



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 131 OF 2017

JOEL KIPKURUI ARAP KOECH.....PLAINTIFF

VERSUS

1. ALICE WAMBUI MAGANDU

2. LAND REGISTRAR Kwale

**3. THE DEPARTMENT OF LAND ADJUDICATION AND
SETTLEMENT KWALE**

4. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. The Application under consideration is the Notice of Motion dated 20th June 2017 in which the Plaintiff/Applicant is seeking the following orders:

1. Spent

2. Spent

3. A temporary Prohibitory Injunction restraining the Defendants by themselves, their servants and agents from selling, transferring, transmitting, charging, issuing Titles or making any entry in respect of Kwale/Shimoni/168 situate in Kwale County and from entering, constructing, cultivating, remaining on or otherwise interfering with the Plaintiff's Title and quiet possession of the property.

4. An order directing the 2nd and 3rd Respondent to furnish the Applicant with duly certified copies of all documents in Register and parcel files for KWALE/SHIMONI/168 situate in Kwale County.

5. Costs.

2. The Application is based on the grounds in the face of the motion and supported by the affidavit of Joel Kipkurui Arap Koech, the Plaintiff sworn on 20th June 2017. Briefly, the Plaintiff avers that he is the beneficial owner of the Suit Property which was fraudulently registered in the name of the 1st Defendant

through illegal means. The Plaintiff deposes that he acquired the Suit Property when the same was allocated to him through a Letter of offer **Ref.No.C/CS/0017/165** dated 1st February 1991 marked “J-1” and that he accepted the offer by paying the necessary charges and was issued with a certificate of outright purchase **Ref:LO/470/168/5** dated 21/2/1991 marked “J-2”. He states that upon payment of the requisite charges, transfer documents were prepared by the Ministry of Lands on 12/11/2007 and dispatched to the Plaintiff for signing whereupon he appeared in person before the officers of the Ministry of Lands, Housing and Urban Development on 18/3/16 and duly executed the discharge of charge (“J-4”) and the transfer documents (“J-3”) which documents were presented to the land registrar for execution.

3. It is the Plaintiff’s contention that on dates unknown to him but purporting to be 17/2/2004, the 1st Defendant through the 2nd and 3rd defendants without the consent or knowledge of the Plaintiff, or any lawful justification failed to register him as the owner and instead made an entry in the land register of the suit property purporting to register the 1st Defendant as the proprietor of the Suit Property.

The Plaintiff further contends that the registration of the 1st Defendant as the proprietor of the Suit Property was unlawful, illegal, fraudulent, through corrupt scheme and in violation of the law. The Plaintiff states that to obstruct the efforts of the Plaintiff to investigate the fraud, the 2nd and 3rd Defendants refused to otherwise give him information on the identities of the persons who registered the 1st Defendant as the proprietor of the Suit Property. The Plaintiff avers that he lodged a restriction over the suit Property but the 2nd Defendant wrote to him threatening to lift the said restriction. The Plaintiff therefore is apprehensive that unless restrained by the Court, the Defendants may transfer the land to 3rd parties thereby defeat his claim herein.

4. The Application is opposed by the 1st Defendant who filed a replying affidavit and grounds of opposition dated 1st September, 2017. The 1st Defendant avers that she is the registered owner of the Suit Property and that she acquired it lawfully after a survey was conducted by the 3rd Defendant in 2004 and was allocated it. The 1st Defendant states that she called upon the 3rd Defendant and confirmed that her name was in the register, the demarcation book and the accountability list and that she accepted the offer and allocation by paying the necessary charges and thereafter the process of transfer began. The 1st Defendant further states that she was present during the demarcation together with the village elders and the family of the person who used to cultivate the land before the scheme allocated the land to her and that at that time there were mango trees which she agreed to and did compensate the owner. It is the 1st Defendant’s contention that upon payment of the requisite charges, transfer documents were prepared by the Ministry of Lands and she was issued with a title Deed marked “A-3”. The 1st Defendant further contends that in registering her as the owner, the 2nd Defendant relied on the records from the Department of Lands and Settlement and could not have issued the 1st Defendant with a title deed if her name was not appearing in the register. She states that all the documents relating to allotment, survey plans, the certificate of discharge and transfer in her favour are in the official custody of the 3rd Defendant. The 1st Defendant denied participating in the alleged fraud and that after demarcation and issuance of title deed, she took over the suit property and began development on it.

5. The 1st Defendant states that as an owner, in 2005, she charged the property to Agricultural Finance Corporation to secure a facility of Kshs.200,000 and applied for another loan of Kshs.800,000 in 2015 but the same was not approved because the plaintiff had lodged a restriction on the Suit Property, an act that she alleges has caused her to sufferer loss as a farmer and businesswoman. It is the 1st Defendant’s contention that any subsequent allotment to the Plaintiff was through fraud and/or corrupt means and is of no effect. The 1st Defendant avers that as the first registered owner her title cannot be impeached and is entitled to title, quiet possession, use and all other rights over the Suit Property as guaranteed under Article 40 of the Constitution of Kenya, the Land Act and the Land Registration Act, and urged the Court to dismiss the Application.

