



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.511 OF 2017

PETER KIMATA WACHIRA.....PLAINTIFF/RESPONDENT

-VERSUS-

FOLDERTEK INVESTMENTS LIMITED.....1ST DEFENDANT/ APPLICANT

DANIEL MUIRURI NJOROGE.....2ND DEFENDANT/RESPONDENT

DISTRICT LANDS REGISTRAR,THIKA.....3RD DEFENDANT/RESPONDENT

COMMISSIONER OF LANDS.....4TH DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

RULING

The Plaintiff herein *Peter Kimata Wachira* filed this suit on **15th December 2008** and sought for various orders against the 1st Defendant herein *Foldertek Investments Ltd.* Among the orders sought are that:-

- 1) A declaration that the transfer and the registration of Title to Ruiru/Kiu Block 2(Githunguri) 3620 to the Defendant is null and void 'ab initio' and is hereby cancelled forthwith.**
- 2) A declaration that the Plaintiff is the duly registered proprietor of the parcel of land known as Ruiru/Kiu Block 2(Githunguri) 3620.**
- 3) An order of rectification of the Title and reinstatement of the Plaintiff's name in the Register of Titles at Thika District as the proprietor of Ruiru/Kiu Block 2(Githunguri) 3620.**

The Plaintiff had averred in his claim that he is the registered proprietor of the suit property ***Ruiru/Kiu Block 2(Githunguri)3620***, having been registered so on **13th September 1996**, as per the copy of title deed which he attached as an annexure to the ***Replying Affidavit*** to the current application. He also alleged that the suit property was purportedly transferred to the 1st Defendant on **26th September 2008** and a title deed issued thereto. He therefore filed this suit but prior to filing of the suit, he had caused a caution to be lodged over the suit property. He also averred that he was in ***exclusive*** use and ***possession*** of the said suit property.

The 1st Defendant on its part filed a Defence and averred that he was the registered owner of the suit property having been a ***bonafide*** purchaser for value of the suit property vide a ***Sale Agreement*** dated **16th September 2008**, between the 1st Defendant and one ***Daniel Muiruri Njoroge***, (now 2nd Defendant). He attached a copy of the title deed to his pleadings and instant application. The 1st Defendant therefore contended that it is the registered proprietor of the suit property as it holds a lawful title deed and the Court was urged to dismiss the suit with costs.

Along the way, the pleadings were amended and 2nd, 3rd, 4th and 5th Defendants were enjoined. The 2nd Defendant is the one who allegedly sold the suit property to the 1st Defendant.

It is evident that both the Plaintiff and the 1st Defendant are in possession of title deeds for the suit property. The Plaintiff's title deed was issued on **13th September 1996** and the 1st Defendant's title deed was issued on **29th September 2008**. Therefore the Plaintiff's title deed is the first in time.

The suit has been pending in court since the **year 2008** and it is among the suits that should be concluded by **31st December 2018**.

The matter had even been referred to the Deputy Registrar for Pre-trial directions.

However, before the Pre-trial directions could be fully complied with, the 1st Defendant filed the instant **Notice of Motion** date **13th March 2018** and sought for injunctive orders in the following terms:-

1) That a temporary injunction be issued by this Honourable Court restraining the Plaintiff/Respondent, his agents, servants and/or people working under him from trespassing, encroaching, alienating, offering for sale, selling, subdividing, cultivating, putting up construction or in any way interfering with the land parcel No. Ruiru/Kiu Block 2(Githunguri) 3620 being the suit properly pending hearing and determination of the suit herein.

The said application was supported by the grounds states on the face of the application and on the **Supporting Affidavit** of **Leonard Ngunju Chege**, a **Director** and **Shareholder** of the 1st Defendant. These grounds are:-

a) The 1st Defendant/applicant is a bonafide purchaser for value of LR.No. Ruiru/Kiu Block 2(Githunguri) 3620.

b) The 1st Defendant/Applicant holds a valid Title deed duly issued by the 3rd Defendant.

c) The acts of the Plaintiff/Respondent, to wit encroachment and cultivation are unlawful and illegal.

d) There is imminent danger that the Plaintiff/Respondent may continue further development to the detriment of the 1st Defendant.

e) It is in the interest of justice that the prayers sought herein are granted to preserve the subject matter of the suit from further alienation and waste due to the Plaintiff's/ Respondent's illegal and wrongful actions hereinabove stated.

In his **Supporting Affidavit**, **Leonard Ngunju Chege** reiterated that the 1st Defendant is the *bonafide* holder of title deed for **Ruiru/Kiu Block 2(Githunguri) 3620** which was issued to it on **29th September 2008**. He also averred that the Plaintiff has unlawfully encroached on the suit property and vide a letter dated **9th September 2015**, its advocate **M/s Munga Wanjau & Co. Advocates** wrote to the Plaintiff's advocate about the said encroachment but the Plaintiff/Respondent has continued with the said trespass and encroachment to date. He urged the Court to allow the instant application for injunction.

