



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.447 OF 2017

ANTHONY KARIUKI CHEGE (as Attorney of MARY NJERI CHEGE

pursuant to general power of Attorney registered as No. IR P/A 66833/1 on

13<sup>th</sup> December 2016.....PLAINTIFF/APPLICANT

-VERSUS-

JAMES KAMAU.....1<sup>ST</sup> DEFENDANT/RESPONDENT

JOSEPH NDUNGU.....2<sup>ND</sup> DEFENDANT/RESPONDENT

ALEX MUHIA KAMAU .....3<sup>RD</sup> DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated **13<sup>th</sup> April 2017**, brought by the Plaintiff/Applicant herein who has sought for the following orders:-

1. Spent

2. Spent

3. That pending the hearing and determination of this suit inter parties, an interim injunction do issue to restrain the Defendants whether by themselves, their agents or servants or otherwise from entering, remaining upon, constructing unauthorized structures, selling, agreeing to sell, charging, leasing or otherwise disposing of the suit property namely land reference No. Ruiru/Ruiru East Block 2/2086 or committing any other acts of trespass or waste therein.

4. That costs of this application be provided for.

The said application is premised on the grounds stated on the face of the application and on annexed *affidavit* of **Antony Kariuki**. These grounds are:-

a. The Plaintiff holds a general **Power of Attorney** registered on IR P/A 66833/1 on **13<sup>th</sup> December 2016**, donated by the registered proprietor of the parcel of land known as title Ruiru/Ruiru East Block 2/2086, one **Mary Njeri Chege**.

b. The Defendants have wrongfully and without any colour of right or the consent of the Plaintiff entered upon and constructed illegal, unsightly and unauthorized structure upon the suit premises namely land reference No. Title Ruiru/Ruiru East Block 2/2086.

c. Unless restrained by injunction, the Defendants threatened and intend to continue their acts of trespass and waste on the suit premises whereupon the Plaintiff will suffer irreparable harm and injury which will not be compensated by an award of damages.

d. The Plaintiff is also apprehensive that the Defendants may alienate the suit property to third parties unless an injunction is granted.

In his *Supporting Affidavit*, the Applicant **Antony Kariuki Chege** reiterated the contents of the grounds in support of the application and

averred that his mother, **Mary Njeri Chege**, who donated **Power of Attorney** to him is the registered owner of the suit property **Ruiru/Ruiru East Block 2/2086**, as per **annexture AKC-2**. It was his further averments that his mother was registered as such proprietor on the **7<sup>th</sup> June 2013**, and she has held the title to the said parcel of land and has never transferred to anyone else.

However, when the Applicant visited the suit property on **29<sup>th</sup> September 2016**, he found the same had been subdivided into **sixteen plots** and **seven** of them had on-going constructions. Upon inquiry, he was informed that the said parcel of land was subdivided and plots sold out by a **land buying Company** which was based in **Githurai**. He however visited **Thika Land Registry** and confirmed that the suit property was still registered in the name of his **mother Mary Njeri Chege**, and even the **Survey Map** from **Survey of Kenya** still showed the suit land was registered in the name of **Mary Njeri Chege**. He thereafter reported the matter to **CID Thika**, and when the Defendants were summoned to the CID Thika, they failed to turn up. He therefore urged the Court to order the persons occupying his mother's land illegally to be restrained by way of an injunction.

The application is opposed and **Joseph Ndungu**, the 2<sup>nd</sup> Defendant swore a **Replying Affidavit** for himself and on behalf of the other Defendants. He averred that they purchased the suit property from one **Martin Njema Kamau**, of **H. Flyers Investment**. He confirmed that they entered into an **Agreement** with the said **land buying Company** and after execution and payment of the same, they were never issued with any title deed. Further that they were summoned to attend a meeting at the **CID Thika, Kiambu** but they failed to turn up for the said meeting. The Defendants were then sued with the present claim.

The parties sought time to negotiate the matter out of court, but they however failed to do so. The Court had on **20<sup>th</sup> June 2017** issued an **Order of maintenance of status quo** pending settlement of the matter out of court.

