



**REPUBLIC OF KENYA**

**ENVIRONMENT & LAND COURT**

**AT NAIROBI**

**ELC NO.1478 OF 2014**

**JESINTER WAIRIMU KARABA....PLAINTIFF/APPLICANT**

**VERSUS**

**RIFAAN LIMITED.....FIRST DEFENDANT**

**KIMSON HOLDING LIMITED.....SECOND DEFENDANT**

**PAUL NDICHU KABARA.....THIRD DEFENDANT**

**AND**

**SAVFFANA LIMITED.....INTERRSTED PARTY**

**RULING**

**INTRODUCTION**

1. The applicant **Jennifer Wairimu Kabara** is a sister to the third Respondent **Paul Ndichu Kabara**. The two are children of the late **George Kabara Kamiti** (deceased) who was a shareholder of **Giathieko Njiru Farm Limited (the Company)**. In or around 1996 when the company's properties were being distributed by its liquidator's, the two were registered as tenants in common in equal shares of the deceased's entitlement which was **6.738 hectares**. The property is known as **LR No. 9363/83** (Suitland).
2. The suit land was about **16 acres**. Each of the two was entitled to 8 acres each but because of public utilities each surrendered an acre, which means that each was entitled to **7 acres**. On **21<sup>st</sup> March 2005**, the applicant sold **4 acres** out of her share to the second Respondent. On **29<sup>th</sup> April 2010**, she sold her remaining **4 acres** to the first Respondent.
3. The applicant filed a Notice of Motion dated **25<sup>th</sup> November 2014**, in which she seeks the following reliefs:-

***a. That this Honourable Court be pleased to grant a temporary injunction against the defendants jointly and/or severally , by themselves ,their agents, servants, employees and/ or any other persons whomsoever acting on their behalf, from selling, transferring, leasing or otherwise alienating the suit land namely LRNo.9363/83,pendingthe hearing and determination of the suit herein.***

***b. That pending the hearing and final determination of the suit herein, this Honourable Court be pleased to order the firm of Faiza Ngatia & Co. Advocates to release the original certificate of L R No. 9363 / 83 to this Honourable Court for safe custody.***

***c. That costs of this application be provided for.***

4. Faiza Ngatia is an advocate whose Law Firm Messers Faiza Ngatia & Co. Advocates had been instructed by the liquidators of the company to process 114 titles arising from the subdivision of **LR No.9363** comprising of **1198 acres**. The advocate is also one of the directors of the first Defendant. In the course of discharging her duties, she came into contact with the applicant who had come complaining that she had been left out from sharing a property which was held by the deceased which was in the process of being registered in the name of the third Respondent. On the instructions of the Chairman of the liquidators committee, the applicant was registered as a tenant in common in equal shares with her brother, the third Respondent.

5. After the titles were processed, the applicant and her brother could not agree on who was to keep custody of the certificate of title. The two then agreed that the title be kept in the offices of Messers Faiza Ngatia & Co. Advocates. When the two siblings wanted to subdivide the suit land and have their own titles, they did not have money to do so. Besides lack of money to carry out subdivision, the applicant had personal issues which required money.

6. The applicant then entered into a sale agreement whereby she sold four acres to the second Respondent. She later on sold the remaining three acres to the first Respondent.

#### **APPLICANT'S CONTENTION**

7. The applicant now contends that the two agreements should be declared null and void on the ground that Faiza Ngatia of Faiza Ngatia & Co. Advocates did not disclose to her that she was a director of the first Respondent and that it is Faiza Ngatia who introduced her to the directors of the second Respondent. She further contends that the land she sold more particularly the last three acres were sold at a price which was too low. That the property fronts the Eastern By-Pass whose value per acre is **Kshs.Sixteen Million (16,000,000)**.

#### **FIRST RESPONDENT'S CONTENTION**

8. The applicant's application is opposed by a Replying Affidavit sworn by Faiza Ngatia, a director of the first Respondent. The affidavit details the chronology of events preceding the filing of this application by the applicant. The first Respondent contends that the applicant all along knew that Faiza Ngatia was a director of the first Respondent and that she signed a transfer in respect of the three acres sold to the first respondent. The transfer bore the photograph of Faiza Ngatia and her husband and that the applicant knew Faiza well having dealt with her.

9. The first Respondent contends that the purchase price of **Kshs.1,000,000/=** per acre was the best prevailing market price as at the time the applicant sold the three acres to the first Respondent. That the land in that area has since gone up tenfold and that the applicant is relying on a valuation which was carried out in 2014 when it ought to have been a valuation as at the time the sale took place. The first Respondent further contends that the applicant's application is motivated by the appreciation of the land and that she is out to get back the land in order to sell it at a higher price.

