



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.805 OF 2017

PETER KAGUNYU KIRAGU PLAINTIFF/APPLICANT

-VERSUS-

ANNE H. G. MUCHUNKU DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated **19th October 2017** brought by the Plaintiff/Applicant herein **Peter Kagunyu Kiragu** and has sought for the following orders:-

a) Spent.

b) Spent.

c) That the Honourable court be pleased to issue an order of injunction restraining the Defendant and/or his servants, agents/assigns from entering into, trespassing onto, constructing on, and/or tampering with beacons and the physical state of the suit parcels Ruiru/Ruiru East Block 2/24632, 24633, 24634, 24635, 24636, 24637, 24638, 24639, 24640, 24641, 24642, 24643 and 24644 pending the hearing and determination of this suit.

d) That costs of this application be provided for.

This application is premised on the grounds stated on the face of the application and upon the *Supporting Affidavit* of **Peter Kagunyu Kiragu**. These grounds are:-

i. That the Plaintiff is the registered proprietor of the absolute interest in land parcels No.Ruiru/Ruiru East Block 2/24631, 24632, 24633, 24634, 24635, 24636, 24637, 24638, 24639, 24640, 24641, 24642, 24643 and 24644.

ii. That the Defendant has trespassed on the Plaintiff's land and destroyed and/or mutilated beacons affixed thereon.

iii. That the Defendant has constructed a semi-permanent structure on land parcel Ruiru/Ruiru East Block 2/24631 and vandalized and mutilated beacons of parcels No.Ruiru/Ruiru East Block 2/24632, 24633, 24634, 24635, 24636, 24637, 24638, 24639, 24640, 24641, 24642, 24643 and 24644.

iv. That the Defendant's actions continue to deteriorate the physical condition of the suit land.

v. That no prejudice will be caused to either party if the orders sought are granted.

In his *Supporting Affidavit*, the applicant averred that he is the proprietor of the absolute interest in all those parcels of land known as titles **Ruiru/Ruiru East Block 2/24631 – 24644** as per *annexture PMK-1(a) to (u)*.

Further that the said parcels were borne out of subdivision of a larger property known as **Ruiru/Ruiru East Block 2/4867** as is evident from *annexture PMK-2*. He contended that on **2nd October 2017**, the Defendant without any colour of right maliciously mutilated and destroyed beacon affixed to the suit parcels. That he is apprehensive that the Defendant will continue to mutilate the said beacons if not enjoined and that the said Defendant does not possess any interest in the suit land to warrant such vandalization and mutilating of the beacons and also putting up structure on the suit properties. He further averred that he stands to suffer irreparably by the persistence of the Defendant's actions if the orders sought are not granted. He urged the Court to allow his application.

The application is vehemently opposed by the Defendant/Respondent **Anne Hildah Gatakaa Muchunku**, who swore a *Replying Affidavit* on

13th November 2017, and averred that she does not occupy or recognize the parcels of land referred to as **Ruiru/Ruiru East Block 2/24631-24644** by the Plaintiff/Applicant. She further averred that together with her brother **Fannuel Murage** and sister **Judy B. Makena**, they are the sole owners of the parcel of land known as **Ruiru/Ruiru East Block 2/4867** since the year 2002, when the said parcel of land was transferred to them by their mother **Mercy M. Kagendo** after attending the **Land Control Board at Thika Lands Office** as is evident from **ANGM-1**, a copy of the title deed. She further alleged that her mother **Mercy Kagendo** had purchased the said parcel of land **Ruiru/Ruiru East Block 2/4867** from **Teresia Nyokabi Kahengeri** and **James Kahengeri Gitu** in 1996 as per the **Sale Agreement** marked **AHGM-2** and the said vendors received **Kshs.350,000/=** from **Mercy K. Kagendo** and transferred **Ruiru/Ruiru East Block 2/4867** to the said purchaser as per **annexture AHGM-3**, a copy of the transfer form. Therefore this property **Ruiru/Ruiru East Block 2/4867**, has been solely owned and occupied by the Respondent's family for the last **21 years** and therefore she is not trespassing on the said property as alleged by the Plaintiff/Applicant as she rightfully and legally owns the same.

She annexed previous searches conducted in **March 2011** and marked **AHGM-4** to confirm that the land in question **Ruiru/Ruiru East Block 2/4867** was owned by the Defendant and her siblings. She therefore denied the Plaintiff's claim in *toto* and contended that there has never been any subdivision of **Ruiru/Ruiru East Block 2/4867** nor any single beacon erected thereon as alleged by the Plaintiff/Applicant. She attached **AHGM-6**, a copy of previously obtained **Map from Survey of Kenya**. She is therefore a stranger to the Plaintiff's claim and she indeed possesses interest on the suit parcel **Ruiru/Ruiru East Block 2/4867**.

