



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC 640 OF 2017

JOEL RICHARD WAMAI (Suing through

VIRGINIAH WAMBUI WAMAI Guardian.....PLAINTIFF /APPLICANT

VERSUS

MARY WANJIRU WAMAI.....1ST DEFENDANT/RESPONDENT

EVA NYAWIRA.....2ND DEFENDANT /RESPONDENT

ANNE MURUGI.....3RD DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated 5th July 2017, brought by the Applicant herein under Sections 1A,1B, 3,3A ,63(a) & (e) and Order 40 Rules 1,2, 3 and Order 51 Rule 1 of the Civil Procedure Rules, wherein the Applicant has sought for the following prayers;

1) That a temporary injunction order be issued restraining the Respondents their families, servants, employees and or agents from claiming, entering, using, alienating, selling, leasing, renting, disposing off, building, cultivating and/or interfering in any way with the suit land parcel No.Ruiru/ Ruiru East Block 3/1552, pending the interparties hearing and determination of this suit.

2) That pending the hearing and determination of this suit the court be pleased to issue an order that parcel No. Ruiru/Ruiru East Block 3/1552, which was illegally, unlawfully and fraudtently registered in the name of the 1st Defendant and then transferred to the 2nd and 3rd Defendants be forthwith reverted and reinstated in the name of the Plaintiff Joel Richard Wamai unconditionally.

3) Costs of the Application.

This Application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of the Applicant, Virginiah Wambui Wamai. The grounds are:-

i. That Virginiah Wambui Wamai is the Plaintiff/Applicant's guardian by dint of the Order issued by this court on 14th June 2017, in Civil Misc.94 of 2017.

ii. That on 7th June 1991, Joel Richard Wamai the Plaintiff who was of sound mind was registered as the owner of parcel No.Ruiru/Ruiru East Block 3/1552, before he became ill and mentality incapacitated in 2007.

iii. That Joel Richard Wamai has two wives, first wife being Mary Wanjiru Wamai while the 2nd wife is Virginiah Wambui Wamai.

iv. That sometimes on or about 13th December 2011, while Joel Richard Wamai was ailing and mentally incapacitated, Mary Wanjiru Wamai, the 1st wife took advantage of the situation of her husband and without leave of the court, fraudulently, illegally and unlawfully registered an instrument on the entries on the parcel No.Ruiru/Ruiru East Block 3/1552 purporting the said parcel was transferred to her as a gift by the said Joel Richard Wamai who was by then mentally incapacitated.

v. That subsequently on 14th December 2011, the said Mary Wanjiru Wamai was issued with a title deed of land parcel No.Ruiru/Ruiru East Block 3/1552.

vi. That sometimes on 16th January 2013, Mary Wanjiru Wamai illegality, unlawfully and fraudulently transferred the said parcel No.Ruiru/Ruiru East Block 3/1552, to her Kinship Eva Nyawira and Anne Murugu Mukunya.

vii. The 2nd and 3rd Defendants are looking for a purchaser to dispose off the suit land, and in fact, they recently took several people (intended purchasers) to the suit land.

viii. The Applicant fears that the Respondents may at any time dispose off or tamper with the entries of the suit land thus occasioning the Applicant to suffer irreparable loss, damage and increase the cost of litigation.

In her **Supporting Affidavit** the Applicant reiterated the contents of the grounds in support of the Application and further averred that the first Defendant/respondent applied and acquired the consent of the **Land Control Board**, through misrepresentation and fraud because by then the Plaintiff/Applicant was mentally incapacitated. Further that she applied to register a caution against the said title but she was advised by the Registrar of lands that since the title deed of parcel **No.Ruiru/Ruiru East Block 3/1552**, had already changed hands to several people, it is only the court which could intervene and redress the issue and bar further transactions. However she did not file the suit until she got the authority to be the Plaintiff's guardian.

