fraudulently. Though allegations of fraud have to be proved in the main trial, the Court finds that the Plaintiff/Applicant has an arguable case.

The Court therefore finds that the Plaintiff/Applicant has good grounds for requesting an order of inhibition.

Having now carefully considered the instant **Notice of Motion** dated **18th April 2017**, the Court finds it merited and proceeds to issue the following orders:-

a) An order of temporary injunction is issued hereby to restrain the Defendants, their servants, licensees and/or agents or any other person from remaining in, selling, subdividing, taking over, alienating, fencing, cultivating or further charging of the suit property Ruiru East Block 1/1778 pending the hearing of the suit.

b) An order of inhibition restraining any dealings of any nature whatsoever on title No.Ruiru East Block 1/1778, without the express approval and consent of the Plaintiff pending the hearing of this suit.

c) An order that the OCS-Ruiru Police Station does assist in enforcement of any orders issued herein.

d) Costs in the cause.

Further, the parties herein to prepare the main suit for hearing expeditiously so that the disputed issues can be resolved at once.

It is so ordered.

Dated, Signed and Delivered at Thika this 13th day of July 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Wairegi holding brief for Mr. Kirimi for the Plaintiff/Applicant

Mr. Nganga for the 2nd Defendant/Respondent and holding brief for Mr. Muriuki for the 3rd Defendant/Respondent

Mr. Kariuki holding brief for Mr. Kanyi for 1st Defendant/Respondent

L. GACHERU

JUDGE

13/7/2018