



**REPUBLIC OF KENYA**

**IN THE E.L.C. COURT OF KENYA AT EMBU**

**E.L.C. 28 OF 2016**

**NJAGI NYAGA**

**LAURENZIA WANJUKI.....PLAINTIFFS**

***VERSUS***

**HENRY GITARI NYAGA.....DEFENDANT**

**RULING**

1. By a Plaint dated and filed on 14<sup>th</sup> April 2016, the Plaintiffs filed suit against the Defendant claiming that the Defendant had illegally and fraudulently transferred Title No. KAGAARI/WERU/540 to himself. The 1<sup>st</sup> Plaintiff claimed to be the ‘rightful owner’ while the 2<sup>nd</sup> Plaintiff claims to have a beneficial interest by reason of having lived there between 1963 and 1978.
2. The Plaintiffs therefore sought a declaration that the registration of Title No. KAGAARI/WERU/540 in the name of the Defendant to be nullified and to have the property revert back to the 1<sup>st</sup> Plaintiff. They also sought damages, costs and any other relief which the court may grant.
3. On or about 28<sup>th</sup> October 2016, the Plaintiffs filed a Notice of Motion application of even date under certificate of urgency seeking an order of interlocutory injunction restraining the Defendant, his agents or servants from “interfering” with the suit property. The said application was supported by a brief 7 paragraph affidavit by Laurenzia Wanjuki, the 2<sup>nd</sup> Plaintiff.
4. It was alleged in the supporting affidavit that the Defendant had continued to cut mature trees for timber which was against the “law”. She also sought an order to restrain the Defendant from undertaking any developments which were going on. The nature of the developments were not disclosed.
5. The said application came up for hearing before me on 23<sup>rd</sup> February 2017 when the Plaintiffs appeared to prosecute the same. The Defendant did not turn up for hearing despite service. On the strength of the affidavit of service dated and filed on 23<sup>rd</sup> February 2017, I allowed the Plaintiffs to proceed with their application in the absence of the Defendant.
6. The said application was prosecuted by the 2<sup>nd</sup> Plaintiff who had a signed authority to plead and act for the 1<sup>st</sup> Plaintiff who was very elderly. The 2<sup>nd</sup> Plaintiff basically reiterated the contents of the Plaint and the supporting affidavit. She emphasized that the suit property rightfully belonged to the 1<sup>st</sup> Plaintiff whom he said was his elder brother. She conceded that the suit property had been transferred severally since the 1<sup>st</sup> Plaintiff’s registration in 1962.

7. The Plaintiffs had not attached a copy of the title document or copy of the land register to either the Complaint or the application. When the court inquired about the said documents, the 2<sup>nd</sup> Plaintiff supplied a photocopy of the land register popularly known as the green card. A copy thereof was placed in the court file. The court noted that both Plaintiffs were unrepresented and they may not be familiar with the proper manner of filing such document.

8. The main issue to consider is whether or not the Plaintiffs have satisfied the requirements for the grant of an order of injunction in terms of the principles established in the case of ***Giella v. Cassman Brown & Co [1973] EA 358*** that is:

***a. That they have a prima facie case with a probability of success.***

***b. That unless the injunction is granted, they might otherwise suffer irreparable loss which cannot be compensated by an award of damages.***

***c. That the balance of convenience lies in their favour where the court is in doubt on (a) and (b) above.***

9. An examination of a copy of the green card which was provided by the Plaintiffs reveals that indeed the 1<sup>st</sup> Plaintiff was registered as owner of Title No. KAGAARI/WERU/540 in 1962. The property thereafter changed hands to Patrick Njeru Nyaga in 1974; Cecilia Wanjira w/o Nyaga in 1977; and finally to Henry Gitari Nyaga in 2009. Although the Plaintiffs' fault the last transfer to the Defendant in 2009 as fraudulent and illegal, nothing is really said about the earlier two transfers.

10. There is no explanation by the Plaintiffs on what steps they have taken in the past to assert their ownership rights all the way from 1974 when the first transfer was effected to 2016 when the present suit was filed. The intervening period is 42 years. The 2<sup>nd</sup> Plaintiff avers in paragraph 5 of the Complaint that she lived on the suit premises between 1963 and 1978 and thereby acquired a beneficial interest. The basis of the alleged beneficial interest is not disclosed and no explanation is given on the steps she has taken, if any, to vindicate that interest since she vacated the suit property about 38 years ago.

11. When the court asked the 2<sup>nd</sup> Plaintiff whether they reside on the suit property, she answered in the negative. She also indicated that the Defendant does not reside on the suit property. The land is currently leased out to various lessees by the Defendant.

12. In the circumstances of this case, I am not persuaded that the plaintiffs have demonstrated a *prima facie* case with a probability of success as envisaged in the case of ***Giella vs Cassman Brown & Co*** (supra). The Plaintiffs, however, will have their day in court during the trial of the action to prove their case.

13. In view of my finding above on the Plaintiff's failure to establish a *prima facie* case with a probability of success, it is not necessary to consider the second and the third principles. The Plaintiffs' case fails at the first of the three hurdles.

14. The upshot of the foregoing is that the Plaintiff's Notice of Motion dated 28<sup>th</sup> October 2016 is without merit. The same is hereby dismissed. Since the Defendant did not turn up for hearing, there shall be no order as to costs.

15. The Plaintiff is encouraged to serve the summons to enter appearance upon the Defendant again as directed by the Deputy Registrar in the court file and prepare the main suit for hearing on the merits.

It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **13<sup>th</sup>** day of **MARCH, 2017**

In the presence of Njagi Nyaga and Laurenzia Wanjuki the Plaintiffs and in the absence of the Defendant.

Court clerk Njue.

**Y.M. ANGIMA**

**JUDGE**

**13.03.17**