



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
E.L.C NO. 314 OF 2015

FRANCIS KIMUNDUI KEIGI.....PLAINTIFF/APPLICANT

VERSUS

JOYCE WANJIRU MACHARIA.....1ST DEFENDANT/RESPONDENT

SIMON MWANGI WAINAINA

JOSEPH GICHUKA MUKORWO

MONICAH WANJIRU KARANJA as

TRUSTEES OF MWIKI TOGETHER

SELF HELP GROUP.....2ND DEFENDANT/RESPONDENT

AGNES WACERA MACHARIA.....3RD DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff/Applicant's Notice of Motion application dated **15th April 2015**, brought under **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and all other enabling provisions of law. The applicant has sought for these orders against the Defendants/Respondents.

a) Spent

b) Spent

c) That the Defendants whether by themselves , their agents and/or servants be restrained by a temporary order of injunction from either entering ,trespassing, disposing and/or in any other manner dealing with land parcel number Thika Municipality Block 40/1656, Thika Municipality Block 40/1657 and Thika Block 40/1658 pending the hearing and determination of this suit.

d) That cost of this application be borne by the Defendants.

The application is premised upon the grounds stated on the face of the application and on the affidavit of **Francis Kimundui Keigi**. These grounds are;-

a) That the plaintiff/Applicant is the bonafide registered owner of Land parcel number THIKA MUNICIPALITY BLOCK 40/1211 (subsequently subdivided into land parcel numbers THIKA MUNICIPALITY BLOCK 40/1656, THIKA MUNICIPALITY BLOCK 40/1657 and THIKA MUNICIPALITY BLOCK 40/1658.

b) That the Defendants fraudulently and dishonestly secured the subdivision of THIKA MUNICIPALITY BLOCK 40/1211 and subsequently registration of land parcel numbers THIKA MUNICIPALITY BLOCK 40/1656, THIKA MUNICIPALITY BLOCK 40/1657, and THIKA MUNICIPALITY BLOCK 40/1658 without any authority and/or consent from the plaintiff who is the legitimate owner thereof.

c) That the Defendants' actions had left the plaintiff with no option but to institute this suit against the Defendants and seek justice from this Honourable Court.

d) That the said actions of the Defendants are illegal and only this Honourable Court has power to prevent any further wasting of the Plaintiff's parcel of land.

In his supporting affidavit the applicant averred that he was the legal owner of land parcels numbers ***Thika Municipality Block 40/1656***, ***Thika Municipality Block 40/1657***, and ***Thika Municipality Block 40/1658*** hereinafter referred to as the (suitland). He further averred that he had never alienated, transferred, and or sold the suitland to the Defendants or to anyone else. He also averred that he carried a search at the Thika Lands office as matter of routine and he was surprised to learn that the suitland had been transferred to the Defendants as per annexure marked 'A'.

It was his allegation that the Defendants were strangers and he had never transacted with them and he wonders how they ended up bring the registered owners. He contended that he had never been to the Land Control Board, seeking consent to transfer the suitland or even to subdivide it and he believed that the transfer was an act of fraud and forgery and this has left him exposed to suffering irreparable loss and damage from the unlawful acts of the Defendants. He therefore urged the Court to preserve the suitland in the meantime to avoid further transferring, charging or dealing in anyway with the suitland as this would lead to miscarriage of justice.

The application is contested and ***Agnes Wacera Macharia***, ***Monica Wanjiru Karanja*** and ***Joyce Wanjiru Macharia*** swore their respective Replying Affidavits and denied the contents of the plaintiff's application. ***Agnes Wacera Macharia*** averred that in or around the month of October 2010, the Plaintiff and herself entered into an oral agreement for the purchase of ***1 acre (0.4000 HA)*** from the Plaintiffs parcel of land then commonly known as ***KEIGI FARM ESTATE LR NO. THIKA MUNICIPALITY BLOCK 40/1211*** at a purchase price of ***Kshs.150,000/=***.

She alleged that she paid the full purchase price and upon completion of payment of the said purchase price in full on the ***22nd July 2013***, the Plaintiff duly executed an acknowledgement of receipt of the full purchase price from himself in respect of the said one acre by which he also committed to transfer the said 1 acre to him as per annexure "***AGM1***".

Further that the Plaintiff embarked on the process of subdividing the said parcel of land with an aim of transferring his 1 acre to him and the rest to his co-defendants whom she knew were also buying land from the Plaintiff as per annexure marked "***AGM3***". She also contended that after obtaining the necessary approvals the plaintiff applied for and obtained the requisite consent to sub-divided the said parcel of land from the Local Land Control Board as per annexure "***AGM4***". It was her further contention that she was aware that upon obtaining the said consent, the Plaintiff embarked on the process of transferring the resultant 3 subdivisions which were given new numbers as ***Thika Municipal Block 40/1656, 1657 and 1658*** measuring ***0.4000 Ha, 1.583 Ha and 5.903 Ha*** respectively as per annexure marked '***AGM 5***'.

That upon obtaining the title deed for the new portions aforesaid, the Plaintiff then again applied for and obtained the consent from the Land Control Board to transfer, to him his portion which had now been

given a new registration number as **Thika Municipality Block 40/1656** measuring **0.4000 Ha**, equivalent to approximately 1 acre or thereabout as per annexure “**AGM6**” (a) and (b) respectively.

It was her further contention that upon obtaining the said consent to transfer, the Plaintiff together with the officials of the said Co-operative Society executed a transfer in his favour and the officials of the group duly executed their part and subsequently he effected the transfer and registration of the said portion of land into his name and later issued with a title Deed for the same as per annexure marked “**AGM 7**”.

Therefore in the light of the foregoing, it is quite clear that he acquired the registration of the suit land after a valid agreement and after following all the laid down procedures and indeed paid the full agreed purchase price as demonstrated herein above and therefore the question of the alleged fraud does not arise at all.

The application was canvassed by way of written submissions. The Law Firm of **Karanja Kangiri** for the applicant filed the written submissions on **11th November 2015**, and urged the court to allow the instant application. The applicant relied on the case of **Giella Vs Cassman Brown & Co. Ltd 1973 EA 358.**

The Law Firm of **C.M Ngugi Rebiro & Co. Advocates** for the Respondents filed their written submissions on **18th November 2015**, and relied on the case of **Peter Kamau Kiriba Vs City Council of Nairobi & 3 Others 92015) eKLR.**

This Court has carefully considered the instant Notice of Motion and the annexures thereto. The Court has also considered the relevant provisions of the law and the written submissions together with the cited authorities. The Court renders itself as follows:-

The Plaintiff has alleged that he was the legal owner of **LR No. Thika Municipality Block 40/1211** which was subsequently subdivided into **Thika Municipality 40/1656, 1657 and 1658**. He further alleged that he did not sell or transfer the said parcels of land to anyone but he was surprised on or about **11th March 2015**, when he carried a search and discovered that the said parcels of land were illegally transferred to the Defendants.

The Defendants on their part have alleged that the said parcels of land were sold to them by the Plaintiff who participated in signing of the transfers to them. Further that the plaintiff even attached copies of his passport to the transfer forms.

The Plaintiff /applicant has **alleged fraud** on the part of the Defendants and the Defendants have alleged malafides on the part of the Plaintiff/Applicant. It is not in doubt that the suit properties are registered in the names of the Defendants. From the available documents vide acknowledgement receipt executed **22nd July 2013**, the plaintiff allegedly acknowledged receipt of the full purchase price towards purchase of 5 acres to be excised from **LR No. Thika Municipality Block 40/1211**.

There are also documents showing that consents for subdivisions of the **Thika Municipality Block 40/1211** were granted by relevant Ministry in the year 2014. The Court has also seen the transfer documents and the said documents were registered by the Land Registrar Thika. It is also evident that Land Parcel no. **Thika Municipality Block 40/1657** is registered in the name of **Joyce Wanjiru Macharia** and the **Thika Municipality Block 40 /1658** is registered in the name of **Simon Mwangi Wainaina, Joseph Gichuki Mukorwo and Monicah Wanjiku Karanja** in the year 2015.

As provided by **Section 26(1)** of the Land Registration Act, then the persons named in the certificates of titles are deemed to be the absolute and indefeasible owner of the suit properties. The said **Section 26(1)** 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 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.

Taking into account the above provisions of law, the court finds that prima facie, the Defendants who are indicated as the proprietors of the suit properties are deemed to be the **absolute** and **indefeasible** owner of the said properties. Though the applicant alleged that the Defendants fraudulently transferred the suit properties to themselves, the Court finds that allegations of **fraud are serious issues** which can only be proved by calling of evidence in the main trial. See the case of **Neepu Auto Spares Limited vs. Narendra Chaganlal Solanki & 3 Others [2014]** where the Court held that:-

“The Respondent was in the effect being accused of fraudulent conduct and allegations of fraud must be strictly proved. The fraudulent conduct must be strictly proved more than on a mere balance of probabilities as required in R G Patel Lalji Makanji [1957] EA 314”.

The Defendants have produced documents to show that they indeed purchased the suit properties from the plaintiff. The plaintiff has denied that allegation and that is an issue to be determined by the trial court after calling evidence. At this juncture, the Court cannot make conclusive findings of facts and law as was held in the case of **Airland Tours & Travel Ltd Vs National Industrial Credit Bank, Nairobi High Court, (Milimani) Civil Case No. 1234 of 2002** that;-

“ In an interlocutory application ,the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

Having now carefully considered and analyzed the available evidence, the court finds that the Plaintiff herein has failed to establish that he has a prima facie case with probability of success as was held in the classical case of **Giella Vs Cassman Brown (supra)**.

Having failed to establish a prima facie case, the court finds that there is no need of venturing into the other grounds as they are sequential. See the case of **Kenya Commercial Finance Co.Ltd Vs Afraha Education Society (2009) EA 86** where the Court held that;-

“ The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction issequential so that the second condition can only be addressed if the first one is satisfied”.

From the foregoing conclusions, the court finds that the applicants Notice of Motion dated **15th April 2015**, is not merited. The same is consequently dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered this **27th** day of **January,2017**

L.GACHERU

JUDGE

In the presence of :-

None attendance for the Plaintiffs/Applicants though served with Notice.

Mr Kanuku holding brief Ngugi for the Defendants/Respondents

Hilda : Court Clerk

Court:

Ruling read in open Court in the presence of the above stated advocate and absence of Plaintiff/Applicant advocates though served with Ruling Notice.

L.GACHERU

JUDGE

27/1/2017