The Application is contested and **Joyce Wangui Ndai**, who is the duly appointed guardian of the first Defendant by virtue of a court order issued by the court filed a **Replying Affidavit** on behalf of the 1st Defendant and that of her co guardian one **Faith Wambui Wamai** having been granted the authority to do so. She averred that the First Defendant is not aware of the alleged mental sickness of her husband. She further alleged that sometime on **4th October 2009**, her husband, the 1st Defendant and **Virginiah Wambui Wamai**, appeared before the then **District Officer, Kinangop Division** where it was mutually agreed that in order to avoid unnecessary squabbles in the family, the two wives should share out their husband's property and parcel of land **LR.No.Nya/Muruaki/483,704 and 2878** totaling **41 acres** which were divided into two portions and **Mary Wanjiru Wamai** was to get **16½ Acres** and **Virginiah Wambui Wamai** got **24½ Acres**.

That further all properties in **Naivasha** belonged to **Virginiah Wambui Wamai**, and all properties in Nairobi belonged to **Mary Wanjiru Wamai**, and the agreement is evident from **annexture JWN-2**. She also averred that it is in that spirit that the first Defendant's husband personally applied for and obtained consent to transfer the suit property herein **Ruiru/Ruiru East Block 3/1552**, as evident by **annexture JWN-3 (a) and (b)** and the first Defendant was duly issued with a title deed upon

the said transfer and she became its absolute proprietor under the Law. Therefore as the absolute proprietor, the first defendant had every right in law to offer the same to any prospective purchaser and it's on that account that she sold the same to the 2nd and 3rd Defendants/Respondents.

She further averred that the first defendant was summoned to the police station sometime at Ruiru where she availed her relevant documents regarding the suit land and no adverse action was taken against her. She further averred that the Plaintiff has failed to substantiate her claim or prove that there was anything illegal, unlawful or fraudulent and the allegations remain just allegations. She accused the Plaintiff in her supporting affidavit of being economical with the truth and as such, she did not deserve orders she was seeking. She further averred that the Affidavit of the Plaintiff was fatally defective and asked the court to expunge the same from the records. She therefore urged the court to dismiss the Application with costs.

The 2nd Defendant/Respondent also filed a Replying Affidavit on her behalf and on behalf of the 3rd Defendant/Respondent having been granted authority to do so by the 3rd Defendant. She averred that sometimes in **October 2012**, the 3rd Defendant and herself got information that the suit land was available for sale. The first Defendant supplied them with a copy of the title to enable them carry out a search to which the 3rd Defendant/ Respondent personally applied for and obtained from the Ministry of Lands on the **10th of October 2012**. She averred that they then retained the services of **M/S Lydia Gitaka & Co. Advocates** who drew the **Sale**

Agreement and on **29th October 2012**, the parties executed the said sale agreement and upon receipt of all the completion documents, the purchase price was paid into the first Defendant's account in terms of the sale agreement. She further averred that upon registration of the transfer, the Advocates forwarded to them the title documents. She confirmed that she is a purchaser for value and that there has been no challenge to the property for the past five years and the said challenge was only discovered when they undertook an official search.

She further confirmed that the 3rd Defendant/Respondent and herself have no blood relationship or kinship with the 1st Respondent as alleged by the Applicant. She further averred that the purchase of the suit property was open and above board and the allegation of conspiracy to defraud are far-fetched. She further averred that upon purchase and transfer of the suit property, she and the 3rd Respondent took possession of the suit property and that they are currently in possession. She further associated herself with paragraphs 10 and 11 of the 1st Respondents **Replying Affidavit** and averred that it is clear that the Plaintiff is using the current proceedings to achieve some personal gains.

She further attested to having seen the Applicant's **Supplementary Affidavit** in which the Plaintiff admits to having signed the agreement dated **4th October 2009**, but alleges that the same was only for collection and gathering of the estate and avers that the same was an afterthought by the Plaintiff being that the same was duly executed by **Joel Richard**

Wamai, and the same was not recorded in the said agreement. She contended that looking at the trail of the transaction both prior to and after registration of the suit property there is no iota of evidence to suggest fraud and averred that in view of the concealment of the material facts by the Plaintiff she urged the Court to discharge the interim order.

