



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.193 OF 2014

**DAVID GIKONYO NJIIRI (suing as the legal representative and administrator of the estate of THE LATE WILSON NJIIRI GIKONYO- DECEASED)
.....PLAINTIFF**

VERSUS

RUTH MARY WANGUI AND 7 OTHERS.....DEFENDANTS

RULING

(Application for injunction; principles to be applied; plaintiff claiming land by way of adverse possession on behalf of the estate of his late father and claiming fraud on the part of the defendants; plaintiff's late father having purchased the property but does not appear to have completed the purchase price and no consent of the Land Control Board was given; land at that time was charged; owner selling it to one of the defendants; the land latter subdivided and sold to the other defendants; prima facie case; court not persuaded that there was continued possession as there must have been entry to survey and demarcate the land; court not persuaded that there was any fraud in the sales; court not persuaded that plaintiff has demonstrated a prima facie case; application dismissed)

1. The application before me is that dated 24 December 2015 filed by the plaintiff. It is an amended Notice of Motion, which as drawn, seeks the following substantive prayers which I have paraphrased.

(i) That leave be granted to amend the plaint.

(ii) That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a permanent injunction restraining the 1st - 8th defendants from selling, charging, dealing, transferring, trespassing, subdividing and/or in any manner so to do interfering with land parcel Njoro/Ngata Block 1/61 also known as Plots Nos. 6268-6313 in the name of the various respondents herein.

(iii) That pending the hearing and determination of this suit, an order of inhibition be issued against the land parcel Njoro/Ngata Block 1/61 also known as Plot Nos. 6268-6313.

(iv) That this court be pleased to issue such conservatory orders as it deems just to make so as to preserve the subject matter of this suit being land parcel Njoro/Ngata Block 1/61 also known as Plot Nos. 6268-6313.

(v) That costs be provided for.

2. The application is based on various grounds and is opposed by the respondents. Before I go far, let me pause here so that I can give a little background to this suit and to the application.

3. This suit was commenced by way of plaint filed on 1 July 2014 which plaint was later amended. The plaintiff has filed this suit as administrator of the estate of Wilson Njiiri Gikonyo (deceased). In the original plaint, he sued two defendants, namely Ruth Mary Wangui and William Wanjohi Mureithi. He averred that as son of the deceased, he has been in occupation of the land parcel Njoro Ngata/Block 1/61 used for agricultural purposes. He pleaded that the said land was purchased on 2 September 1998 by his father from the 1st defendant. His father then took possession and commenced farming activities. The title to the property had however been charged and the transfer of the property could not be effected. In the year 2012, the 1st defendant discharged the title but sold the property to the 2nd defendant at the price of Kshs. 9,000,000/=. The deceased then filed a suit, being Nakuru HCCC No. 153 of 2012 (OS) claiming the property by way of adverse possession but the suit was dismissed.

4. After the judgment, the 1st defendant transferred the property to the 2nd defendant. It is the claim of the plaintiff that this sale to the 2nd defendant was fraudulent. It was pleaded in the original plaint that upon purchase, the 2nd defendant entered the property, started burning grass, erecting fences and advertised the property for sale. He pleaded that as a result, the plaintiff has been denied his rights as occupier of the land, and the estate of the deceased, denied the use of the land. In the original plaint, he asked for orders inter alia for a declaration that the sale and subsequent transfer of the land to the 2nd defendant is a nullity; an extension of time to the estate to apply for Land Control Board consent; and in the alternative, payment by the 1st defendant of a sum equivalent to the current market value.

5. Together with the plaint, the plaintiff filed an application for injunction, seeking to restrain the 1st and 2nd defendants from selling the property, subdividing it, or trespassing into it. He also asked for an order of inhibition, prohibiting any dealings on the said property. This application was amended through an amended notice of motion filed on 11 January 2016. In the amended motion, the plaintiff inter alia has sought orders to amend the plaint so as to add several other defendants and to effect amendments in the property in issue, for it had by now been subdivided into several plots, in addition to seeking the orders of injunction.

6. The prayers for amendment of plaint were not opposed and an amended plaint was filed on 24 February 2016. The amended plaint now has 8 defendants, the original two defendants and 6 other persons, namely Family Shade Africa Limited, Hellen Njeri Wanjohi, Keren Jepchumba Ayabei, Daniel Owuor Onyango, Elijah Mbaru Ndungu, and Godfrey Michael Otieno Nyamai.

