



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 341 OF 2013a

NAOMI WANGUI KURIA.....PLAINTIFF

VERSUS

HARRISON KARANJA NJIHIA.....1ST DEFENDANT

ONESMUS GACHUHI GITHINJI2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

GITHUNGURI CONSTITUENCY

RANCHING COMPANY LIMITED.....4TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 3rd July 2014 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendants/Respondents from selling, transferring, building, digging, excavating, trespassing, developing, leasing, charging or dealing in any manner whatsoever with the parcel of land known as Ruiru/Ruiru East Block 1/1350 and the resultant subdivisions thereof being Ruiru/Ruiru East Block 1/4226-4231 (hereinafter referred to as the “suit properties”) pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Naomi Wangui Kuria, sworn on 3rd July 2014, in which she averred that she owns the suit properties. She averred that the suit properties were fraudulently transferred by the 4th Defendant to the 1st Defendant who subsequently transferred the same to the 2nd Defendant through the Commissioner of Lands and the Land Registrar Thika. She stated that she is apprehensive that the suit properties may be disposed of before this suit is heard and determined.

The Application is contested. The 2nd Defendant, Onesmus Gachuhi Githinji, filed his Replying Affidavit sworn on 18th July 2014 in which he averred that he purchased the land parcel Ruiru/Ruiru East Block 1/1350 from the 1st Defendant at a price of Kshs. 5,500,000/-. He annexed the Sale Agreement in support of this assertion. He further stated that prior to the said purchase, he physically inspected the land and confirmed that it was vacant and undeveloped. He further averred that he carried out a search on the said

land at the Thika Lands Registry which confirmed that indeed the 1st Defendant was the registered owner thereof. He annexed a copy of the 1st Defendant's Title Deed. He confirmed that the said land parcel was transferred to him upon which he proceeded to subdivide it into 6 parcels comprising the suit properties. He annexed copies of the titles, Land Control Board consent, mutation form and valuation report. He stated that having done proper due diligence, he is an innocent purchaser for value without notice. It was his averment that in the circumstances, the Plaintiff has not disclosed a prima facie case with a probability of success and that the prayers sought by her in this Application should not be granted.

Both the Plaintiff and the 2nd Defendant filed their written submissions.

The issue arising in this Application for my determination is whether or not to issue the order of temporary injunction that the Plaintiff/Applicant seeks. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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 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.”

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must warn the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

With that background laid down, I turn to assessing whether or not the Plaintiff has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial. The Plaintiff/Applicant claims that she owns the land parcel known as Ruiru/Ruiru East Block 1/1350 which has since been subdivided into 6 portions being the suit properties. It is her contention that this parcel belongs to her. She has, however, not produced any sale agreement or document of title to support her assertion of ownership. The law on the issue of disposition of an interest in land is very clear. The **Law of Contract Act at section 3(3)** clearly indicates as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) The contract upon which the suit is founded

a. Is in writing

b. Is signed by all the parties thereto: and

c. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party..."

Going by these legal provisions, the Plaintiff fails in demonstrating her ownership of the suit properties as she has not produced any documentary evidence upon which she relies. The Plaintiff has conceded that the suit properties are now registered in the name of the 2nd Defendant but she contends that the transfer to the 2nd Defendant was fraudulent. The 2nd Defendant has exhibited copies of his title deeds to the suit properties which were issued on 7th April 2011. The 2nd Defendant produced all the necessary documents to demonstrate that he purchased the land from the 1st Defendant who also held a title deed to the parcel of land. He annexed a copy of the 1st Defendant's title deed. The law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the Land Registration Act provides as follows:

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

The Plaintiff alleges that the transfer of the suit property to the 2nd Defendant was effected by way of fraud. The standard of proof in fraud is higher than a balance of probability but falls short of proof beyond reasonable doubt. In the case of **Koinange & 13 others –vs- Koinange (1986) KLR 23** the Judge relied on the decision in the *Ratilal Patel v Lalji Makanji [1957] EAR 314-317* and held as follows,

"There is one observation which we must make- burden of proof – standard of proof required – allegations of fraud must be strictly proved, although that standard of proof may not be so heavy as to require proof beyond reasonable doubt. Something more than a balance of probability is required"

Even at this interlocutory stage of the proceedings, I have not seen any evidence produced by the Plaintiff that goes to establish that the transfer of the suit property to the 2nd Defendant was effected by way of fraud other than the bland statement in her Supporting Affidavit. On the other hand, the 2nd Defendant has gone to great length to demonstrate how he came to be the registered proprietor of the suit properties. I consider that the Plaintiff has failed to convince this court that the 2nd Defendant is guilty of any fraud. The Plaintiff has not discharged the burden of proof for her allegation of fraud. Arising from this, I find that the Plaintiff has not established that she has a prima facie case with a probability of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of *Giella versus Cassman Brown*, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

"The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only

be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

In light of the foregoing, I hereby dismiss the Plaintiff’s Application. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE