



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 222 OF 2014

LUCY WANGARI MUCHIRI.....PLAINTIFF/APPLICANT

VERSUS

JOHN NGANGA KIHURA.....1ST DEFENDANT/RESPONDENT

MARGARET MWIHAKI KIHURA.....2ND DEFENDANT/RESPONDENT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

PHILIP ULUMA(THE LIQUIDATION NGUNDUFARMERS

CO-OP SOCIETY LIMITED.....5TH DEFENDANT/RESPONDENT

STEPHEN KIHARA MUCHUI T/A MUCHUI & COMPANY

ADVOCATES.....6TH DEFENDANT/RESPONDENT

MAWEGA COMPANY LIMITED.....7TH DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed a notice of motion dated 12th January 2015 in which she sought the following reliefs:-

1. Spent

2. Spent

3. That the Honourable Court be pleased to grant interim orders of injunction restraining the 1st and 2nd Defendants whether by themselves or through their agents and/or servants from transferring, alienating, disposing, leasing, trespassing or in any other manner whatsoever from interfering with LR No. Nairobi Block 126/3 pending the hearing and determination of the suit.

4. That the costs of this application be provided for.

2. The applicant contends that on 15th February 1989, she bought some share from Susan Ngendo who was a shareholder of Ngundu Farmers Co-operative Society Limited. She duly paid share transfer fees and other monies such as survey fees after which she was registered as member No. 582. By virtue of her shareholding, she was allocated the suit land LR No. 126/3. She took possession and did small scale farming until 1994 when she left the country for England.

3. When she came back from England, she started pursuing title documents through the firm of Muchui & Co. Advocates who had been given mandate to process titles for the shareholders. She was unable to procure title. She later found out that the first and second respondents had obtained title to the suit land. She wrote to the land Registrar asking him to restrict the land. She contends that she learnt that the first and second respondents are in the process of sub-dividing the suit land and that therefore if an injunction is not issued, the suit land will be sold to third parties.

4. The applicant's application is opposed by the first respondent through a replying affidavit sworn on 2nd March 2016. The first respondent contends that he has been wrongly sued in this suit as he has no proprietary interest in the suit property. That the suit property was initially jointly registered in his name and that of the second respondent but that he has since sold his half share in the suit land to Mawega Company Limited which has since been registered as joint owner of the suit property with the second respondent. A certificate of lease in the name of Mawega Company Limited and the second respondent was issued on 20th November 2013 before the present suit was filed. He therefore contends that the suit against him is misconceived and no injunction orders can issue against him since he has no interest in the suit property. He blames the applicant for filing a suit against him before ascertaining the ownership of the suit property.

5. The second respondent has opposed the applicant's application based on a replying affidavit sworn on 1st March 2016. The second respondent contends that the suit land was allotted to her late mother Virginia Wanjiku Leo who was a shareholder of Ngundu Farmers Co-operative Society Limited. Her mother joined the society in the 60's and was member number 658. Her mother was allocated Plot No. 5 in the survey plan. This plot is what became plot No. 126/3 after registration.

6. The second respondent further states that when their mother died, they underwent succession process where all her shares at Ngundu Farmers Co-operative Society were bequeathed to her and her brother, the first respondent. The two went ahead to process title documents. The second respondent's brother later sold his half share in the suit land to Mawega Company Limited which has since been allowed to come into the suit as an interested party. The second respondent contends that the applicant is a grabber who is only attempting to snatch their land using dubious documents.

7. The interested party has opposed the applicant's application through a replying affidavit sworn on 10th November 2016. The director of the interested party contends that his company purchased half of the suit land from the first respondent and that it has since sub-divided its half share which has been sold to third parties. That if an injunction will be given, it will affect third parties who are not parties to this suit.

8. I have considered the applicant's application as well as the opposition to the same by the first and second respondents as well as the interested party. I have also considered the submissions by all the concerned parties. The only issue for determination in this application is whether the applicant has demonstrated that she has a prima facie case against the two respondents to warrant issuance of injunctive orders against them.

9. The principles for grant of temporary injunctions were set out in the celebrated case of **Giella –Vs- Cassman Brown & Co. [1973] EA 358**. One of the principles is that the applicant has to demonstrate that he has a prima facie case with probability of success. A prima facie case was described in the case of **Mrao Ltd – Vs- First American Bank of Kenya Ltd. & 2 others (2 or 3) eKLR** as follows:-

“A *prima facie* case in 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 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.”

10. In the instant case, the first respondent has demonstrated that he was not the registered owner of the suit land as at the time the suit was filed. The first respondent had already sold his half share in the suit land to Mawega Company Limited on 1st October 2013. By 20th November 2013, Mawega Company Limited had obtained certificate of lease in its favour jointly with the second respondent. The applicant filed this suit on 26th February 2014. Had the applicant bothered to do a search, she would have realised that the first respondent no longer had interest in the suit property. It is therefore clear that no injunction orders can issue against the first respondent who has no interest in the suit property.

11. I have looked at the documents relied on by the applicant in laying her claim to the suit land. The agreement for sale of a share from Susan Ngendo to the applicant is dated 15th February 1989. The share certificate issued to her is dated 28th November 1984. The share certificate had a different name which appears to have been erased and the applicant’s name inserted on the same. It is not possible that one could be issued with a certificate before she purchased the share. In the sale agreement at the bottom of the same there are handwritten remarks “original owner – Peter Kimani”

12. There is no evidence to show that the share which the applicant bought from Susan Ngendo is the one which enabled her to be allocated the plot which upon registration became the suit land known as LR No. Nairobi Block 126/3. The second respondent has annexed documents to show that her late mother was a shareholder of the society as from the 60’s. There are receipts showing how she was given ballot number 5 which later became the suit land. The mother of the second respondent was given a letter of subdivision scheme approval from the Ministry of Lands showing that her plot was 126/3. From the documents relied on by the applicant, I find that the same have not disclosed a *prima facie* case against either the first or second respondents.

13. The interested party has already bought half share of the suit property. The interested party has already subdivided its half share and sold to third parties. An injunction cannot issue to affect innocent third parties who are not parties to the suit. The applicant annexed photographs showing that the property had been subdivided. The interested party annexed letters from the relevant authorities giving a go ahead to the subdivision and development of the suit land. A *prima facie* case is the cornerstone of the three principles in **Giella Case (Supra)**. Once one has failed to establish that she has a *prima facie* case, there is no point of considering the other principles. I therefore find that the applicant’s application lacks merit. The same is hereby dismissed with costs to the first and second respondents as well as the interested party.

It is so ordered.

Dated, Signed and delivered at Nairobi on the 27th day of June, 2017

E. O. OBAGA

JUDGE

In the presence of:-

M/s Wanjiru for 6th defendant who also holds brief for Mr

Kamau for the 1st and 2nd defendants

Court Assistant: Hilda

E. O. OBAGA

JUDGE