



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 188 OF 2016

ALEX MWANGI NGAYO.....PLAINTIFF

VERSUS

VICTORIA WAMBERE NGAYO.....1ST DEFENDANT

KEZZIAH FAITH NJERI.....2ND DEFENDANT

PETER WAWERU MURIUKI.....3RD DEFENDANT

JANE WAMBUI MUTUGI.....4TH DEFENDANT

MARITINA KAVESU MUTUGI.....5TH DEFENDANT

RULING

ALEX MWANGI NYAYO the plaintiff herein filed this suit on 16th November 2010 seeking orders that this Court declares that title to land parcel No. MWERUA/KABIRIRI/1112 was illegally and fraudulently transferred to the 1st defendant and cancellation of the resultant sub-divisions being MWERUA/KABIRIRI/3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, and 3673 (herein the suit properties) and the original parcel No. MWERUA/KABIRIRI/1112 be reconstituted and revert to the names of the deceased **ERASTUS NGAYO NDERI**. The basis of his claim is that land parcel No. MWERUA/KABIRIRI/1112 belonged to the late **ERASTUS NGAYO NDERI** who was the father to the plaintiff and 1st defendant. That on or about 13th August 2015, the 1st defendant fraudulently and unlawfully caused the said land parcel to be transferred into her names and so on 3rd December 2015, the plaintiff placed a caution thereon. That caution was however removed and the land sub-divided giving rise to the suit properties thus giving rise to this suit.

Simultaneously with that suit, the plaintiff filed a Notice of Motion seeking the following orders:

1. Spent.

2. Spent.

3. That the Honourable Court be pleased to issue an injunction restraining the defendants, their employees, agents and/or servants from transferring, disposing, cultivating, building or interfering in any way with the suit properties pending the hearing and determination of this suit.

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

That application which is the subject of this ruling is based on the grounds set out therein and supported by the plaintiff's affidavit dated 17th November 2016 to which is annexed several documents including the search certificates for the suit properties. It is the plaintiff's case that land parcel No. MWERUA/KABIRIRI/1112 belonged to their late father and the 1st defendant fraudulently transferred it into her names when their late father was on his death bed. That the transfer was not with the knowledge of the plaintiff or other family members and so on 3rd December 2015, the plaintiff placed a caution on the land to protect his interest. However, on 22nd December 2015, the 1st defendant filed **KERUGOYA CHIEF MAGISTRATE'S CIVIL CASE No. 307 of 2015** seeking to remove the caution which case is still pending. The 1st defendant, through unknown procedures, had the caution removed and divided the land giving rise to the suit properties which she then transferred to herself and the other defendants. That the 1st defendant had no title to transfer to the other defendants since the original land parcel No. MWERUA/KABIRIRI/1112 was family land to be shared between the family members.

The 1st and 2nd defendants filed grounds of opposition to the application terming it as incompetent, defective in law and not meeting the threshold of the grant of orders of injunction.

The 1st, 2nd and 3rd defendants filed their replying affidavits. The 1st defendant deponed that the land parcel No. MWERUA/KABIRIRI/1112 was transferred to her as a gift by her late father **ERASTUS NGAYO** who was of sound mind since she was the most trusted child and the one taking care of him. That following his death, the plaintiff and her siblings met and agreed on how to share the land and unanimously resolved that one acre to be sold to cater for the sub-division and transfer costs since none of them was willing to meet the costs. So she looked for purchasers who included the 2nd, 3rd, 4th and 5th defendants and entered into sale agreements with them in order to acquire costs of the sub-division and all this was done with the knowledge of her siblings. The plaintiff however lodged a caution on the land just when she was about to transfer the suit properties to the defendants and other siblings and so she filed **KERUGOYA CHIEF MAGISTRATE'S CIVIL CASE No. 307 of 2015** which is still pending. During the pendency of that suit, the plaintiff agreed to remove the caution following a meeting with the elders and the 1st defendant commenced the process of transferring the suit properties to the rightful beneficiaries. The plaintiff later changed his mind and filed this suit. That she resides and utilizes the land and if she is restrained from entering or cultivating it, she will be rendered homeless.

The 2nd defendant deponed that she is the registered proprietor of parcels No. MWERUA/KABIRIRI/3669 and 3670 which she purchased for value and in good faith from the 1st defendant having conducted due diligence and also having discussed with some of the plaintiff's siblings. She then took possession and has a crop on the said two parcels and an order restraining her would be prejudicial to her as she would not be able to access her crop. She annexed copies of her title deeds to parcels No. MWERUA/KABIRIRI/3669 and 3670, the sale agreement and a photograph of her crop – annexures **KEN 1 to KEN 3**.

The 3rd defendant similarly deponed that she is the registered proprietor of land parcels No. MWERUA/KABIRIRI/3665 and 3660 which she purchased from the 1st defendant in good faith after conducting a search and after having met and discussed the issues with some of the plaintiff's siblings. She then took possession and has a crop on the land and therefore any restraining orders would mean that her crop goes to waste and she would suffer loss.

The 4th and 5th defendants did not file any responses to the application.

The application was canvassed by way of written submissions which have been filed both by **MS MUTHIKE** advocate for the plaintiff and **MR. NGIGI** advocate for the 1st, 2nd and 3rd defendants.

I have considered the application, the grounds of opposition, the rival affidavits and annexures thereto as well as the submissions filed.

The following facts are not in dispute:

- 1. That the plaintiff and 1st defendant are siblings.***

2. That the original land parcel No. MWERUA/KABIRIRI/1112 was registered in the names of their late father ERASTUS NGAYO but has since been sub-divided resulting into the suit properties.

3. That some of the suit properties are registered in the names of the 1st defendant (MWERUA/KABIRIRI/3667, 3668, 3673, 3674, 3675 and 3676), land parcels No. MWERUA/KABIRIRI/3665 and 3666 are registered in the names of the 3rd defendant, parcels No. MWERUA/KABIRIRI/3669 and 3670 are registered in the names of the 2nd defendant, parcel No. MWERUA/KABIRIRI/3671 is registered in the names of the 4th defendant and parcel No. MWERUA/KABIRIRI/3672 is registered in the names of the 5th defendant.

The 1st defendant's case is that the original land parcel No. MWERUA/KABIRIRI/1112 was gifted to her by her late father which is denied by the plaintiff who claims that the transfer was obtained fraudulently by the 1st defendant who took advantage of their late father's illness and that the original land was family land. The 2nd and 3rd defendants on their part aver that they bought their resultant sub-divisions for value and in good faith and are now in possession of their respective parcels. Whether the land was indeed transferred to the 1st defendant by her late father as a gift or whether that transfer was procured fraudulently by the 1st defendant will be issues for the trial Court and cannot therefore be determined in this application. What the plaintiff needs to establish at this stage is if he has met the threshold for the grant of an interlocutory injunction to restrain the defendants from transferring, cultivating, building or interfering in any way with the suit properties.

An application for a temporary injunction pending trial has to be determined in line with the now well settled principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:

1. The applicant must show a prima facie case with a probability of success at the trial.

2. Secondly, a temporary injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages; and

3. Thirdly, if the Court is in doubt, it will decide such an application on the balance of convenience.

A prima facie case on the other hand was defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)** as:

“..... a case in 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”

In the case of **NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS 2014 e K.L.R**, the Court of Appeal outlined the key ingredients of a prima facie case and said:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance, or

as otherwise put, on a preponderance of probabilities”.

Finally, as was held in the case of *FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALES LTD 1986 3 ALL E.R 772*, a Court considering such an application should take the course that appears to take the lower risk of injustice should it turn out to have been “*wrong*”.