However, the Plaintiff/Respondent contested the said application and filed a Replying Affidavit on **4th April 2018** and averred that he is the registered owner of the suit property since **13th March 1996** as per the annexed copy of the title deed. That he has been in possession and use of the suit property and has never sold it or gifted anyone. However, he noted encroachment on the suit property by the 1st Defendant in the **year 2008**. He subsequently filed the instant suit against the 1st Defendant and the pleadings were later amended to include the 2nd to 5th Defendants. He confirmed that a caution lodged on the suit property is still intact and valid as per **annexture PWK-7**. Further that the 1st Defendant has all along known that the Plaintiff has been in exclusive occupation of the suit property and that the instant application has only been filed as a gimmick to delay the full hearing and determination of this suit.

Further, that the 1st Defendant is a complainant in **Criminal Case No.2780 of 2012, Rep...Vs...Daniel Muiruri Njoroge**, where 2nd Defendant is charged with an offence of **Conspiracy to Defraud** the 1st Defendant. Again the 1st Defendant is also a party to an agreement for refund of the purchase price of the alleged suit property **Ruiru/Kiu Block 2(Githunguri) 3620** by the 2nd Defendant. He contended that this application is an abuse of the court process and only meant to curtail just and expeditious hearing and determination of the suit.

The 2nd Defendant, **Daniel Muiruri Njoroge** filed his **Replying Affidavit** on **13th April 2018** and averred that he was the registered owner of the suit property which he later lawfully sold to the 1st Defendant for value. Therefore the 1st Defendant is the *bonafide* and registered owner of the suit land. He urged the Court to allow the instant **Notice of Motion**.

The application was canvassed by way of written submissions which this Court has carefully considered. The Court has also considered the whole pleadings and the annexures thereto.

As already stated, this is a matter filed in court in the **year 2008**. It should be finalized by **31st December 2018** and therefore it will be fixed for hearing within the service weeks.

Further the 1st Defendant has sought for injunctive orders which are equitable reliefs granted at the discretion of the court. The said discretion must be exercised judicially. It is also instructive to note that at this stage, the court is not called upon to determine the disputed issues herein with a finality. The court is only supposed to determine whether the Applicant is deserving of the injunctive orders sought 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 that the Court is entitled at this stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria....”

Of course the criteria to be used is the one postulated in the case of Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 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.**

Has the Applicant herein established any of the above stated criterias?

It is not in doubt that the Plaintiff herein is the one who initiated this suit in the **year 2008** and alleged that he is the *bonafide* registered proprietor of the suit property being a title holder from **13th March 1996**. He also alleged that he has been in exclusive possession of the suit land since then. The 1st Defendant/Applicant has not denied that the Plaintiff has been in possession and occupation of the suit land since **1996**. The Plaintiff also alleged that the 1st Defendant encroached on the suit land in **2008** and thus this suit.

It is also not in doubt that the 1st Defendant too has a title deed that was issued to it in the **year 2008**. Of course the title of the 1st Defendant was issued to it after the Plaintiff's title deed had been issued. At the danger of being seen like the court is dealing with disputed issues with finality, it is evident that the Plaintiff's title is the first in time. The court will therefore have to await the calling of evidence to establish which of the two titles is genuine and who is the *bonafide* owner of the suit property.

However, the Plaintiff has alleged that he has been in exclusive use of the suit property since **1996**, and the 1st Defendant has not denied that allegation. Further the 1st Defendant had admitted that even in the **year 2015**, the Plaintiff was still using the land and that is why he instructed his advocate to write to the Plaintiff's advocate about the said encroachment. Even if the 1st Defendant has alleged that the Plaintiff did not cease to encroach on the suit land, the 1st Defendant did not take any action until the **year 2018**, when this suit was supposed to be heard expeditiously and be removed from the system through expeditious disposal of the same.

It is also not in doubt that the 1st Defendant is a complainant in a Criminal Case No.2780 of 2012, wherein the 2nd Defendant is charged with an *offence* of **Conspiracy to defraud** the 1st Defendant. There is also an alleged agreement between the 1st and 2nd Defendant for refund of the purchase price for the suit property **Ruiru/Kiu Block 2(Githunguri) 3620**. Therefore the Court finds that this instant application by the 1st Defendant is an afterthought and it is only meant to delay the expeditious disposal of this suit.

For the above reasons, the court finds that the 1st Defendant has not established that it has a *prima-facie* case with probability of success at the trial.

Having found that the 1st Defendant/Respondent has not established a *prima-facie* case with probability of success, the Court will not deal with the other limbs of Giella Case (supra). This is because the said principles 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."

Consequently, the Court finds that the 1st Defendant's/Applicant's **Notice of Motion** dated **13th March 2018** **is not merited**. The said **application is dismissed entirely with costs to the Plaintiff/ Respondent**.

Further, the Court directs that **this suit be heard within the service week period without fail** given that it is a **2008 matter**, which is **over 5 years**.

For the above reasons, the Defendants have 14 days to comply with Order 11 from the date of this Ruling. This matter will proceed for hearing without fail before **Hon. Justice Oscar Angote** on **26th November 2018**, during the Service Week.

It is so ordered.

Dated, Signed and Delivered at Thika this 2nd day of November 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Karuga holding brief for M/S Irungu for Plaintiff/Respondent

No appearance for 1st Defendant/Applicant

Mr. Madegwa holding brief for Mr. Muthomi for 2nd Defendant/Respondent

No appearance for the 3rd Defendant/Respondent

No appearance for the 4th Defendant/Respondent

No appearance for the 5th Defendant/Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above states advocates.

L. GACHERU

JUDGE

2/11/2018