7. In the amended plaint, it is pleaded that the land parcel Njoro/Ngata/Block 1/61 has now been subdivided into 46 plots being plot numbers 6268 to 6313. Family Shade Africa Limited own the plot numbers 6268- 6283 and 6290 -6310. The plot numbers 6284 and 6289 are owned by William Wanjohi Mureithi; Keren Jepchumba Ayabei plot No. 6285; Godfrey Michael Otieno Nyamai, plot No. 6286; Daniel Owuor Onyango, plot numbers 6287 and 6288; and Elijah Mbaru Ndungu, the plot numbers 6310-6313. In the amended plaint, it is pleaded that Family Shade Limited was incorporated by the 2nd and 4th defendants (William Wanjohi Mureithi and Hellen Njeri Wanjohi respectively) to perpetrate a fraud on the estate of the deceased. It is pleaded that all the defendants were aware that the plaintiff held an overriding interest in the original land parcel No. 61 and therefore they could not lawfully acquire title to any subdivisions of the land parcel No. 61. It is further pleaded that the deceased held an overriding interest in the original land parcel No. 61 and therefore no valid title could be acquired or was acquired by the 2nd to 8th defendants.

8. It is added in the amended plaint, that before the sale of the original land parcel No. 61 to the plaintiff's father, his father had been permitted to reside and make use of the suit property by the 1st defendant, who lived in Kitale. It is averred that his father purchased the land at the price of Kshs. 1, 320,000/= and that he paid the sum of Kshs. 960,000/= and an agent's commission of Kshs. 120,000/=. It is pleaded that if this contract of sale is not valid, then the plaintiff is entitled to the land by virtue of the doctrine of adverse possession. It is pleaded that once the plaintiff's father entered into the contract of sale and took possession on 2 September 1998, his possession became adverse to that of the 1st defendant, and that as

of 1 September 2010, he had been in occupation for over 12 years, hence the title of the 1st defendant became extinguished and the deceased acquired the right to have the property transferred to him. It is pleaded that on 27 March 2013, the 1st defendant transferred the suit property to the 2nd defendant. On 6 May 2013, the property was subdivided by the 2nd defendant into the 46 plots which plots were later transferred to the 3rd, 5th, 6th, 7th and 8th defendants. To the original prayers in the plaint, the plaintiff has added prayers inter alia to have the subdivisions cancelled and for the original land parcel No. 61 to be transferred to him.

9. The other prayers in the amended motion, basically being those of injunction, are opposed by the defendants.

10. In her reply, the 1st respondent did not dispute the sale agreement between herself and the plaintiff's late father on 2 September 1998. She has however deposed that the deceased was unable to complete the purchase price and she terminated the agreement. The property had been charged and was at risk of being sold by Barclays Bank, and she therefore sought another buyer to save it. According to her, the 2nd respondent lawfully purchased the property and the same was transferred to him.

11. On the part of the 2nd respondent, it is averred that the plaintiff has never been in possession of the property. He has stated that he took possession and subdivided the land into 46 plots which have now been sold to different people, who have taken possession and commenced developments.

12. The 5th respondent swore an affidavit vide which she has averred that she purchased the plot No. 6281 in the year 2013. She went to inspect the property and the same was vacant. Upon purchase, she was issued with a title deed which she now holds.

13. I have considered the matter and the submissions made by counsels. I take the following view.

14. What I have before me is an application for injunction. The principles upon which applications such as these are determined, were laid down in the case of ***Giella vs Cassman Brown (1973) EA 358***. In the said case, it was held that to succeed in an application for injunction, an applicant needs to demonstrate a prima facie case with a probability of success and also show that he is going to suffer irreparable loss if the injunction is not granted. If in doubt, the court will determine the application on a balance of convenience. I have no problem with these principles only to add that in my own opinion, when faced with an application for injunction, what the court is actually being tasked to do, is to pronounce how best the subject matter of the property ought to be preserved, pending hearing of the suit. The principles laid down in the case of ***Giella vs Cassman Brown*** offer a guide to the court while making this decision.

