



Kamau & 3 others (Suing as the personal representatives of the Estate of Isaac Kamau Ndirangu) v Joem Consultants Limited & another (Environment & Land Case E230 of 2022) [2024] KEELC 1160 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1160 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E230 OF 2022
OA ANGOTE, J
FEBRUARY 29, 2024**

BETWEEN

**SUSAN WANJIRU KAMAU 1ST PLAINTIFF
PAULINE WAIRIMU KAMAU 2ND PLAINTIFF
MUTHONI KAMAU 3RD PLAINTIFF
JIMMY THUO KAMAU 4TH PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF ISAAC
KAMAU NDIRANGU**

AND

**JOEM CONSULTANTS LIMITED 1ST DEFENDANT
CHIEF LAND REGISTRAR NAIROBI 2ND DEFENDANT**

RULING

1. Before the Court for determination is the Plaintiffs' Notice of Motion dated 8th July 2022 and brought under Order 40 Rules 2 and 4 of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act* and Section 13(7) of the *Environment and Land Court Act*. The Plaintiffs are seeking for the following orders:
 - a. An order be issued pending the hearing and determination of this suit restraining the 1st Defendant from selling, alienating, charging or otherwise dealing in any way whatsoever with Title No. L.R No. 301516/26, IR 161316 or the derivative titles thereof, L.R No. 30516/37 IR 233642 and L.R No. 30516/38 IR 233643 (hereinafter 'the suit property') until further orders of the Court.



- b. The Court do issue any other order it deems just and expedient in the circumstances.
 - c. Costs of the application be provided for.
2. The application is based on several grounds and supported by an affidavit sworn by Susan Kamau, the 1st Plaintiff, who deponed that their deceased father acquired the suit property and was issued with a title on 2nd March 2015 and that sometime in 2016, they took over the management of their father's estate due to his old age.
 3. The 1st Plaintiff deponed that that they noted that the title to the suit property was missing, that a search at the land registry revealed that the suit property had been transferred to the 1st Defendant and that the deceased affirmed that he had never transferred the suit property to any third party.
 4. The deponent averred that the deceased died on 22nd November 2018 and the Plaintiffs were issued with letters of administration and that the impugned transfer was done on 13th March 2015, just 11 days after the suit property was registered in the name of the deceased and that there was no basis for the Kshs. 90,000,000 consideration that the deceased is said to have received.
 5. The deponent stated that the Plaintiffs conducted due diligence and found that the suit property had been subdivided into L.R o. 30516/37 1R 233642 and L.R No. 30516/38 1R 233643 and that the search at the registry revealed that the former piece of land was still registered in the name of the deceased. However, a physical copy of the title was in the name of the 1st Defendant.
 6. It was deponed by the 1st Plaintiff that the 1st Defendant irregularly and fraudulently transferred the suit property to itself; that the Plaintiffs as beneficiaries of the estate of the deceased have a legitimate expectation to have their proprietary rights respected; that the 1st Defendant has shown intention to dispose of the suit property; and that the intended disposal could extinguish the Plaintiffs' proprietary rights.
 7. The deponent also stated that the Plaintiffs stand to suffer irreparable harm from the intended disposal of the suit property by the 1st Defendant. In conclusion, it was stated that the balance of probabilities tilted in favour of the Plaintiffs as they will be irreversibly prejudiced if at the conclusion of the main suit it is found that the transfer to the 1st Defendant was fraudulent.
 8. The 1st Defendant filed a Replying Affidavit sworn by its director, Emmanuel Okello, who deponed that the 1st Defendant is a real estate company which has been in operation since 2014 and that he met the deceased in 2009 and assisted him in processing the requisite documents for the suit property.
 9. It was deponed by the 1st Defendant's Director that they became good friends with the deceased and the deceased offered to sell to the 1st Defendant the suit property and that a sale agreement was executed by the parties and upon payment of the purchase price, a transfer was executed in favour of the 1st Defendant.
 10. The deponent averred that forensic investigations were carried out which revealed that the sale agreement and transfer were duly executed by the vendor and the spouse had executed the spousal consent and that consequently, the file that had been opened at the Directorate of Criminal Investigations was closed.
 11. The deponent further stated that the 1st Defendant opted to subdivide and sell the suit property due to frustrations occasioned by the Plaintiffs and that the subdivisions of the suit property have been sold to third parties and the prayer for injunctive relief as sought by the Plaintiffs has since been overtaken by time.



12. In conclusion, the deponent stated that the Plaintiffs' claim is barred by the *Limitation of Actions Act* as the sale agreement was executed on 4th March 2015 while the transfer was executed on 9th March 2015 and registered on 13th March 2015, a period of more than seven years.
13. The 1st Defendant's Director filed a Further Affidavit in which he reiterated that the subdivisions of the suit property had already been sold to third parties with L.R No 30516/37 having been transferred to third parties following a consent entered into in ELC Case No. 154 of 2018.
14. Both parties filed submissions and authorities which I have considered.