Considering all the above precedents and the pleadings and submissions herein, it is not in doubt that the suit properties are currently registered in the names of the defendants who would therefore be entitled to the protection of their titles as provided under Sections 24, 25 and 26 of the Land Registration Act. It is correct as held in the case of *MOSES WARUI GATIMU VS DOUGLAS MWAI MACHURU & ANOTHER KERUGOYA ENVIRONMENT AND LAND COURT CASE No. 786 of 2013 2014 e K.L.R* which has been cited by counsel for the 1st, 2nd and 3rd defendants, that it would be a rare case indeed to injunct a registered owner of a property. But of course if such registration is obtained through fraud, then the registered owner would not be protected by the provisions of *Section 26 of the Land Registration Act* because *Sub-sections (1)* thereof provides that such registration can be challenged on grounds of fraud, misrepresentation to which the person was a party or if the registration was acquired illegally, un-procedurally or through a corrupt scheme. At this stage, this Court cannot make definitive findings as to whether the ownership of the suit properties by the defendants was procured by fraudulent means as pleaded by the plaintiff or indeed any other corrupt means. That will be determined at the trial. Similarly, whether or not the original land parcel No. MWERUA/KABIRIRI/1112 was infact transferred to the 1st defendant by her late father as a gift or she took advantage of his poor health to transfer it to herself will also be issues for the trial Court. So too will be the issue whether or not the 2nd and 3rd defendants were purchasers for value and in good faith. What is clear, however, and has not been rebutted, is that the 2nd and 3rd defendants are in occupation of their respective parcels following the purchase of the same from the 1st defendant. Until their titles are declared to have been obtained fraudulently, they cannot be injuncted from occupying the suit properties. To do so would amount to evicting them before trial. But they can be injuncted from disposing or alienating the suit properties pending trial. It must be remembered that the main purpose of an interim order of injunction is to preserve the property in dispute while the issues regarding its ownership are interrogated. In my assessment of the evidence in this case, it is doubtful if the plaintiff has established the first two principles set out in the *GIELLA* case (supra). This application will therefore be determined on the balance of convenience.

The issue as to whether or not the defendants’ titles to the suit land were fraudulently or un-procedurally procured is yet to be determined. Meanwhile, at least the 2nd and 3rd defendants are in occupation of their respective parcels where they have a crop. To injunct them at this stage from cultivating or in any way accessing their respective parcels would amount to evicting them therefrom. I am not persuaded to issue such orders now. On the other hand, if the 1st, 2nd and 3rd defendants titles to their respective parcels of the suit properties are found, after trial, to have been obtained fraudulently, and no temporary injunction is granted to restrain them from selling or charging them, a greater injustice would have been occasioned to the plaintiff as the suit properties would be out of his reach. Greater prejudice will be occasioned to the plaintiff if he is denied the order of injunction and he succeeds at the trial than will be caused to the defendants if an injunction is granted to the plaintiff and they (defendants) prevail at the trial. That is the lower risk of injustice referred to in the *FILMS ROVER INTERNATIONAL* case (supra) cited to above. And that is the route that this Court must take bearing in mind that the defendants will not be prejudiced as they remain the registered proprietors of the suit properties awaiting the final orders of this Court after hearing the parties’ evidence. The plaintiff’s application will therefore be allowed only to the extent that the defendants, their agents, servants or those acting under them shall not sell, charge, construct on or in any other way dispose of the suit properties pending the hearing and determination of this suit. The defendants shall however be at liberty to access the suit properties and cultivate thereon.

Ultimately therefore, and upon considering all the matters herein, I would allow the plaintiff’s Notice of Motion dated 17th November 2016 but only to the following limited extent:

1. The defendants, their agents, servants or any persons acting under them shall not sell, charge,

construct on or in any other way dispose of the land parcels No. MWERUA/KABIRIRI/3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, 3673, 3674, 3675 and 3676 pending the hearing and determination of this suit or until further orders of this Court.

2. The parties to comply with the pre-trial directions so that this suit is heard and determined in the next twelve (12) months.

3. Costs shall be in the cause.

B.N. OLAO

JUDGE

16TH JUNE, 2017

Ruling delivered, dated and signed in open Court this 16th day of June 2017

Ms Kiragu for Ms Muthike for Plaintiff present

Ms Njiru for Mr. Ngigi for the 1st, 2nd & 3rd Defendants present.

B.N. OLAO

JUDGE

16TH JUNE, 2017