Further that they have over the years leased this land to one of their neighbours **Samuel Mutunga** for farming activities as is evident from **annexture AHGM-9**, which are copies of the **Lease Agreement**. Therefore the Plaintiff's intention of trying to evict her and her siblings from **Ruiru/Ruiru East Block 2/4867**, is a gross violation of their rights and aimed at disenfranchisement of their benefits.

Further, the Respondent alleged that the Plaintiff obtained the title deed for land parcel **No.Ruiru/Ruiru East Block 2/4867** fraudulently and should be subjected to criminal investigations since neither of the holder of the title has sold the suit property or any part thereof to anyone and they have no intention of selling it now or in the near future. She urged the Court to dismiss the Plaintiff's/Applicant's instant Notice of Motion application.

The Plaintiff/Applicant filed a **Supplementary Affidavit** and reiterated that he purchased the suit property prior to its formal registration from a member of **Nyakinyua Investment Co.Ltd** and he complied with all requirements as is evident from **annexture PKK-1(a)** and **(b)**. That he bought the suit property from **Virginia Wairimu Mahinda** who had also bought the same from **Esther Wariara Muturi**, a member of **Nyakinyua Investment Co.Ltd** as per **anexture PKK (a),(b) and (c)**. That upon subdivision and transfer, he became the registered proprietor as he annexed the **Mutation Forms** duly approved as **annexture PKK-3**. He also contended that he was not aware of any other title preceding that of **Virginia Wairimu** or indeed **Nyakinyua Investment**. He reiterated that he is the registered proprietor of all the parcels of land and he denied being a fraudster.

The said **Notice of Motion** was canvassed by way of written submissions. The **Law Firm of Lilian Nchogu & Co. Advocates** for the Defendant/Respondent filed their submissions on **9th February 2018** and submitted that the Applicant has not established all the principles laid down for grant of injunctive orders. The Defendant/Respondent urged the Court to dismiss the instant application with costs.

On the part of the Plaintiff, the **Law Firm of Nderitu Waturu Associates** filed their submissions on **16th February 2018** and submitted that the Plaintiff is the registered proprietor of the suit parcels of land as from **October 2017** and as provided by **Section 26(1)** of the **Land Registration Act**, he is deemed to be the absolute and indefeasible owner and therefore he has established all the principles set out in the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358**, and since he has also been in possession of the suit property, the Court should allow his instant application.

This Court has now carefully considered the entire pleadings and the annexures thereto. The Court too has considered the rival written submissions, the cited authorities and the relevant provisions of law and the Court renders itself as follows:-

The Applicant herein has sought for injunctive reliefs which are equitable orders granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others...**

Vs...Gatheru & Others (1990) KLR 554, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the

Court and the discretion is a free one but must be judicially

exercised”.

Further, as the court embarks on determination of this application, it will take into account that it is not supposed to decide the disputed issues with finality. All that the court is supposed to do is to determine whether the Applicant is deserving of the orders sought based on the usual criteria 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.

From the available evidence, it is apparent that the Plaintiff herein bought the parcel of land from one **Virginia Wairimu Mahinda**, which suit property was previously described as **Ruiru/Ruiru East Block 2/4887**. The said **Virginia Wairimu Mahinda** was registered as a proprietor of the suit property on **28th March 2017**. From the Supplementary Affidavit of the Applicant, this **Virginia Wairimu Mahinda** had allegedly bought the parcel of land from one **Esther Wariara Muturi**, who only had a letter of clearance from **Nyakinyua Investment Co.Ltd**, dated **18th February 2011**. The said **Esther Wariara Muturi** was never registered as a proprietor and there is no Sale Agreement attached to the affidavit to show or confirm that indeed **Esther Wariara Muturi** sold the suit property to **Virginia Wairimu Mahinda** or that she was a member of the **Nyakinyua Investment Co.Ltd**. Therefore the authenticity of the letter dated **18th February 2011** can only be ascertained by calling of evidence especially officials from **Nyakinyua Investment Co. Ltd** and that they did recognize the said **Esther Wariara Muturi** as one of their members. Even without going to the merit of the main suit, the Court finds that there is no **Sale Agreement** between **Virginia Wairimu Mahinda** and the Plaintiff/

Applicant herein. The only document linking **Virginia Wairimu Mahinda** to **Nyakinyua Investment Co. Ltd** is **annexture PKK-1(b)** which shows that **Virginia Wairimu Mahinda** paid **Kshs.20,000/=** allegedly to **Nyakinyua Investment Co. Ltd** for transfer of **Ballot No.111**. There is no co-relation between **Ballot No.111** to **LR.No.Ruiru/Ruiru East Block 2/4867** and **Esther Wariara Muturi**. Indeed **annexture PKK-1(a)** dated **17th** is not clear what it is and it was from whom.

