



REPUBLIC OF KENYA



Wairimu & 4 others v Muiruri & 6 others ((By Way of Amended Counterclaim)) (Environment & Land Case 962 of 2015) [2024] KEELC 132 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 132 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 962 OF 2015**

AA OMOLLO, J

JANUARY 24, 2024

JOHN GAKOBO MUIRURI 1ST PLAINTIFF/RESPONDENT

BENJAMIN GAJCAGUA NYAGA 2ND PLAINTIFF/RESPONDENT

VERSUS

NAOMI WAIRIMU & OTHERS..... DEFENDANT/APPLICANTS

(BY ORIGINAL CLAIM)

AND

BETWEEN

NAOMI WAIRIMU 1ST PLAINTIFF

EUSTUS KIMANI MUKIRI 2ND PLAINTIFF

IRENE WANJIKU KIBUA 3RD PLAINTIFF

DANIEL NJUGUNA KAGUNDA 4TH PLAINTIFF

MARGARET WAKANYI NJOROGE 5TH PLAINTIFF

AND

JOHN GAKOBO MUIRURI 1ST DEFENDANT

BENJAMIN GAJCAGUA NYAGA 2ND DEFENDANT

JOSEPH KINYUA KARANI 3RD DEFENDANT

REGISTRAR OF TITLES 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

NATIONAL LAND COMMISSION 6TH DEFENDANT

NJORA HOUSE LIMITED 7TH DEFENDANT



(BY WAY OF AMENDED COUNTERCLAIM)

RULING

1. This ruling is in respect of an application dated September 26, 2022 brought by way of Notice of Motion by the Plaintiffs in the Counterclaim (hereinafter “the Applicants”) seeking the following orders:
 - a. Spent.
 - b. Spent.
 - c. That an order of temporary injunction to issue restraining the 1st, 2nd and 3rd Defendants/ Respondents and the intended 7th Defendant/Respondent in the amended Counterclaim by themselves, their servants, their workers and/or agents from entering, from sub-dividing, from developing, from constructing thereon, from remaining on, from selling, from charging, from mortgaging, from disposing, from transferring and/or in any other manner from inter-meddling with the plot/portion Number 3, Plot No. 7 & 8, Plot No. 6, Plot No. 5 and Plot No. 4 respectively measuring 40 x 60ft being part of the Nairobi/Block/117/267 now within L.R. No. Nairobi /Block 117/267 now L.R. No. Nairobi/Block 117/846, L.R. No. Nairobi/Block 117/848 and L.R. No. Nairobi/block 117/847 and for avoidance from carrying out the acts above over the L.R. Number Nairobi/block 117/267 now the L.R. Number Nairobi/Block 117/846, L.R. No. Nairobi/Block 117/848 and L.R. No. Nairobi/Block 117/847 now Nairobi/Block 117/1165 and L.R. No. Nairobi/Block 117/1166 pending the hearing and determination of this suit and/or until further orders of the honourable court.
 - d. Spent.
 - e. That for avoidance of doubt and pending the hearing and determination of this suit that there be an order of temporary injunction to issue restraining the 1st Defendant in the counterclaim by himself, his servants, his workers and/or his agents from entering, from sub-dividing, from developing, from constructing thereon, from remaining on, from selling from charging, from mortgaging, from disposing, from transferring and/or in any manner from intermeddling with Margaret Wakanyi Njoroge Share Certificate No. 1 for Plot No. 7 measuring 40 x 60sq ft and Share Certificate No. 2 for Plot No. 8 measuring 40 x 60sq ft and over Naomi Wairimu Plot No. 3 measuring 40 x 60sq ft. all the three(3) plots being a portion of the L.R. No. Nairobi/block 117/267 and was processed in to the Title L.R. No. Nairobi/Block 117/846 now Nairobi/Block 117/1165 and Nairobi/Block 117/1166.
 - f. That the Officer Commanding Kasarani Police station to supervise and ensure compliance.
 - g. That the costs of this application be in the cause.
2. The application is premised on the grounds pleaded on the face of it and supported by the affidavit of Margaret Wakanyi Njoroge sworn on September 26, 2022. She deposed that during the pendency of the original suit, the 1st and 2nd Plaintiffs processed title Nairobi/Block 117/846, L.R. No. Nairobi/Block 117/848 and L.R. No. Nairobi/block 117/847 now Nairobi/block 117/1165 and L.R. No. Nairobi/block 117/1166 (the suit properties) in respect of which the Applicants still hold share Certificates. These titles were allegedly issued on 1st November 2017, November 3, 2017 and December 6, 2017 and the same was done through fraud, illegality and un-procedurally. She deposed that in



violation of a court order, the 3rd Respondent and/or the 7th Respondent constructed a house on Plot No. 5 belonging to Irene Wanjiku Kibua and Plot No. 4 belonging to Daniel Njuguna Kagunda respectively.

3. She deponed that the Applicants purchased their plots from Peter Kariuki Ngacha (Deceased) within Title No. Nairobi/Block/117/267 and they took possession thereof. That they received from the deceased their share certificates and that the original title to the property in the deceased name was placed in the custody of the transaction lawyer, Peter Kariuki Kimani of F.N. Kimani & Associates Advocates, Nairobi. The Applicants aver that despite this, the title to the suit property was allegedly transferred to the Respondents on July 2, 2015 yet the original title deed is still in the custody of the mentioned firm of advocates. They added that since no succession process has been undertaken, the transfer was fraudulent, illegal, null and void and amounts to intermeddling which is an offence under the [Law of Succession Act](#) Cap 160 of the Laws of Kenya.
4. The Applicants assert that since the Respondents' title by was obtained illegally, any act done under it is a nullity, wholly illegal and un-constitutional and cannot be protected, thus the court should not lend its hand or countenance it. It is deposed further that the Respondents have trespassed on the Applicants various plots and are in the process of constructing on it. Further that the 1st and 2nd Respondents keep interfering with the register of the suit title, for instance, what was initially Nairobi/Block 117/846 is now Nairobi/Block 117/1165 and Nairobi/Block 117/1166 in a bid to change the subject matter of this litigation and complicate the quest for justice.
5. The only response filed in opposition to the application was a Replying Affidavit sworn on March 8, 2023 by Isaac Nyoike, a Director of the 7th Defendant/Respondent in the Counterclaim. Mr Nyoike stated that the 7th Respondent was a purchaser for value of L.R. No. Nairobi/Block 847 from the 1st and 2nd Respondents. He deposes that the application had been overtaken by events for seeking to stop acts that have already taken place, as the plots are now registered in the name of the 7th Respondent, and that the 7th Respondent has already built a flat of 6 floors financed by Family Bank Limited.
6. The 7th Respondent deposed to conducting due diligence before purchasing the land and confirmed that the land belonged to the 1st and 2nd Respondents. He avers that the Applicants' claims that they bought their plots from persons not party to this suit are baseless as the parcels are occupied by the legal and registered owners thereto. Consequently, he asserts that the Applicants have no legal or equitable right to claim the land owned by the 7th Respondent which would entitle them to an order of injunction. Further that any subdivision to L.R. No. Nairobi/Block 117/267 was sanctioned by the Ministry of Lands. Hence, it argues that the application and this suit are an abuse of the court process in the absence of evidence to support the Applicants' claim. He urged that the application be dismissed with costs.
7. The Applicants filed a Supplementary Affidavit sworn by Daniel Njuguna Kagunda on May 9, 2023 reiterating the contents of the Supporting Affidavit sworn by Margaret Wakanyi. He then added that the root of the 1st and 2nd Respondents' title is not valid, is suspicious, fraudulent and originates from a transfer by Peter Kariuki Ngacha in 2015 who had died on October 26, 2012 as confirmed by the Certificate of Death annexed. He also deposed that title No. Nairobi/Block 117/267 was subject of litigation and the court had not authorised the 1st and 2nd Respondent to deal with the land/title.
8. The Applicants deposed that aside from the fact that the flat was built during the existence of the court order, one Joseph Kinyua Karani the 3rd Respondent had told court on October 10, 2016 that he will stop the construction, but in defiance of the court order, he did not. Further, that due diligence cannot validate an illegality.



Submissions

9. Despite directions by this court that Parties to the application file written submissions, only the Applicants complied. They filed their submissions dated April 26, 2023 and submitted that the conditions for the grant of a temporary injunction were settled in *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358. It was submitted that the three titles to the suit properties Nairobi/Block 117/846, L.R. No. Nairobi/Block 117/848 and L.R. No. Nairobi/Block 117/847 issued on November 1, 2017, November 3, 2017 and December 6, 2017 and now Nairobi/Block 117/1165 and L.R. No. Nairobi/Block 117/1166 are all sub-divisions from the initial Nairobi/Block 117/267.
10. The Applicants explained that they are all purchasers of their respective plots within Title No. Nairobi/Block/117/267 from Peter Kariuki Ngacha (deceased) and received ownership documents from him as well the original title to the entire property. The said Peter Kariuki Ngacha died on October 26, 2012 and his partner Edward Nyoike Mwangi died in 2014. It is their case that the original title is still in the possession of the advocate who handled the transaction yet the 1st and 2nd Plaintiff's in the original suit managed to transfer the property to their names. Further, that during the pendency of the suit, the 7th Defendant constructed a house on one of the plots the subject matter of this suit in violation of a court order.
11. It was further submitted that the said titles were obtained through fraud, illegality and un-procedurally, which is a matter to be determined at the full hearing hence the need to preserve the subject matter from sale, transfer or charging. That the Respondents actions on the properties is trespass and the 1st and 2nd Plaintiffs in the Original Suit keep on interfering with the register with a view to complicating the process of doing justice. It is the Applicants' submission that they are purchasers for value without notice of any irregularities or defect in title.
12. The Applicants also submitted that they had satisfied the second limb on the likelihood of suffering irreparable harm as defined in *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR. The Applicants explained that the destruction of the 2nd Applicant's fence, destruction of maize crops, depositing of sand and other building material has caused them irreparable damage. Further that the intended construction will create a situation that will negate their claim of ownership of the plot and the resulting displacement. It was submitted that since the harm the Applicants would suffer is greater compared to that of the Respondents, the balance of convenience lay in granting the injunction (*Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 Others* (2016) eKLR, *Amir Suleiman vs Amboseli Resort Limited* (2004) eKLR and *Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & Another* (2019) eKLR).