#### **SECOND RESPONDENT'S CONTENTION.**

10. The second Respondent has also opposed the applicant's application based on an affidavit sworn by its director on **20<sup>th</sup> March 2015**. The second Respondent contends that it purchased four acres from the applicant in 2005 and two acres from the third Respondent who is a brother to the applicant. That what it paid then was the prevailing market price and that it has since sold the six acres to the fourth Respondent who has taken possession and developed the six acres.

### **THIRD RESPONDENTS' CONTENTION**

11. The third Respondent has opposed the applicant's application based on a Replying affidavit sworn on 15<sup>th</sup> December 2014. The third Respondent contends that the applicant's application is misconceived in so far as it relates to him. That he was improperly joined in this suit. That the applicant is reneging on the agreements which she had entered into with buyers and that her actions are motivated by greed for unjust enrichment. That her actions have affected him as a co-owner because he cannot deal with his share of the suit land because of the caveats placed on the title.

### **ANALYSIS**

12. I have carefully considered the applicant's application, the supporting affidavit, and further affidavit. I have also considered the Replying Affidavits filed by the Respondents. This is an application for injunction and the principles for grant of such an injunction are now well settled. See **Giela Vs.Cassman Brown & Co.Ltd (1973) EA 358;-** Firstly an applicant must demonstrate that he has a prima facie case with probability of success. Secondly an injunction will not normally be granted unless otherwise the applicant will suffer injury which will not be compensated in damages. Thirdly, if the court is in doubt it will decide the application on a balance of convenience.

13. The issue for determination in this application is whether the applicant has demonstrated that she has a prima facie case. A prima facie case was defined in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125** as follows:-

**“ A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter’.**

14. In the instant case, it is clear that the applicant had sold four acres of her share in the suit land the second Respondent on **21<sup>st</sup> March 2005**. At this time, the price per acre was **kshs.100,000/=**. Again on **29<sup>th</sup> April 2010**, the applicant sold three acres to the first Defendant. This time, the price per acre was **Kshs.1000,000/=** .

15. The applicant's contention is that the price was a gross undervaluation. The applicant went and instructed a Firm of valuers who valued the suit property in **2014**. The entire suit land which is about **16.65 acres** was valued at **Kshs.280, 000,000/-**. This is the motivation behind the filing of this application. What the applicant is forgetting is that the property was sold years back and that the valuation was only done in 2014. When the property was sold the Eastern By-Pass was not in place. The current valuation has taken in all the factors including communication which includes the now Eastern By-Pass.

16. The third Respondent who is a brother to the applicant sold two acres to the second Respondent later in **2005** at a price of **Kshs.130,000/=** per acre. In **2006** the second Respondent sold the six acres it had purchased from the applicant and her brother at **Kshs.250,000/=** per acre. As at 2010 when the first Respondent bought three acres from the applicant, the price of land had gone up. She was paid **Kshs.3000,000/=** in instalments. This shows how the prices appreciated.

17. The applicant is using her relationship with Messers Faiza Ngatia & Co Advocates to seek to renege on the agreements which she lawfully entered into with the first and second Respondent. Faiza Ngatia of Faiza Ngatia & Co. Advocates did not take advantage of her. The history of how the title now held in her office came to be there is clear. It was kept there because the applicant and her brother could not agree on who was to keep it.

18. While the title was held by Faiza Ngatia & Co. Advocates, the applicant approached the firm to represent her. Faiza Ngatia has sworn an affidavit detailing what happened between her and the applicant. The applicant signed a transfer where Faiza's photograph was appended. She cannot therefore turn round and claim that Faiza did not disclose the fact that she was a director of the first Respondents Company.

19. The applicant also claims that it is Faiza Ngatia who introduced herself to the second Respondent. Contrary to her allegations, the second defendant's director has sworn an affidavit that he comes from the same village with the applicant and that it is the applicant who approached him and floated the idea of sale. This is confirmed by the third Respondent who also sold two of his acres from the suit land to the second Respondent.

**CONCLUSION**

20. From the facts emerging in this matter, the applicant is not being honest. An injunction is an equitable remedy and whoever approaches the court has to do so with clean hands. It is clear that the applicant is only intent on reclaiming what she sold out because the price has gone up. Considering the materials presented to me. I do find that the applicant has not demonstrated that she has a prima facie case with chances of success. I proceed to dismiss her application with costs to the Respondents.

It is so ordered.

**Dated, Signed and Delivered at *Nairobi* on this *1<sup>st</sup>* day of *March* 2017**

**E.O.OBAGA**

**JUDGE**

In the presence of ;-

M/s Ogot for Mr Ngugi for the Plaintiff/Applicants

Mr Njeru for 1<sup>st</sup> Defendant/Respondent

M/s Ogot for 2<sup>nd</sup> Defendant/Respondent

Mr Nyamweya for the 3<sup>rd</sup> Defendant/Respondent also holding brief for M/s Kamuyu for interested party.

Court Assistant: Kelvin

**E.O .OBAGA**

**JUDGE**