The Plaintiff/Applicant filed a **Supplementary Affidavit** on **18th of December 2017**, and reiterated the contents of her earlier affidavit and further annexed medical reports of **Joel Richard Wamai**, as evident by **annexture VWM-1 (a-b)**. She further averred that she only signed the agreement dated **4th October 2009**, believing that it was for gathering and consolidating of the properties owned by the husband and not

as a bequest or disposing off any property. She averred that at the time of entering the said agreement, her husband was already incapacitated facts that are well within the knowledge of the parties. She reiterated that having perused the **Land Control Board Consent** dated **11th October 2011**, her husband was incapacitated at that time and therefore lacked capacity to give consent to the 1st Respondent.

This Application was canvassed by way of written submissions wherein the **Law Firm of Dola Magani & Co Advocates** for the Plaintiff/Applicant filed their submissions on **1st March 2018**, and urged the court to allow the instant Application. It was submitted that Applicant has met

the threshold set up in the case of **Giella.Vs...Cassman Brown (1973) EA 358** cited with affirmation in **Naftali Ruthi Kinyua...Vs...Patrick Thuita Githure & Another (2015) eKLR** at **Pg.6** which set out three principles that guide the award of temporary Injunction which include:-

- 1. That the Applicant must establish a prima facie case with probability of success.**
- 2. That if an injunction is not awarded, the Applicant stands to suffer loss that damages will not be sufficient compensation.**
- 3. That if in doubt, the court should determine the matter on a balance of convenience.**

The Court was urged to allow the Plaintiff/Applicant's application with cost.

The 1st Defendant/Respondent through the Law firm of **C.M Ngugi Rebero & Co. Advocates** filed their written submissions on **22nd March 2018**, and submitted that the Applicant has not met the threshold for grant of injunctive orders and the instant application should be dismissed with costs The Respondent relied on various decide cases and various provisions of the Law.

They relied on **Section 107** of the **Evidence Act** which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any court to give judgment as to any legal right or liability and it was for that party to show that the facts with which he alleges his case depend upon exist.

Further the 1st Respondent relied on the Text Book of **Halsburys Laws of England 4th Edition Volume 17 at para 13 and 14** which stated as follows;

The legal burden is the burden of proof which remains constant throughout a trial, it is the burden of establishing the facts and contentions which will support a party's case. If the conclusion of the trial he has failed to establish these to the appropriate standard he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in every case with separate issue.

The 1st Respondent also relied on the case of **Macharia.Vs...Annah Mutua Ndwiga & Another (2017)eKLR**.

The 1st Respondent further relied on the case of **James Maina Anyanga...Vs...Lorna Yimbiha Ottaro & 4 Others (2014)eKLR**, where the Court held that:-

“The burden of proof in the first instance lies upon the person alleging lack of capacity”.

It was therefore submitted that the Plaintiff/ Applicant has miserably failed to establish on a balance of convenience that the husband lacked mental capacity to give the consent.

For this the relied on the case of **Peter Kamau Kiriba...Vs...City Council of Nairobi & 3 Others (2015)**, where the Court held:-

The position of the law in regard to this to be found in Section 26 (1) of the Land Registration Act which provides as follows;

“The Certificate of title issued by the Registrar upon registration or to a purchaser of Land upon transfer 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 and the title of that proprietor shall not be 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.***

For the above it was submitted that the court is duty bound to hold that the documents produced by the 1st Defendants *prima facie* evidence that the person named as the proprietor in this case the 1st Respondent is the absolute and infeasible owner of the suit property and that the title of such proprietor shall not be subject to challenge.

It was further submitted that the Plaintiff has not demonstrated that the suit property was transferred as a result of fraudulent dealings and therefore the Plaintiff/ Applicant has not established a prima facie case as against the Respondents.