6. The 2nd, 3rd and 4th Defendants have not opposed the Application. The Advocates for the Plaintiff and

for the 1st Defendant agreed to dispose of the Application by written submissions and filed their respective submissions in which they outlined the facts as contained in their affidavits and pleadings. They also made brief oral submissions highlighting those written submissions. Briefly, counsel for the Plaintiff submitted that the Plaintiff has established a prima facie case with a probability of success and that the Plaintiff stands to suffer irreparable loss and damage that cannot be compensated by damages unless the orders sought are granted. Further, it was submitted that the balance of convenience tilts in favour of the Plaintiff.

7. The 1st Defendant's counsel submitted that the 1st Defendant holds title to the Suit Land and the Applicant being not the registered owner and holds no title has no chances of success. Further, it was submitted that the 1st Defendant's title as the first registered owner cannot be impeached even on the alleged grounds of fraud.

8. I have carefully considered the application. This being an application for interlocutory injunction, the Plaintiff must satisfy the conditions laid down In the case of **Giella –v- Cassman Brown & Company Ltd (1973) EA 358.** The Plaintiff must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable damage. If the court is however in doubt on the foregoing, it will decide the matter on the balance of convenience.

9. The dispute is over the ownership of title **NO.KWALE/SHIMONI/168.** The Plaintiff's main contention is that he was allocated the Suit Property in 1991 and that upon paying the necessary charges, was issued with a certificate of outright purchase and the transfer made in his favour. It is the plaintiff's contention that the 2nd and 3rd Defendants failed to register him as the owner of the Suit Land and instead fraudulently registered the 1st defendant as the owner. On the other hand, the 1st Defendant contends that she is the rightful owner and that as the holder of the title and being the first registered owner, her title cannot be impeached.

10. In the case of **Mrao Ltd –v- First American Bank of Kenya Ltd (2003) eKLR,** the Court of Appeal held that:

“.....A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant's case upon trial....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 from the latter.... ”

11. In this case, both the Plaintiff and the 1st Defendant are claiming the Suit Property. The main dispute is who between the Plaintiff and the 1st Defendant is the true owner of the Suit Property. The Plaintiff claims that he was allocated the land in 1991 and has exhibited some documents in his name. On the other hand, the 1st Defendant claims the land was allocated to her in 2004 and has produced a title deed and other documents to support her contention. Both parties accuse each other of fraud. The issue as to who between the Plaintiff and the 1st Defendant is the rightful owner is an issue that can only be ascertained at the trial. Until that fact is established, it is only fair that the status quo prevailing be maintained. The courts have also accepted that in dealing with an application for an interlocutory injunction, the court is not necessarily bound by the three principles set out in **the Giella –v- Cassman Brown case.** The court may look at the circumstances of the case generally and the overriding objective of the law.

12. In the case of **Suleiman – v- Amboseli Resort Ltd (2004) KLR 589,** Ojwang Ag. J (as he then was) stated thus:

“Counsel for the Defendant urged that the shape of the Law governing the grant of injunctive relief was long ago, in Giella – v- Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new

situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at 780 – 781: - A fundamental principle of ... that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’... Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –v- Cassman Brown, the court has to consider the following questions before granting injunctive relief:

i) Is there a prima facie case.....

ii) Does the applicant stand to suffer irreparable harm....

iii) On which side does the balance of convenience lie.....

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice... if granting the applicant’s prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the Applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly there would be a much larger risk of injustice if I found in favour of the Defendant than if I determined this application in favour of the applicant. ”

13. In that case, the court granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the Court should do justice to the parties before it and their interests must be put on scales. Both the plaintiff and the 1st Defendant are claiming the suit property. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined.

14. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is clear that the Plaintiff has established a prima facie case with a probability of success against the Defendants.

In my view, it is clear that the plaintiff has shown his right over the Suit Property. As regards irreparable damage, I take the view that should the suit land be alienated, the Plaintiff will have lost what he regards as his land and which may not be quantified in damages. The balance of convenience would tilt in favour of the plaintiff in order to safeguard the subject matter of the suit pending hearing and determination.

15. Arising from all the above reasons, I find merit in the application. Accordingly, I grant the order for temporary injunction in terms of prayer 3 of the Notice of Motion dated 20th June 2017. Considering the circumstances of this case, I order that the costs of the application shall be in the cause.

Ruling dated, signed and delivered at Mombasa this 9th day of July 2018.

C. YANO

JUDGE