15. In order to assess whether or not an applicant has laid down a prima facie case, it is inevitable that the court does comb through the material tabled by the applicant and make a preliminary assessment of the same so as to determine whether they measure up to what may be termed a prima facie case. Where the respondents have replied to the application, the material tendered by the applicant will have to be assessed alongside that tabled by the respondents.

16. In our case, I have seen that the plaintiff's suit is basically that the land parcel No. 61 could not properly have been sold, on the argument that the deceased had an overriding interest in it, given that he took possession after the sale of 2 September 1998. It is claimed that the subsequent sale to the 2nd respondent, and the other downstream sales made by the 2nd respondent, are all fraudulent, inter alia because the 1st defendant breached the sale agreement of 2 September 1998; that he failed to disclose that the deceased had earlier purchased the property; failed to procure land control board consent; and that the deceased had an overriding interest. Part of the prayers in the suit are for a declaration that the plaintiff's father acquired title by way of adverse possession on 3 September 2010; a declaration that the 1st defendant became a constructive trustee on the said date; a declaration that the sale of 13 March 2012 to the 2nd defendant was a nullity; and a declaration that the subdivision into the current 46 plots is illegal, null and void. It is principally because of these prayers that the plaintiff seeks to have the original land parcel number 61 transferred to him.

17. It is not disputed that the plaintiff's deceased father had entered into a sale agreement on 2 September 1998. Some money was paid although not the full purchase price. Of importance is that no consent of the Land Control Board was ever obtained. I think, given this latter fact, the deceased found it difficult to enforce the sale agreement and therefore sought to be declared to be owner of the land through the doctrine of adverse possession vide the case Nakuru HCCC No. 153 of 2012 (OS). This case was dismissed on 15 February 2013. It was not dismissed after a hearing on merits but because of a technical defect. The plaintiff in this suit, has averred that this suit is therefore not captured by the doctrine of res judicata.

18. I note that in this matter, the plaintiff has filed suit on behalf of his late father. He seeks to have his late father inter alia declared owner by way of adverse possession. This suit was filed on 1 July 2014. I observe that the plaintiff's father died on 4 March 2013. It does appear to me that when the suit was filed, the respondents had moved into the property in issue and subdivided the same. They could of course not have managed to subdivide the land without sending a surveyor, who must have entered into the land, and carved out the several plots. These plots were advertised for sale and they must have been independently assessed by the Land Registrar who then issued the new titles to the subdivisions. The title of the 5th respondent for example was issued on 17 October 2013. I am not persuaded that the plaintiff continued to sustain possession to the time that the suit was filed. The deceased of course had died and could not be able to sustain any possession. I am not too convinced, at least at this stage of the proceedings, and I must emphasise that this is a preliminary assessment subject to change after hearing the parties on merits, that the plaintiff has a high probability of success in his suit for adverse possession.

19. The plaintiff also has a claim based on fraud. So far, I am not persuaded that the sale of the property to the 2nd respondent was fraudulent. There was no Land Control Board consent on the sale to the plaintiff's father and that agreement was rendered null and void. The plaintiff's father may have continued in possession, and he was entitled to file suit for adverse possession, which he did but failed. I do not see what other overriding interest he can hang onto, for he did try to assert his rights in the earlier suit, which did not succeed. I have not seen, at least at this stage of the proceedings, any fraud in the sale of the property from the 2nd respondent to the other respondents. The other persons to me appear to be innocent purchasers for value. I am not seeing how it can be said that they were party to fraudulent acts.

20. Given the above, I regret that the plaintiff has not persuaded me that he has displayed a prima facie case with a probability of success. I am not in doubt and therefore need not consider the balance of convenience. I dismiss this application with costs. For the avoidance of doubt, pending the hearing and determination of this suit, the respondents ought to be the persons in possession and occupation of the suit property. I am also unable to issue any orders to restrain them from dealing with the suit land. 21. In the event that after hearing this suit on merits this court is of the view that the plaintiff deserves the orders sought, the plaintiff may still benefit from the alternative prayer wherein he has sought to be compensated with the current value of the suit land.

22. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 1ST day of March 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :

Mr. Ndung'u present for the plaintiff/applicant

Mr. Ikua present for the defendants/respondents

Court Assistant: Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU