



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 147 OF 2017

PAUL NDIRANGU MUTHONI..... PLAINTIFF/APPLICANT

-VERSUS-

KUTAI MATENDE RICHARD 1ST DEFENDANT

MARY MUTHONI NDIRANDGU 2ND DEFENDANT

RULING

1. By a chamber summons brought under **Order 40 Rule 1(A)** and 2 of the Civil procedure Rules dated **26th February 2013**, the plaintiff/applicant Paul Ndirangu Muthoni, brought this application against the defendants/respondents seeking, among other orders, a temporary injunction to restrain the 1st defendant either by himself, his servants and/or agents from alienating, encumbering, selling, disposing off, partitioning or in any way interfering with the current status of Land parcel **Laikipia Nanyuki Marura block 111/447(sweet waters)** (the suit property) pending the hearing and determination of this case.
2. The application is not opposed.
3. The respondents were duly served with the application, plaint and chamber summons (see paragraphs 3 and 5 of the affidavit of service sworn by **Teobald Maina Kihia** on 2nd October 2017) but none of the respondents opposed the application or presented themselves for the hearing of the application.
4. During the hearing, the applicant chose to rely on the application, the grounds on its face and his supporting affidavit sworn on **18th September, 2017**. In that affidavit, he deposes that the 1st respondent together with others, tricked his mother (the 2nd respondent) to enter into a secret sale agreement with them and illegally transfer the suit property to them. It is his contention that the 1st respondent, who has since caused the suit property to be registered in his name, is in the process of subdividing it and if not stopped by this court, this suit will be overtaken by events.
5. In support of his case, the applicant has annexed copies of title deeds for the suit property. One title deed showing the 1st respondent as the current registered owner having been issued with the title deed for the suit property on 13th July, 2017 and the other showing the 2nd respondent as registered owner having been issued with a title deed for the suit property in December 1988. He has also annexed a sale agreement dated 20th June, 2017 between the 1st and 2nd defendants drawn by the firm of Kivuva Omuga & Company Advocates and executed by both parties.

6. The principles to be considered on whether to grant an interlocutory injunction relief were clearly set out in the case of **Giella Vs Cassman Brown** (1973) E.A 358. Before granting the injunction the court will consider whether:

1. The applicant has shown that he has a *prima facie* case with a probability of success.

2. Damages will be an adequate remedy and

3. On the balance of convenience, should the court be in doubt, it will determine the matter on a balance of convenience.

7. I have considered the application, the grounds on which the application is premised, the supporting affidavit and the annexures.

8. In paragraph 5 of the plaint, the plaintiff has deposed that he was given authority by his siblings to file this suit on their behalf and on his own behalf. I have perused the court record but I have not come across any authority to plead filed by the applicant on behalf of his siblings. Secondly, when I interrogated the applicant during the hearing of the application on where his family lives, he confessed that they do not live on the suit property but live on a different parcel of land. This is contrary to what is deposed in paragraph 10 of his plaint where he states as follows:

“We have no other place to settle on. We only relied on the said parcel of land to develop and settle our families. Therefore the said transaction has rendered us destitute and landless”.

Thirdly, although the applicant has alleged that their mother has always made him and his siblings understand that the suit property belonged to them; that she was holding the suit property in trust for them and that she was tricked into selling the suit property by the 1st respondent, the applicant has failed to produce any evidence to prove these allegations.

9. Under **Section 107** of the Evidence Act, Cap 80 the applicant has the burden to prove his assertions but he has failed to table any evidence to prove the existence of those facts.

10. In view of the forgoing, I find and hold that the applicant has not made up a *prima facie* case with probability of success.

11. On whether damages will be an adequate remedy, this being a land matter, whose value is ascertainable, I find that damages can be easily assessed and the applicant compensated by way of damages.

12. Finally, I find the balance of convenience tilts in favour of the 2nd respondent who is not only the registered proprietor of the suit but is also in possession. Under **Section 26** of the Land Registration Act 2012 courts should take a certificate of title as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner.

13. For the reasons given I find the application without merit and I dismiss it with no order as to costs since the defendant did not enter appearance.

Dated, signed and delivered at Nyeri this 4th day of October, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Paul Ndirangu – plaintiff

N/A for the defendants

Court assistant - Esther