



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 44 OF 2018

DICKSON BUNDI NJAGI.....PLAINTIFF/APPLICANT

VERSUS

JAMLECK KIURA MURATHI.....DEFENDANT/RESPONDENT

RULING

The application before me is the Notice of Motion dated 16th July 2018 brought under **Section 1A, 1B, 3A Civil Procedure Act** and **Order 40 Rules 1 and 10 Civil Procedure Rules**. The Applicant is seeking the following orders:

1. Spent.

2. That the defendant/Respondent, his servants, agents or anybody acting through him be restrained from selling, charging, transferring, leasing, renting out, surveying, sub-dividing, constructing or in any way dealing with the plot variously known as Kianyaga/Market/11, Baragwe/Raimu/490/11 or Plot Number 11 Kianyaga Market, or in any way interfering with the plaintiff's use and occupation of the same until this application is heard and determined.

3. The Applicant is also seeking similar orders pending hearing and determination of the main suit herein.

The application is supported by five grounds shown on the face of that application and the affidavit of the Applicant sworn the same date. On 7th September 2018, the Respondent through the firm of Abuodha & Omino filed grounds of opposition as a rejoinder to the said application.

I have considered the said Notice of Motion and the supporting affidavit and the annexures thereto. I have also considered the grounds of opposition filed by the firm of Abuodha & Omino Advocates. The Applicant is seeking an equitable relief of injunction under **Order 40 Civil Procedure Rules**. Before an Applicant is granted an equitable relief, she must demonstrate the three principles as set out in the celebrated case of **GIELLA VS CASSMAN BROWN & CO. LTD (1973) E.A at Page 358** as follows:

1. An Applicant must establish a prima facie case.

2. An Applicant must show that she will suffer an irreparable injury and

3. Where the Court is in doubt, it may decide the case on a balance of convenience.

The Applicant in the plaint herein dated 16th July 2018 admitted that the Respondent acquired the suit property by way of transmission through Succession Cause No. 227/1998 which was later changed to Succession Cause No. 73/2002 (Embu). He stated that the defendant is the sole proprietor of the suit property registered as KIANYAGA/MARKET/11 which he now seeks to have it cancelled on grounds of fraud, malice and illegality. The Applicant is seeking an equitable relief of injunction on grounds that the Respondent is actively seeking a buyer with the intent of defying the Applicant's proprietary rights and those of the deceased co-owners. The Applicant has not attached any sale agreement indicating that the Respondent intends to dispose of the suit property. Though the Respondent has not filed a replying affidavit controverting the averments contained in the sworn affidavit in support of this application, it is quite evident from the pleadings and the Applicant's admission that the Respondent is the registered proprietor of the suit property parcel No. KIANYAGA/MARKET/11.

Section 26 of the Land Registration Act provides as follows:

"The certificate of title issued by the Registrar upon registration or to a purchaser of land upon 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, 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”.

The particulars of fraud, malice and illegality contained in the plaint herein remain mere allegation until the defendant is proved to have been a party to the same.

In the result, I find that the Applicant has not proved the ingredients for the grant of the orders of injunction. I therefore dismiss the application dated 16th July 2018. The costs of that application to abide the event. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 31st day of October 2018.

E.C. CHERONO

ELC JUDGE

31ST, OCTOBER, 2018

In the presence of:

M/S Muthama for Applicant