



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC NO. 1389 OF 2013

MAVOLONI COMPANY LIMITED.....PLAINTIFF

VERSUS

- 1. THE LAND REGISTRAR, THIKA**
- 2. THE DIRECTOR OF SURVEY**
- 3. THE COMMISSIONER OF LANDS**
- 4. THE ATTORNEY GENERAL**
- 5. THE AFRICAN NATIONAL TRADERS**
- 6. AND FARMERS UNION**
- 7. LONGNECK INTERNATIONAL LIMITED**
- 8. DOMINIC KAMATA NJOGO**
- 9. HELLEN NDUTA KAMATA**
- 10. YAHYA MOHAMED SULEIMAN**
- 11. NAIMA SULEIMAN**
- 12. DOMINIC KIKUI**
- 13. ELIAS KIMANI**
- 14. TERESIA NDUKU**
- 15. STANDARD CHARTERED MANAGEMENT**
- 16. AGENTS LIMITED.....DEFENDANTS**

RULING

The plaintiff brought this suit by way of Originating Summons dated 15th September 2015. The Originating Summons was initially brought against the 1st to 4th defendants only. On 30th September

2009, the plaintiff filed amended Originating Summons of the same date through which the 5th to 15th defendants were added to the suit. In the amended Originating Summons the plaintiff sought among others the following reliefs;

1. A declaration that the purported sub-division and transfer of the plaintiff's parcels of land known as GATUANYAGA/NGOLIBA/BLOCK 2/1-209 to the 5th to 14th defendants and subsequent registration of the same in their names was fraudulent, illegal, null and void for all purposes.
2. An order against the 1st defendant to rectify the registers for the said parcels of land so as to reinstate and/or register the plaintiff as the proprietor of the said 209 parcels of land.
3. An order against the 2nd defendant to provide the registered Registry Index Map(R.I.M) and area list for the said 209 parcels of land.
4. An order for the eviction of the 5th to 14th defendants from the suit properties and a permanent injunction to restrain them from in any way re-entering and/or interfering with the plaintiff's use and possession of the same.
5. An order for the removal of cautions registered against the titles for the parcels of land known as GATUANYAGA/NGOLIBA/BLOCK2/122, 137, 205, 206, 207, 208 and 209 AND 1-209 and for the 15th defendant to release to the plaintiff the original title deeds for the said parcels of land.
6. Such other orders, declarations and reliefs as may serve the ends of justice and as may be necessary to protect the Plaintiff's rights and interests over the suit properties.

In support of the amended Originating Summons, the plaintiff put forward the following grounds. Sometimes in the year 1992, the 3rd defendant approved the plaintiff's application to sub-divide its parcel of land known as Kiambu L.R No. 1154/2 measuring 1,599 acres into 205 agricultural plots ranging from 5 acres to 139 acres. As a condition for this approval, the plaintiff was required by the 3rd defendant to surrender its original certificate of title for the said Kiambu L.R No. 11154/2 in exchange for new free hold titles. The subdivision process was carried out successfully. However, the 3rd defendant failed to hand over to the plaintiff the title deeds for the 205 agricultural plots in its name as the parties had agreed. If that was not enough, the file which contained the new Registry Index Map and the area list for the new plots which the 2nd defendant handed over to the 1st defendant also went missing at the Thika and Kiambu Land Registries. The plaintiff learnt after the filing of this suit that the title deeds for the 205 agricultural plots were issued in the year 1992 in the name of the plaintiff and subsequently, the plots were transferred to the 5th to 14th defendants which transfers were carried out without the consent of the plaintiff and the Land Control Board. Following the said illegal transfers, the plaintiff has been deprived of its land by the 5th to 14th defendants who have grabbed over 209 plots belonging to the plaintiff. Furthermore, the parcels of land which were reserved for public purposes also disappeared. The plaintiff was left to contend with only seven(7) parcels of land in its name which parcels had cautions registered against them by the 15th defendant.