Analysis and Determination

15. The conditions for the grant of a temporary injunction were set out as follows in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.
16. In the case of *Mrao Ltd. v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 the Court defined a prima facie case as follows:

“In civil cases, a prima facie case is 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's cause upon trial. That is clearly a standard, which is higher than an arguable case.”
17. It is not in dispute that at one point, the deceased owned the suit property. The Plaintiffs (who are the personal representatives of the deceased) have stated that the alleged transfer of the suit property to the 1st Defendant was fraudulent. They have stated that they have *prima facie* case with chances of success on account of the alleged fraud.
18. It is the Plaintiffs' case that the spousal consent was a forgery and that the transfer was voidable as there was no proven consideration in the case. The 1st Defendant has argued that the transfer was legal as evidenced by the sale agreement and transfer on record. According to the 1st Defendant, the forensic examiner's report concluded that the signatures on the stated documents were valid.
19. The right that the Plaintiffs are alleging has been violated is that they have proprietary/ownership interests in the suit property as personal representatives of the deceased. The right has apparently been infringed by the 1st Defendant whom they allege illegally acquired the suit property.
20. As per the forensic examiner's report, the signature on the spousal consent form dated 9th March 2015 was different from that of the deceased's spouse known signature that was in the documents presented for comparison. This in itself creates doubt on the entire transaction.



21. Section 12(1) of the *Matrimonial Property Act* provides as follows:
- “An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.”
22. The spousal consent is an integral part of any transfer dealing with matrimonial property. The fact that the authenticity of the spousal consent on record has been called into question also leads to questions about the validity of the same as well as the validity of the transfer it was meant to support.
23. The 1st Defendant has alleged that he paid the deceased Kshs. 90,000,000 for the suit property. He has produced the sale agreement and transfer in support of this assertion. The Plaintiffs have questioned this by asserting that there was no proof of such payment. In my view, the lack of any documentary evidence of such a substantial amount calls into question whether the transaction happened. This in turn calls into question the validity of the sale agreement as consideration is an essential part of any agreement.
24. Indeed, the burden to prove payment of the purchase price rested on the 1st Defendant. In the instant matter the 1st Defendant *prima facie*, failed to discharge that proof. There was no evidence that the deceased was paid the purchase price and consequently, *prima facie*, there was lack of consideration for the contract. The lack of consideration is likely to vitiate a contract, thus rendering it null and void.
25. In view of the foregoing, I find that the Plaintiffs have established a prima facie case with chances of success.
26. On the issue of irreparable harm, the Plaintiffs have stated that they will suffer irreparable harm if the injunctive orders are not granted as the 1st Defendant could sell the suit property to third parties who would be considered bona-fide purchasers.
27. The 1st Defendant has argued that the quest for injunctive orders has been overtaken by events because it has sold the suit property to third parties. A consent entered into in ELC No. 154 of 2018 with third parties and copies of sale agreements was annexed on the Affidavit.
28. The 1st Defendant has however not exhibited any evidence to show that the transfer of the sub divisions to the third parties took place, other than a title that shows that part of the suit property was transferred to Dash Energy Limited.
29. In any event, the third parties who have purchased the land can still be joined in this suit. The mere fact that the suit property has been transferred to third parties cannot be a reason to deny a party injunctive orders, especially where such a party was not involved in the transfer of the suit property to the third party, or was not aware of the said transfer.
30. The 1st Defendant has also claimed that being a claim founded on a contract executed more than seven years ago, the Plaintiffs’ claim is statute barred. However, upon perusal of the Plaintiff, I am of the view that the action as framed is an action for recovery of land which can be brought within twelve years, and not an action founded on contract as alleged by the 1st Defendant. The claim is therefore not statute barred.
31. In view of the foregoing, I find that the Plaintiffs’ claim for injunctive relief has merit. The application dated 8th July, 2022 is hereby allowed as follows:
- a. An order be and is hereby issued pending the hearing and determination of this suit restraining the 1st Defendant, or any one claiming under it, from selling, alienating, charging or otherwise



dealing in any way whatsoever with Title No. L.R No. 301516/26, IR 161316 or the derivative titles thereof, L.R No. 30516/37 IR 233642 and L.R No. 30516/38 IR 233643.

b. The 1st Defendant to pay the costs of the application.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY IN NAIROBI THIS 29TH FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kiplagat for Koyyoko for 1st Respondent

Ms Ondieki holding brief for Kofu for Plaintiff/Applicant

Court Assistant - Tracy