Having failed to settle the matter out of court, the parties canvassed the instant **Notice of Motion** by way of **written submissions** which this Court has carefully read and considered. The Court has also considered the relevant provisions of law and the cited authorities.

The guiding law herein is **Order 40 Rule 1** of the **Civil Procedure Rules** and **Section 63(c)** of the **Civil Procedure Act**. Further, the Court will take into account the overriding objectives as provided by **Section 1A & 1B** of the **Civil Procedure Act** and the inherent power of the court to issue any orders that are necessary for ensuring end of justice is met as provided by **Section 3A** of the **Civil Procedure Act**.

The Applicant has sought for injunctive orders and the principles to be considered are the ones laid down in the case of **Giella...Vs... Cassman Brown & Co. Ltd 1973, EA 358**. These principles 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 this Court will also take into consideration that at this juncture, it is not called upon to determine the disputed facts with finality. The Court is only mandated to determine whether the Applicant is deserving of the equitable relief of injunction based on the usual criteria. See the case of **Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

**“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”**

There is no doubt that the Applicant herein possesses **General Power of Attorney** donated to him by his mother, **Mary Njeri Chege**. The Applicant therefore had a right to bring up this suit on behalf of his mother.

There is also no doubt that **Mary Njeri Chege ID No.3066253** is the registered proprietor of the suit property **Ruiru/ Ruiru East Block 2/2086**, having been registered so on **7<sup>th</sup> June 2013**. Therefore as a registered proprietor, she is deemed to be the absolute and indefeasible owner of such parcel of land and the said proprietorship can only be defeated or challenged if it was acquired **fraudulently or unprocedurally** or through corrupt scheme. **See Section 26 (1) (a)&(b) of Land Registration Act**, which states:-

**“The certificate of title issued by the registrar upon registration, or to a purchaser 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.**

However, no such evidence has been brought out by the Defendants herein. The Defendants have alleged that they purchased the suit property from one **Martin Njema Kamau**, who was selling this land on behalf of a **land buying and selling Company** known as **H. Flyers Investment**. However, the Defendants did not attach any documents to show such purchase.

The Applicant has alleged that *Mary Njeri Chege* is still the registered proprietor of the suit property as per the records at *Thika Lands Registry*. The *Survey Map* too from the *Survey of Kenya* confirms the same position Prima-faciely, *Mary Njeri Chege* is the registered proprietor of the suit property and therefore the *Applicant has established that he has a prima-facie case with probability of success at the trial.*

On whether the Applicant will suffer irreparable loss, it is not in doubt that the suit property has been divided into sixteen(16) plots and seven (7) of them had on-going constructions before *status quo* orders were issued. If the said third parties would be allowed to develop their resultant plots, then the Plaintiff/Applicant will lose the suit property and it would be difficult to claim compensation from the sixteen individuals whom she never sold the land to. Therefore *it is apparent that the Plaintiff will suffer irreparable loss which cannot be compensated by an award of damages.* 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”**

Though the *Court is not in doubt, it is very clear that the balance of convenience tilts in favour of maintaining the status quo.* The *status quo* herein is what prevailed before the suit property was sold to the Defendants and later to the other sixteen individuals.

For the above reasons, the **Court finds that the Plaintiff/Applicant has established all the principles set out in the case of *Giella....Vs.... Cassman Brown(supra)*.** Consequently, the **Court allows the Notice of Motion dated 13<sup>th</sup> April 2017 entirely in terms of prayer No.3. The Applicant is also entitled to costs of this application.**

It is so ordered.

**Dated, Signed and Delivered at *Thika* this 28<sup>th</sup> day of September 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Munawa holding brief Ngure Mbuku for Plaintiff/Applicant

No appearance for 1<sup>st</sup> Defendant/Respondent

No appearance for 2<sup>nd</sup> Defendant/Respondent

Present in person for 3<sup>rd</sup> Defendant/Respondent

Lucy - Court clerk

**Court** –Ruling read in open court.

**L. GACHERU**

**JUDGE**

**28/9/2018**