What I now have before me are two (2) applications by the Plaintiff dated 15th June 2010 and 4th January 2011. In the application dated 15th June 2010, the Plaintiff has sought an injunction to restrain the 5th to 14th defendants from receiving compensation from Tanti Water Services Board pending the hearing and determination of the Originating Summons. The application was brought on the grounds that Tanti Water Services Board had proposed to build Yatta Dam and for that purpose it intended to acquire parcels of land along Thika River. Among the parcels to be acquired were those in the names of the 5th to 14th defendants which are the subject of this suit. The plaintiff has contended that it stands to suffer irreparable loss if the 5th to the 14th defendants are compensated for the said parcels of land before the issue of the ownership thereof is determined by this court. In the application dated 4th January 2011, the

plaintiff has sought a temporary injunction to restrain the 5th to 14th defendants by themselves, their servants and/or agents from cultivating or planting crops on, uprooting or cutting down the plaintiff's trees, building or constructing houses on, carrying out further sub-division, selling and/or otherwise interfering with the Applicant's right over the parcels of land known as GATUANYAGA/NGOLIBA BLOCK 2(Mavoloni/416 to 430, 293,274, 275,296,176 to 292, 599 to 613, 585,588,591, 596,589,590,592 to 595,546,545, 542, 541, 536, 539, 540, 543 to 544, 547, 614, 640, 616 to 619, 7 to 9, and 21 to 22, 11 to 17, and 22 to 24, 10,1,2,3 and 18, 26,27,126 and 127 (hereinafter referred to as "the suit properties") pending the hearing and determination of the Originating Summons.

The application dated 4th January 2011 was brought on the grounds that the plaintiff is the rightful owner of 209 parcels of land which resulted from the sub-division of the original parcel of land known as L.R No. 11154/2 which parcels of land were illegally combined, subdivided and sold to the 5th to 14th defendants and are now comprised in the suit properties. The plaintiff contended that the 5th to 14th defendants are cultivating, building houses and cutting down trees on the suit properties for timber and firewood. The plaintiff contended that it would suffer irreparable harm if the 5th to 14th defendants are not restrained from carrying out the said activities and from carrying out further sub-division and sale of the suit properties.

The plaintiff's two applications were opposed by the 5th, 7th to 10th and 12th to 14th defendants through various affidavits and supplementary affidavits. I have considered the applications, the affidavits filed in support and in opposition thereto and the written submissions by the parties' advocates. The two applications are related. The same have been brought on the same grounds. I would therefore determine the same together. The two applications are seeking interlocutory injunction. The principles upon which this court exercises its discretion in applications of this nature are well settled. In the case of Giellavs. Cassman Brown and Co. Ltd. (1973) E.A 358 which was cited by the plaintiff and the defendants in support of their respective submissions, it was held that an applicant for a temporary injunction must establish:-

- i. A prima facie case with a probability of success.
- ii. That if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages and;
- iii. If in doubt, the court shall determine the application on a balance of convenience.

In the of Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125, the court defined a prima facie case as;

"a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR, the court stated that;-

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."

The court went further to state that;

".....in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation."

I have at the beginning of this ruling set out the plaintiff's claim against the defendants. The plaintiff's case is that, it was at all material times, the registered proprietor of all that parcel of land known as L.R No. 11154/2 measuring approximately 1,599 acres (hereinafter referred to as "the original plot"). Sometimes in 1992, the plaintiff sought approval from the 3rd defendant to subdivide the original plot into 209 agricultural plots. The approval for the subdivision was granted on condition that the plaintiff surrenders to the 3rd defendant its title for the original plot in exchange with free hold titles for the said 209 agricultural plots which were to be released to the plaintiff after the completion of the exercise. The plaintiff has contended that its intention was not carried out as planned. After surrendering its title for the original plot to the 3rd defendant and paying the requisite charges for the subdivision, it was kept in the dark with regard to the procedures that followed. The plaintiff has contended that the 209 titles for the agricultural plots which resulted from the subdivision of the original plot were never handed over to it. The Registry Index Map and the area list which were prepared following the subdivision of the said parcel of land also disappeared without trace. The plaintiff has contended that without its knowledge and consent, the 5th to 14th defendants fraudulently colluded with some of the plaintiff's directors and officials and caused the 5th to 14th defendants to be registered as proprietors of some of the parcels of land that resulted from the subdivision of the original plot. The plaintiff has contended that the transfer and registration of the said parcels of land in the names of the 5th to 14th defendants were carried out unlawfully without the consent of the Land Control Board and as such the transactions were null and void. The plaintiff has contended that as a result of the said fraudulent transactions the plaintiff has been unlawfully deprived of its land comprising of 209 plots by the 5th to 14th defendants. The plaintiff has contended further that as a result of the said acts of fraud, the land that it had set aside in the subdivision scheme for a trading center, a nursery and primary school, water points, a church and other public utilities cannot be accounted for. The plaintiff has submitted that it has established a prima facie case with a probability of success against the defendants. The plaintiff has submitted that the orders ought be intended to preserve the properties in dispute pending the hearing and determination of the dispute between the parties. The plaintiff has contended that there is adequate evidence that the 5th to 14th defendants acquired the suit properties fraudulently. The plaintiff has contended that it was not aware of the transactions through which the 5th to 14th defendants acquired the disputed parcels of land and that there is no evidence that any payment was made for the said parcels of land either to the plaintiff or to the 15th defendant who was its financier. On the defendants' contention that the suit is time barred, the plaintiff has submitted that its claim against the defendants is based on fraud whose limitation period runs from the date when the fraud was discovered. The plaintiff has submitted that having regard to the time when it discovered the fraud, the suit herein was brought within time. The plaintiff has contended that it has made out a case for the orders sought in that any further alienation of the parcels of land in dispute would subject it to loss which cannot be compensated in damages. The plaintiff has submitted that the defendants have not placed any credible evidence before the court that they have transferred the parcels of land in dispute to third parties.

For the defendants, it has been submitted that the plaintiff's application before court have no merit. The 1st to 4th and the 6th and 15th defendants neither filed replying affidavits nor submissions in response to the applications. The 5th defendant opposed the two applications through replying affidavits sworn by Kimani Wanyoike on 9th March 2010 and 24th May 2014 and a supplementary affidavit sworn on 28th November 2011. The 7th and 8th defendants opposed the applications through separate replying affidavits sworn on 5th March 2015 and 8th March 2015 respectively while the 9th defendant opposed the applications through a replying affidavit sworn on 1st October 2014. The 10th and 11th defendants opposed the application through a replying affidavit sworn by the 10th defendant on 1st October 2014 while the 12th, 13th and 14th defendants opposed the applications through a replying affidavit sworn by the 14th defendant on 18th September 2014. The 12th, 13th and 14th defendants filed supplementary affidavits sworn on 19th December 2011 for the 12th and 13th defendants and 6th December 2011 for the 14th defendant.

The 5th defendant has contended that the plaintiff is guilty of material non-disclosure. The 5th defendant has contended that the plaintiff has failed to disclose to the court the fact that the original plot was being

sub-divided so that the resultant plots may be sold by the plaintiff to pay off the debt that it owed the 15th defendant. The 5th defendant has contended that following the subdivision of the original plot, it entered into agreement for sale with the plaintiff dated 6th May 1993 through which the plaintiff sold to it a total of 139 parcels of land measuring 5 acres each at a consideration of Kshs. 13,900,000. These parcels of land were registered as Gatunyanga/Ngoliba/Block 2/ 4, 5, 6, 19, 20, 28, 29, 39 to 46, 53 to 56, 63 to 66, 73 to 76, 83 to 87, 93 to 121, 123, 124, 131 to 136 and 138 to 204. The 5th defendant has contended that the sale of the said parcels of land to it by the plaintiff was consented to by the Land Control Board after which the said parcels of land were transferred to it by the plaintiff after payment of the full purchase price which was made to the 15th defendant which had a charge over the properties to secure its debt. The 5th defendant has contended that it realized later that three of the plots which were sold to it were water points and the same were excluded from the agreement. The 5th defendant has contended that it is an act of dishonesty for the plaintiff to feign ignorance of the transactions above in which it participated fully. The 5th defendant has contended that apart from the said parcels of land which it purchased from the plaintiff, a company in which the 5th defendant has interest, Kantafu Company Limited was allocated by the 3rd defendant on 22nd July 1996 land which was reserved for public utilities during the subdivision of the original plot and which the plaintiff had surrendered to the Government. The said parcel of land was registered in the name of Kantafu Company Limited as Gatunyanga/Ngoliba/Block 2/125 after the said company was issued with a 99 year lease. The 5th defendant has contended that the said parcel of land was subsequently subdivided into several plots with individual titles owned by third parties. The 5th defendant has contended that the facts set out above have been within the knowledge of the plaintiff for several years. The 5th defendant has contended that there have been a number of suits over the properties in dispute herein in which the plaintiff has been involved. The 5th defendant has cited the 1994 High Court Case between the 5th defendant and the plaintiff concerning the parcels of land referred to above which the 5th defendant purchased from the plaintiff. The 5th defendant has also referred to the 1997 High Court case between Kantafu Company Limited and the plaintiff concerning the said parcel of land which was allocated to Kantafu Company Limited by the 3rd defendant. The 5th defendant has contended that all that which has been stated above concerning the manner in which the 5th defendant acquired the properties in dispute were all along within the knowledge of the plaintiff and that it is not correct as claimed by the plaintiff in its affidavit in support of the Originating Summons that it came to know of the transfer of the properties in dispute herein to the 5th defendant after the filing of the Originating Summons herein in 2008. The 5th defendant has contended that the plaintiff's suit is time barred. The 5th defendant has exhibited in its affidavits, the agreement for sale that it entered into with the plaintiff in respect of the 136 parcels of land that it purchased from the plaintiff, evidence of payment of the purchase price, instruments of transfers which were executed in its favour by the plaintiff, copies of title deeds for the various parcels and a lease and certificate of lease in favour of Kantafu for Gatunyanga/Ngoliba/Block2/125. The 5th defendant also exhibited pleadings which were filed in the 1994 and 1997 cases which I have referred to above. In its submission, the 5th defendant reiterated the contents of the affidavits it had filed in opposition to the plaintiff's applications and adopted the submissions of the 9th to 14th defendants. The 5th defendant submitted that the plaintiff's applications are not sustainable and urged the court to dismiss the same.

The 7th and 8th defendants who are related contended that they acquired their parcels of land known as Gatunyanga/Ngoliba/Block 2/11 to 17, 23 to 25, 32 to 36, 49 to 52 59 to 62 and 69 to 72 for valuable consideration from the 6th defendant who had purchased the same from the plaintiff. The 7th and 8th defendants have contended that as at the time of purchase of the said parcels of land, the same were in the name of the 6th defendant. The 7th and 8th defendants have contended that they had no obligation to go behind the title which was held by the 6th defendant to find out how the 6th defendant had acquired the said parcels of land. On his part, the 9th defendant contended that he was the owner of Gatunyanga/Ngoliba/Block 2/1 which it acquired from the plaintiff at a consideration of Kshs.200,000/- . The 9th defendant exhibited a copy of her title and evidence of payment of the purchase price which was made to the 15th defendant. On their part, the 10th and 11th defendant like the 9th defendant contended

that they purchased their parcels of land known as Gatunyaga/Ngoliba/Block 2/2, 3 and 18 from the plaintiff in 1993 at a consideration of Kshs.200,000/- each. The 10th and 11th defendants exhibited agreements of sale, evidence of payment of the purchase price, instruments of transfer executed in their favour by the plaintiff and title deeds for the parcels of land in dispute. The 12th, 13th and 14th defendants have contended that they are the lawful owners of Gatunyaga/Ngoliba/Block 2/126, 127, 26 and 27. They have claimed that they acquired the said parcels of land legally. The 14th defendant has contended that the plaintiff had brought a suit against her in 1994 in respect of Gatunyaga/Ngoliba/Block 2/126 and 127 which suit the plaintiff had sought interlocutory injunction against the 14th defendant and lost. The 14th defendant has contended that the said suit is still pending. The 12th, 13th and 14th defendants annexed copies of certificates of official search showing that the said parcels of land are registered in their names. The 14th defendant has also exhibited a copy of the plaint which was filed in Nairobi HCCC No. 995 of 1994 which was brought against her by the plaintiff and a copy of the ruling that was made in the matter on the plaintiff's application for interlocutory injunction.

In their submission, the 8th and 9th defendants reiterated that they acquired the properties registered in their names from the 6th defendant for valuable consideration and that they had no duty to investigate the 6th defendant's title. The 8th and 9th defendants submitted further that the orders sought to restrain them from receiving compensation from Tanathi Water Services Board cannot issue because the order would affect Tanathi Water Services Board which is not a party to these proceedings. The 9th, 10th and 11th defendants also submitted that they were innocent purchasers for value of the parcels of land registered in their names. They submitted that the plaintiff has failed to demonstrate the fraud alleged against them. The 9th, 10th and 11th defendants have submitted further that the plaintiff's suit is time barred and that the plaintiff is estopped from denying the actions of its own officials. The 9th, 10th and 11th defendants have contended that no grounds have been put forward to warrant the grant of the injunctive reliefs sought by the plaintiff. In their submissions, the 12th, 13th and 14th defendants submitted that the plaintiff's applications before court are incompetent and gross abuse of the process of the court. They have submitted that the plaintiff has not demonstrated a prima facie case against the defendants and has also failed to show that it will suffer irreparable injury if the orders sought are not granted. The 12th, 13th and 14th defendants have submitted that the applications are re judicata as against the 14th defendant and that the allegations of fraud levelled against them have not been proved. The 12th, 13th and 14th defendants have submitted that the plaintiff has not demonstrated that they acquired the suit properties illegally.

The onus was upon the plaintiff to establish a prima facie case against the defendants and also to demonstrate that it will suffer irreparable injury if the orders sought are not granted. On the material before me, I am not satisfied that the plaintiff has discharged the burden that is placed upon it by law. In its Amended Originating Summons, the plaintiff has claimed that it was not aware that portions of the original plot had been sold and transferred to the 5th to the 14th defendants until after the filing of this suit in 2008. In fact, the plaintiff has contended that it obtained that information from the replying affidavits which were filed herein. This contention is not only false but is also misleading. The material before the court shows clearly that the plaintiff is the one who sold most of the parcels of land in dispute to the 5th, 6th, 9th, 10th, 11th and 14th defendants. The 7th and 8th defendants acquired their parcels of land from the 6th defendant. Although it is not clear how the 12th and 13th defendants acquired their parcels of land, there is no evidence that the same were acquired unlawfully or fraudulently. Contrary to the allegations contained in the Originating Summons and the affidavits filed in support of the applications before the court, the plaintiff was aware of the transactions leading to the transfer of the properties in dispute to the 5th to 14th defendants as far back as 1994. It is on record that in 1994, the 5th defendant filed a suit against the plaintiff in Nairobi HCCC No.625 of 1994 seeking to restrain the plaintiff from interfering with its quiet possession of the parcels of land the subject of the plaintiff's claim herein against the 5th defendant. In that suit the plaintiff herein filed a counter-claim against the 5th defendant claiming that the 5th defendant had acquired titles to the subject properties irregularly and fraudulently. In the alternative the plaintiff claimed that the 5th defendant had acquired the said parcels of land at gross undervalue. The plaintiff asked the court to cancel the 5th defendant's titles and in the alternative, to order the 5th