The 2nd and 3rd Respondents through the **Law Firm of Kerongo & Co. Advocates** filed their written submissions on **3rd April 2018**, and submitted that the sequence of transfer to the 1st respondent and again to the 2nd and 3rd Respondents is clear and open. It was further submitted that the agreement executed on **1st December 2009**, was signed by **Joel Richard Wamai**, a fact that has not been disputed by the Plaintiff/Applicant and that the confusion of mental status of **Joel Richard Wamai** is being used selectively by the Applicant to benefit herself.

It was further submitted that the Applicant is throwing mere allegations of fraud at the court and she wants the court to find if they fit her case. It was further submitted that in the documents filed herein by the Applicant, there is no particular aspect of fraud or forgery which has been assigned or associated with the 3rd Defendant/Respondent and simply the Applicant is on a fishing expedition.

This Court has now carefully considered the pleadings in general and the annexures thereto. The Court too has considered the written submissions and the cited authorities together with the relevant provisions of law and makes the following findings:-

The application herein is anchored under **Order 40 Rule 1** of the **Civil Procedure Rules**, which order is applicable when the suit property is in **danger** of being **wasted, damaged, alienated** and is in the verge of being **disposed off**.

The Applicant herein therefore has a duty to establish the existence of the above parameters to warrant the court grant the sought orders of injunction. It is trite that injunction order is an equitable relief which is 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 at this juncture, the court is not called upon to decide disputed issues with a finality given that the available evidence is only affidavits evidence which has not been subjected to the usual test of cross-examination to verify its veracity. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999**, where the Court held that:-

“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

The test that the court will apply herein in determining this application is the one laid down in the case of **Giella...Vs...Cassman Brown (supra)**.

The question now for determination is whether the Applicant is deserving of the orders sought herein.

There is no doubt that the **Virginia Wambui Wamai**, who is suing as **guardian** of **Joel Richard Wamai**, is a co-wife to the 1st Defendant **Mary Wanjiru Wamai**. From the available documents, the said **Joel Richard Wamai** is ailing and suffering from senile dementia as per the medical records.

It is also not in doubt that the suit property herein **Ruiru/Ruiru East Block 3/1552**, was initially in the name of **Joel Richard Wamai** and this registration was done on **7th June 1991**.

The Applicant has alleged that the 1st Defendant fraudulently transferred the suit property to her name in the **year 2011** while **Joel Richard Wamai** was still ailing and was not in a state of mind where he could give **Consent** for such transfer. That later the said 1st Defendant transferred the suit property to 2nd and 3rd Defendants thus depriving **Joel Richard Wamai** of the said property.

However, the 1st Defendant through her appointed guardian averred that indeed the suit property was transferred to her by her husband **Joel Richard Wamai** after obtaining **Consent** from the **Land Control Board** on **11th October 2011** as is evident from **JWN-3b**. She further averred that prior to obtaining the said **Consent**, the said **Joel Richard Wamai** together with his two wives being **Virginia Wambui Mwai** and **Mary Wanjiru Wamai** had signed an agreement on how Joel's wives were to be given his property. The said agreement is dated **4th October 2009** and is marked **JWN-2** and **Virginia Wambui Wamai** admitted to have signed it.

Though the Applicant **Virginia Wambui Wamai** has alleged that the said agreement was only meant to gather and consolidate Joel's properties, it is clear that it provided how various properties were to be distributed

between the two wives, **Virginia Wambui Wamai** was to get the properties in **Naivasha** and **Mary Wanjiru Wamai** was to get all the properties in **Nairobi** and the Court would take it that **Ruiru property** was among the properties in **Nairobi**. It is also evident that **Mary Wanjiru Wamai**, the 1st Defendant got registered as a proprietor of **Ruiru/Ruiru East Block 3/1553** on **14th December 2011**. The Applicant did not raise any eyebrows then.

