



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 119 OF 2015.

MARTHA WANGUI GICHIGI.

STEPHEN KIBERA THURURA (Suing on their behalf legal rep of;

VERONICA WAGAKI THURUKA.....PLAINTIFFS.

VERSUS

1. HENRY GITAHU THURURA

2. STABEX INTERNATIONAL LTD.

3. COUNTY LAND REGISTRAR – BUSIA

4. ATTORNEY GENERAL].....DEFENDANTS.

R U L I N G.

1. The application before me is a Notice of Motion dated 28/4/2016 filed here on the same date. It was brought under sections 3A and 63 (e) of Civil Procedure Act (cap 21) and under order 40 rules 1, 2, and 3 of the Civil Procedure Rules. It is also stated to be brought under all other enabling provisions of law. In the application; the two plaintiffs – MARTHA WANGUI GICHIGI and STEPHEN KIBERA THURURA - ask the court to restrain the defendants – HENRY GITAHU THURURA (1ST DEFENDANT) STABEX INTERNATIONAL LTD (2nd defendant), COUNTY LAND REGISTRAR – BUSIA (3rd defendant) and ATTORNEY GENERAL (4TH defendant) – as prayed for in the prayers set out on the face of the application.

2. The bone of contention is ownership of land parcel NO. NORTH TESO/KAMURIAI/1003 ('suit land') which the plaintiffs claim to be entitled to but which the 1st defendant, who is their kin, illegally sold and transferred to 2nd defendant. The 3rd and 4th defendants are sued because of the role they are said to have played in the alleged sale and transfer. The suit is actually aimed at reversing the transactions so that the plaintiffs can get their entitlement.

3. The application herein is an interim measure meant to take care of the situation before the suit is determined. At this stage only prayers (c) and (d) are for consideration. Prayers (a) and (b) were for consideration at an earlier stage. Prayers (c) and (d) are as follows:

Prayer (c) An Order of injunction do issue to restrain the defendants/respondents, their agents, servants or otherwise howsoever from trespassing on, remaining on, entering in, or continuing in occupation or possession of the developed housing premises on land parcel NO. NORTH

TESO/KAMURIAI/1003 pending hearing and determination of the suit.

Prayer (d) That costs of this application be provided for.

4. According to the plaintiffs, the land was purchased by 1st plaintiff for her handicapped late daughter. That daughter died intestate. Succession proceedings were never taken out to enable anybody to get a title deed. In spite of that however, the 1st defendant managed to get the land registered in his name. He then sold it to 2nd defendant. The plaintiffs further say that their workers and tenants are being threatened from using or accessing the suit land and there are also threats to tenants who live in premises on the suit land. The plaintiffs say they have a prima facie case against the defendants and the defendants are said not to have locus to interfere with the plaintiffs ownership of the suit land.

5. The 1st defendant responded by filing grounds of opposition but which in reality is a Notice of preliminary objection. He alleged that the suit land was sold with the full knowledge of the plaintiffs. He termed the application as incompetent and alleged that it is an abuse of the court process. To the first defendant the orders sought are incapable of being granted.

6. The 2nd defendant filed a replying affidavit on 12/8/2016. The long and short of the 2nd defendants response is that it acquired the property through purchase from 1st defendant, was not privy to any illegal or under hand dealings with the property by 1st defendant before purchase, followed due process in acquisition, and is therefore an innocent purchase for value without notice of any defect in title. That being, the case, the 2nd defendant urged that the application be dismissed.

7. The other parties to the suit – 3rd & 4th defendants – did not make a response and it is clear that the application does not affect them in practical terms.

8. The application was canvassed by way of written submissions. The plaintiffs first set of submissions was filed on 16/9/2016. There was a second set, filed mainly as a response to 2nd defendants submissions, on 28/11/2016 while those of 1st defendant were filed on 13/2/2016.

9. The plaintiff submitted, inter alia, that they have established a prima facie case with overwhelming chances of success. According to the plaintiffs, the defendants have failed to answer pertinent factual matters raised in the application. And the matters generally concern the illegal and fraudulent nature of the transactions initiated by the 1st defendant regarding the suit property. The allegation by the 2nd defendant that it was an innocent purchaser for value was said not to hold against the plaintiffs claim that the transactions by 1st defendant were fraudulent.

10. The plaintiffs were also said to be likely to suffer irreparable loss as the defendants have disrupted their petrol retail business and are intent on taking over rental premises. This is said to pose the risk of exposing the plaintiffs to possible suit from tenants. The tenants are said to be apprehensive of abrupt and/or arbitrary removal. They are looking up to the plaintiffs for an effective solution.

11. The balance of convenience was said to lie in plaintiff's favour as a restraining order would alleviate the suffering occasioned by the defendants.

12. As I pointed out the plaintiffs filed a second set of submissions to counter some of the averments made in the 2nd defendants submissions. The 2nd defendant had emphasized their innocence in the whole transaction. The plaintiffs countered this by submitting that the coming into force of the Land Registration Act rendered obsolete the principle of innocent purchaser in instances where fraud has taken place. In other words, the Land Registration Act is construed to have neutered or ousted the legal protection of an innocent purchaser for value without notice of the defect of title.

13. The first defendant submitted that the requisite principles required to meet the threshold for granting temporary restraining orders have not been met. According to 1st defendant, no prima facie case was

made . The plaintiffs did not also demonstrate irreparable loss. Moreover, the plaintiffs can adequately be compensated with damages as the respondents are capable of doing so.

14. In the submissions of the 2nd defendants, fraud was said to have been alleged against the 1st defendant without evidence to support it. |And even if such fraud were to be found, the 2nd defendant averred that it was not part of it. The 2nd defendant said it was a bonafide purchaser. It exercised due diligence and it therefore acquired an absolute and indefeasible title. The plaintiff were said to have failed to establish a prima facie case. It was submitted that the plaintiffs can be compensated in damages should they ultimately win the case. The balance of convenience was also said to be in favour of 2nd defendant given that the land is registered in its name.

15. Some decided authorities were availed. The plaintiffs, for instance, availed the cases of **PETER NDERITU JULIUS VS HUMPREY WANGOMBE KAHARIRI & ANOTHER: ELC. NO. 80 OF 2012, KERUGOYA, and ELIJAH MAKERI NYAAGWA'RA VS STEPHEN MUNGAI NJUGUNA & ANOTHER; ELC. NO. 609 B/2012, ELDORET**. Some of the case availed by 2nd defendant were: **JANET FLORA MUNA VS JOHN KARANU IKINU & 2 OTHERS [2015] e KLR, . SHIMONI RESORT VS REGISTRAR OF TITLES FIVE others: [2016] e KLR ,CHARLES KARATHE KIARIE & 2 others VS ADMINISTRATORS OF THE ESTATE OF JOHN WALLANCE MATHARE (deceased) and 5 others: [2013] e KLR and ZEBAK LIMITED VS NADEM ENTERPREISES [2016] e KLR**. I have read those authorities .

16. I have considered the application, the responses made, and the pleadings in the suit as filed. I have considered the submissions and the decided authorities too. For all practical and legal purposes the application is essentially between the plaintiffs and 2nd defendant. The other defendants basically lose nothing whether or not the application is granted. And this is so because they neither possess nor operate on the suit land. Both the plaintiffs and the 2nd defendant seem to realize this and the submissions against each other are therefore lengthy and detailed. In fact, I need to point out that if I become equally detailed in addressing the issues raised, I will end up determining some of the issues for trial prematurely.

17. To avoid a scenario like that, my approach must be circumspect. I bear in mind the holding of the court in **SHITAKHA VS MWANDO & 4 others [1986] KLR 445** where it was emphasized that the court should not decide substantive issues at the interlocutory stage. This ought to be left for trial. There is also the case of **MBUTHIA VS JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988] KLR 1**, where the court held, inter alia, that the correct approach in dealing with an application for injunction is not to decide issues of fact, but rather to weigh up the relevant strengths of each sides proposition. The Lower court judge in that case was faulted for having gone far beyond his proper duties by making final findings of fact.

18. I have pointed out that I have considered the authorities availed. In view of the approach I have chosen in handling the application, the authorities are largely unhelpful. In fact the authorities would be useful for the main trial, not in the interlocutory stage. I need to explain: The principle of an innocent purchaser for value without notice of defect of the title is, for instance, a major plank in the 2nd defendants defence. The plaintiffs noticed that and opposed it strenuously. Their position is that the principle does not apply in view of the relevant provisions of Land Registration Act. They even availed a case - **ELIJAH MAKJERI NYANGWA'RA VS STEPHEN NJUGUNA & Another [2013] e KLR** – where the court expressed an opinion similar to that. To counter that, or probably to even out scores, the plaintiffs brought a case – **SHIMONI RESORT VS REGISTRAR OF TITLES & 5 others [2016] e KLR** - where the court expressed a contrary view. If I now start considering the import of these two cases, I would prematurely be determining an issue that is essentially for determination at the main trial. In other words, I would be giving a pointer as to the outcome of the main suit.

19. IN this matter, it seems clear that the 2nd defendant came to the scene after the 1st defendant had already transferred the land to himself. It is plain that the 1st defendant had done so and even secured a

loan from a bank. The fraud alleged by the plaintiff seems to largely belong to the period before the 2nd defendant came to the scene. That fraud seems to have taken place in the process of transferring title from the deceased daughter of the plaintiff to 1st defendant.

20. The 2nd defendant then came to the scene and purchased the property from 1st defendant much like any other purchaser would do. As things stand, the 2nd defendant has title to the suit land. The plaintiffs are not the title holders and the presumption of rights and privileges that go with such ownership cannot be construed in their favour at this stage.

21. In a scenario like that, the plaintiffs needed to give an undertaking to pay damages in the event that the 2nd defendant turns out to be successful in the end. They have not given such undertaking. Instead, it is the 2nd defendant itself that has undertaken to pay damages to the plaintiffs. This omission by the plaintiffs is an obvious disadvantage to them. In **GATI VS BARCLAYS BANK (K) LTD [2001] KLR 525** the court held, inter alia, that an undertaking as to damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue.

22. It needs to be borne in mind too that the plaintiffs are trying to restrain a title holder. Being not title holders themselves, they are in a somewhat disadvantaged position. It becomes rather difficult for them to convince anybody that they have established a prima facie case. In **JAMIN KIOMBE LIDODO VS EMILY JERONO KIOMBE & Another: HCC. NO. 81/2005 (unreported) Gacheche J, (as she then was)** held that where an applicant has not shown title to the suit land, it is unsafe to hold that a prima facie case is made.

23. In **KENYA HOTELS LIMITED VS KENYA COMMERCIAL BANK LTD & Another : [2004] 1 KLR 80**, the court held, inter alia, that while remaining guided by the principles spelt out in **GIELA VS CASSMAN BROWN & CO. LTD [1973] EA 358**, it is also necessary to consider all the other circumstances of the case. From the pleadings in this particular case, the central player seems to be the 1st defendant. The 2nd defendant seems to be a late comer to the scene. But the injunction sought is mainly targeted at the 2nd defendant, not the first defendant. This is another consideration that disinclines me from granting the injunction sought.

24. The upshot therefore is this. The plaintiffs application is found unmeritorious and the same is hereby dismissed with costs.

DATED AND DELIVERED ON 16TH DAY OF FEBRUARY, 2017.

A.K. KANIARU,

JUDGE.

1ST PLAINTIFF PRESENT.....

2ND PLAINTIFF.....PRESENT.....

1ST DEFENDANT...ABSENT.....

2ND DEFENDANT...ABSENT.....

3RD DEFENDANT....ABSENT.....

4TH DEFENDANT.....N/A.....

J U D G E.