defendant to pay to the plaintiff a sum of Kshs. 30,460,000 being the loss that it suffered in the sale of the said parcels of land to the 5th defendant. It is also on record that in the same year, the plaintiff sued the 14th defendant over the parcels of land which are the subject of the plaintiff's claim against her herein contending that the same were acquired irregularly and at gross under value. The plaintiff sought interlocutory injunctions against the 14th defendant in that case but lost the application. In 1997, Kantafu Company Limited sued the plaintiff in Nairobi HCCC No.975 of 1997 over Gutuanyaga/Ngoliba/Block 2/215 which is also the subject of this suit seeking injunction to restrain the plaintiff from interfering with its possession of the same. Again the plaintiff filed a counter-claim contending that the said parcel of land was acquired irregularly by Kantafu Company Limited as the 3rd defendant herein had no power to allocate the same to them. The plaintiff sought revocation of the said title and injunction to restrain Kantafu Company Ltd. from dealing with the land.

What is clear from the foregoing is that the plaintiff was aware of the facts giving rise to the present suit at least by the year 1994. If that is the case, the plaintiff should have brought this suit by the year 2006. The defendants' contention that the plaintiff's suit is time barred is therefore not farfetched. As I have pointed out, there are also other pending suits between the parties concerning the same subject matter. It follows that the plaintiff's claim in some respect is *subjudice*. As against the 14th defendant, the interlocutory injunction sought is *res judicata*, a similar application between the same parties over the same subject matter having been heard and dismissed by a court of competent jurisdiction.

The foregoing procedural issues aside, there is no evidence placed before the court that the 5th to 14th defendants acquired the properties in dispute illegally and fraudulently. The standard of proof of fraud is higher than a balance of probabilities. Fraud must be pleaded with particulars and strictly proved. There are no particulars set out in the Amended Originating Summons as to how each of the defendants participated in the illegalities and fraud levelled against them by the plaintiff. I have also noted that the plaintiff has accused its previous directors and officials of wrong doing in the transfer of the disputed properties to the 5th to 14th defendants. None of the said officials have been made a party to this suit. The plaintiff has also sought to restrain the 5th to 14th defendants from receiving compensation from Tanathi Water Services Board which is not a party to this suit. The plaintiff has not placed any evidence before the court that the said Tanathi Water Services Board is about to make any payment to any of the defendants herein in respect of the properties in dispute.

Due to the foregoing, I am not satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants. Having reached that conclusion, it is not necessary for me to consider whether the plaintiff would suffer irreparable injury if the orders sought are not granted or the balance of convenience. If I was to consider whether the plaintiff would suffer irreparable injury if the orders sought herein are not granted, I would have held against the plaintiff on the issue. I have noted from the earlier suits filed by and against the plaintiff that the plaintiff's likely loss is quantifiable. The plaintiff can therefore be compensated in damages by the defendants if the court finds at the trial that the plaintiff is entitled to the reliefs sought in the Amended Originating Summons.

For the foregoing reasons, I find no merit in the plaintiff's two applications dated 15th June 2010 and 4th January 2011. The same are accordingly dismissed with costs to the 5th and 7th to 14th Defendants.

Dated and Delivered at Nairobi this 17th Day of February, 2017

S. OKONG'O

JUDGE

In the presence of

Mr. Mwai

for the Plaintiff

Mr. Kinyanjui	for the 5thDefendant
Ms. Akwara	for the 7th and 8thDefendants
Mr. Kinyanjui	for the 9th defendant
Mr. Kinyanjui	for the 10th and 11th defendants
N/A	for the 12th to 14th defendants
Kajuju	Court Assistant