Analysis and determination

13. I have considered the application, the replying affidavit, the submissions rendered and relevant authorities filed in support thereof. The issue for determination is whether or not the applicant has met the threshold for grant of a temporary injunction orders prayed. To demonstrate that they have a *prima facie case*, the Applicants have pleaded that they purchased their plots from one Peter Kariuki Ngacha-deceased and his partner Edward Nyoike Mwangi-deceased. The suit property Nbi Block 117/267 was however exclusively registered in the name of the late Peter Kariuki Ngacha-deceased as shown in the copy of the Title Deed issued on December 30, 2010 annexed to the Supporting Affidavit. The Applicants averred that the said Peter Kariuki Ngacha-deceased handed over the original title deed to the Advocates then handling the transaction, although there is no supporting affidavit from the said advocates annexed to corroborate this averment



14. In its response, the 7th Respondent stated that it purchased the property having conducted a search which confirmed that the land belonged to the 1st and 2nd Plaintiffs in the original suit. That by the time this application was brought, the transfer had already been registered in the name of the 7th Respondent. From the copies of titles annexed by Applicants, it reveals that the transfer from Peter Ngacha-deceased to the 1st and 2nd Respondents was registered on June 16, 2015. This means that the change of ownership to the 1st and 2nd Respondents took place even before this suit was filed and that change cannot form a basis for issuance of injunctive reliefs at this interlocutory stage.
15. Secondly, in so as the constructions on the suit plot complained of, the Applicants annexed photographs to prove the actions. Unfortunately, the photographs (annex MNN2) are undated, yet the dates were important in light of the deposition by the 7th Respondent that the flats are built and completed. In the absence of clear evidence on the actual state of the impugned developments, this court is unable to find that a *prima facie case* has been demonstrated to warrant issuing an order of injunction.
16. The second requirement is that the applicant must demonstrate they will suffer irreparable harm that cannot be compensated by way of damages. The term irreparable harm refers to harm or injury that cannot be adequately compensated by any amount of monetary award or one which cannot be reversed to the state before the damage. The *Halsbury's Laws of England*, Third Edition, Volume 21, paragraph 739, page 352 reads:-

“It is the very first principle of injunction law that *prima facie* the Court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the Court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.
17. Once an applicant has established a *prima facie case*, the concept of irreparable harm kicks in to protect the *prima facie case* from being rendered nugatory. In this instant application, the Applicants have alleged destruction of their fence and crops on the land as well as dumping of building materials. They have also alleged ongoing construction, which the 7th respondent has denied while deposing that the construction of the flats were completed before this application was filed. Besides, the Applicants have also alleged interference with the register which although true, the action of transfer to the 7th Respondent was already done as of the time of filing this application.
18. However, the alleged interference with the register of the suit land during the pendency of this suit by virtue of a transfer effected in favour of the 7th Respondent justifies the need for injunctive reliefs to avoid future interferences. If not for any other reason, but to preserve the subject matter of the suit until the court has heard all the parties and a determination made on the ownership of the suit properties and interests thereto.
19. The prime movers of the actions complained of namely the 1st, 2nd and 3rd Defendants in the counterclaim are parties to the suit herein. Hence, the 7th Respondent is bound by the said doctrine of *lis pendens* irrespective of whether it had notice of the litigation or not. Consequently, in exercise of



the powers donated to this court under sections 3, 3A and 63(e) of the Civil Procedure Act, this court finds that a case has been made for grant of orders sought in the application which are hereby issued on the following terms:-

- a. An order of temporary injunction be and is hereby issued restraining the 1st, 2nd and 3rd Defendants/Respondents and the intended 7th Defendant/Respondent in the amended Counterclaim by themselves, their servants, their workers and/or agents from further subdividing, carrying on any further construction, from selling, from disposing of, and or from transferring the plot/portion Number 3, Plot No. 7 & 8, Plot No. 6, Plot No. 5 and Plot No. 4 respectively measuring 40 x 60ft being part of the Nairobi/Block/117/267 now within L.R. No. Nairobi /Block 117/267 now L.R. No. Nairobi/Block 117/846, L.R. No. Nairobi/Block 117/848 and L.R. No. Nairobi/Block 117/847. For avoidance of doubt, from carrying out the acts above over the L.R. Number Nairobi/Block 117/267 now the L.R. Number Nairobi/Block 117/846, 117/848 and 117/847 (now Nairobi/block 117/1165 and 117/1166) pending the hearing and determination of this suit and/or until further orders of the honourable court.
- b. The Officer Commanding Kasarani Police Station to supervise and ensure compliance with order no (a).
- c. The costs of the application are ordered in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2024.

A. OMOLLO

JUDGE