As a proprietor, she had all the rights and privileges as provided by **Section 27** of the **Registered Land Act** (now repealed). Selling of the said property was one of such right. Indeed on **29th October 2012**, the 1st Defendant entered into a **Sale Agreement** with 2nd and 3rd Defendants/Respondents, for the sale of the suit property. The said suit property was registered in favour of 2nd and 3rd Defendants on **30th**

January 2013. The suit property is now registered in favour of the 2nd and 3rd Defendants who have alleged that they have been in possession of the same since the time of the said purchase.

Indeed the Plaintiff/Applicant lives in **Naivasha** and she could certainly not have been in occupation and possession of the suit property. The Plaintiff/Applicant has alleged fraud on the part of the 1st Defendant and in extension the 2nd and 3rd Defendants'/Respondents'. Fraud is a serious allegation which needs to be proved in the main trial. See the case of **Emfel Ltd...Vs...Registrar of Titles Mombasa & 2 Others (2014) eKLR**, where the court held that:-

“Allegation of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the Respondents to totally ignore the rules of evidence.”.

Therefore at this juncture, the Court cannot find and hold that the 1st Defendant fraudulently transferred the suit property to her name and later sold it to the 2nd and 3rd Defendants/Respondents without the knowledge and consent of **Joel Richard Wamai**.

However, the 2nd and 3rd Defendants/Respondents are the registered owners and without any evidence of wrongdoing on their part, this Court finds no reason to restrain them from enjoying their rights and privileges as proprietors of the suit properties. For the above reasons, the Court finds that the Plaintiff/Applicant has not established that she has a *prima-facie* case with probability of success at the trial.

On the second limb, of whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, the Court finds that the Plaintiff/Applicant has never been in occupation and possession of the suit land. Further, the suit land was first registered in favour of the 1st Defendant/Respondent in **2011** and later in favour of 2nd and 3rd Defendants/Applicants in **2013**. The suit land can be quantified and the value can be ascertained. In the event that the Plaintiff/Applicant would be the successful litigant after the main trial, then she can be adequately compensated by an award of damages.

On the third limb, the Court finds that the Court is not in doubt. However, if it is to decide on the balance of convenience, the same would tilt in favour of maintaining the *status quo* and the *status quo* herein is that the 2nd and 3rd Defendants/Respondents are the registered owners of the suit property and are in possession and that should remain so until the suit is heard and determined.

On prayer **No.4** of reverting the suit property to Plaintiff **Joel Richard Wamai**, the Court finds that this is a mandatory injunction which is only granted in very exceptional circumstances as was stated in the case of **Kenya Breweries Ltd & Ano....Vs....Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109**, where the Court held that:

“A mandatory injunction can be granted on an in f the Defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application”. See **Volume 24 Halsbury Laws of England 4th Edition Paragraph 948**.

From the available evidence, the Court finds that the Applicant has not established any special or exceptional circumstances that would warrant this Court grant a mandatory injunction. The title deed was registered in the name of 2nd and 3rd Defendants/Respondents on **4th January 2013**. If they wanted to steal a march against the Plaintiff/Applicant, then they would have sold it immediately after the transfer. They never did so and the court believe that the suit property would still remain in their names until the suit is heard and determined. The Court can only grant such orders after calling of evidence and maybe after establishing that fraud was involved in the said registration. For now, the Court finds that the Applicant is not deserving of the said mandatory orders.

Having now carefully considered the available evidence, the Court finds the **Notice of Motion** dated **6th July 2017**, **not merited and the same is dismissed entirely with costs to the Defendants/Respondents**. The parties to comply with Order 11 the soonest and then set the suit down for hearing and determination.

It is so ordered.

Dated, Signed and Delivered at Thika this 10th day of **December. 2018.**

L. GACHERU

JUDGE

10/12/2018

In the presence of

Mr. Magani for Plaintiff/Applicant

Mr. Ngugi for 1st Defendant/Respondent

Mr. Muya holding brief for Mr. Githui for 2nd & 3rd Defendants/Respondents

Lucy- Court Assistant

L. GACHERU

JUDGE

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

L. GACHERU

JUDGE

10/12/2018