There is no doubt that **Virginia Wairimu Mahinda** got registered as the proprietor of the suit property on **28th March 2017**, but it is not clear how she got registered as such proprietor. That can only be ascertained from calling of evidence in the main suit from the officials of **Nyakinyua Investment Co. Ltd** and **Thika Lands Office**.

However, from the **Replying Affidavit** of the Respondent herein, it is apparent that the initial land property **No.Ruiru/Ruiru East Block 2/4867** was registered in the names of **Teresia Nyokabi Kahengeri** and **James Kahengeri Gitu** on **15th august 1994**. Thereafter, the said vendor, **Teresia Nyokabi Kahengeri** and **James Kahengeri Gitu** sold the suit property to **Mercy M. Kagendo** on **5th March 1996**, vide a **Sale Agreement** even dated. This initial suit property **Ruiru/Ruiru East Block 2/4867**, was later transferred to **Mercy Kagendo** on **7th May 1996** as is evident from the **Transfer** document **annexture AHGM-3**. Indeed, **Mercy M. Kagendo** was registered as a proprietor of this suit property on **16th May 1996** and under **Cap 300 (now repealed)** therefore she became the absolute and indefeasible proprietor of the said land as from **16th May 1996**. This was way before **Esther Wariara Muturi** was confirmed as the proprietor of the suit property by **Nyakinyua Investment Co.Ltd** vide the letter dated **18th February 2011**.

Since there is not Certificate of Title in the name of **Esther Wariara Muturi** to confirm that she was registered as a proprietor of the suit property as at **18th February 2011**, the said letter cannot supercede the Certificate of title held by the registered proprietor. Further, it is evident from **annexture AHGM-5**, a copy of the **Green Card**, the said land parcel **Ruiru/Ruiru East Block 2/4867**, was transferred to **Fennuel Murage Mugendi**, **Anne Hilda Gataka** and **Judy B. Makena** on **11th July 2002**. The **Certificate of official Search** dated **14th March 2011**, confirms the same. The Respondent attached a **Certificate** of title marked **AHGM-1** to confirm that indeed the three named persons above are the proprietors of the suit property and the Certificate of Deed was issued on **12th July 2002**. The Defendant/Respondent has alleged that as proprietors, they have never sold the suit property to anybody not even **Esther Wariara Muturi** or **Virginia Wairimu Mahinda**. The Respondent has contended that they are still the registered owner of the initial land parcel **No.Ruiru/Ruiru East Block 2/4867**.

On the issue of whether the said title deed changed hands from the Respondent to other parties, that cannot be resolved now but only through calling of evidence from the **lands office Thika**. The Respondent has denied ever subdividing or allowing the subdivision of the initial suit land. She further contended that the Plaintiff/Applicant and the other vendors that he has named are strangers to her and the other registered owners.

Indeed the Plaintiff is the registered owner of the various suit parcels of land stated in the Plaintiff which he acquired on **30th July 2017**. That acquisition was done about **15 years** after the Defendant had been registered as the proprietors of the initial land parcel which the Respondent claims they have never sold it.

Though **Section 26(1)** of the **Land Registration Act** provides that a **Certificate** of title issued to a proprietor is deemed to be prima-facie conclusive evidence that such proprietor is the absolute and indefeasible owner, such proprietorship can be challenged if the same was acquired through **fraud, misrepresentation, unprocedurally, illegally** or through a **corrupt scheme**. See **Section 26(1)** of the

Land Registration Act, which provides:-

“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.

The Plaintiffs/Applicants Certificate of titles have been challenged by the Defendant/Respondent herein. The authenticity of the same has to be tested through calling of evidence in the main trial. The Plaintiff/Applicant therefore cannot dangle the said Certificates of title and claim ownership without authentication of the same and his acquisition of the land by the court and which the court stated earlier has to be done through the calling of evidence at the main trial.

For now the Court finds that the Plaintiff has not established that he has a prima-facie case with probability of success at the trial as per Giella...Vs...Cassman Brown & Co. Ltd (supra).

Having found that the Applicant has not established a prima-facie case with probability of success at the trial, this Court finds no reason to deal with the other two principles set out in Giella case as they are sequential. See the case of Kenya Commercial Finance Co. Limited..Vs.. Afraha Education Society (2001) 1EA 87, where the court held that"-

“The conditions in the case of Giella ..Vs.. Cassman Brown for granting of temporary injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt, then the third condition can be addressed.”

Having now carefully considered the available evidence, the Court finds that the Applicant’s **Notice of Motion** application dated **19th October 2017 is not merited and the said application is dismissed entirely with costs to the Defendant/Respondent herein.**

The parties to prepare the main suit for hearing expeditiously so that the contested issues can be resolved at once.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of October 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Applicant

M/S Karwitha holding brief for M/S Nchongu for Defendant/Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Ruling read in open court.

L. GACHERU

JUDGE

19/10/2018