



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT .AT KERUGOYA

ELC CASE NO. 293 OF 2014

IBRAHIM MURIITHI MUTUGI (Suing as the Administrator and legal representative
of the Estate of **MUTUGI NGURI KIMBIRU (Deceased)**.....**PLAINTIFF**

VERSUS

MARGARET WANGECHI KAROKI**1ST DEFENDANT**

JOHN MUNENE ANDEREA.....**2ND DEFENDANT**

RULING

This is in respect to the 1st defendant's Notice of Motion dated 16th June 2017 seeking the following orders:

- (a) An order be issued inhibiting and prohibiting any and all dealings in land title No. MWERUA/KAGIO/522 until this case is heard and determined or until further orders of this Court.***
- (b) The Land Registrar Kirinyaga be ordered not to register any dealings whatsoever in the title No. MWERUA/KAGIO/522 until the suit is heard and determined or until further orders of the Court.***
- (c) An order do issue against the plaintiff and all his servants, agents and any other person whosever claiming through or under him from interfering with the 1st defendant's portion of what was title No. MWERUA/KAGIO/522 until further orders of the Court.***
- (d) In the alternative, an order do issue directing the Land Registrar Kirinyaga to immediately reinstate title No. MWERUA/KAGIO/714 and MWERUA/KAGIO/715 to conform with the status subsisting as at 12th November 2014 when this suit was commenced by the plaintiff.***
- (e) Such further or other orders as may be made as are just and expedient.***
- (f) The costs of this application be paid by the plaintiff.***

The application is based on the grounds set out therein and supported by the affidavit of **MARGARET WANGECHI KAROKI** the 1st defendant.

The gravamen of this application is that the 1st defendant is the registered proprietor of land parcel No.

MWERUA/KAGIO/714 which is one of two sub-division of land parcel No. MWERUA/KAGIO/522 and which he purchased from the plaintiff's father **MUTURI NGURI** in 1973 for valuable consideration having obtained the necessary consent. The other sub-division is parcel No. MWERUA/KAGIO/715. However, on 12th November 2014, the plaintiff filed this suit claiming that the sub-division of the original land parcel MWERUA/KAGIO/522 into parcels No. MWERUA/KAGIO/714 and 715 was fraudulent and that those titles should be cancelled and revert to the original MWERUA/KAGIO/522 which should be declared as the property of the plaintiff's deceased father **MUTUGI NGURI**.

The record shows that an ex-parte judgment was subsequently entered against the defendants on 20th March 2015. That judgment was set aside vide this Court's ruling dated 31st March 2017 after it was established that the defendants were not properly served. Indeed it turned out that the 2nd defendant is deceased. The 1st defendant's case is that following the revocation of title No. MWERUA/KAGIO/714 and 715, the plaintiff has started selling land parcel No. MWERUA/KAGIO/522 to third parties and has up-rooted the boundaries to land parcel No. MWERUA/KAGIO/714 belonging to him and land parcel No. MWERUA/KAGIO/715 belonging to the deceased 2nd defendant. All this was done notwithstanding this Court's ruling dated 31st March 2017 setting aside the judgment earlier obtained. Further, it is the 1st defendant's case that the plaintiff's actions border on the criminal in that, while he was aware about this Court's ruling delivered on 31st March 2017, he nonetheless proceeded with succession proceedings in **BARICHO SENIOR PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE No. 289 of 2016** and had himself declared as the heir to the land parcel No. MWERUA/KAGIO/522.

The application is opposed and in a replying affidavit, the plaintiff has deponed, inter alia, that he followed the right steps in filing **BARICHO SENIOR PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE No. 289 of 2016** and the 1st defendant did not file any protest to stop the transmission of land parcel No. MWERUA/KAGIO/522 to him and his ownership thereof is absolute and cannot be defeated as it is protected by **Section 26 of the Land Registration Act 2012**. He is therefore at liberty to invite any willing buyer and has not disobeyed any Court order. That the 1st defendant is not in possession of any part or the whole of land parcel No. MWERUA/KAGIO/522. The 1st defendant is not therefore deserving of any of the orders sought as she has not met the threshold in the case of **GIELLA VS CASSMAN BROWN 1973 E.A. 358** and it would be a miscarriage of justice to grant the orders sought since the Land Registrar is not a party. That his late father did not sell the property in question and there is no sale agreement to that effect.

The application has been canvassed by way of written submissions which have been filed both by **MR. GICHUKI** instructed by **WAIGANJO GICHUKI & CO. ADVOCATES** for the 1st defendant and **MR. OMENYA** instructed by the firm of **F.K. OMENYA & CO. ADVOCATES** for the plaintiff.

I have considered the application, the rival affidavits and the submissions by counsel.

The application is premised under the provisions of ***Sections 3 and 19 of the Environment and Land Court Act, Section 68 of the Land Registration Act and Sections 1A, 1B and 3A of the Civil Procedure Act.***

It is not in dispute that prior to 12th November 2014 when the plaintiff filed this suit seeking the revocation of titles No. MWERUA/KAGIO/714 and 715, the title No. MWERUA/KAGIO/714 was registered in the names of the 1st defendant while title No. MWERUA/KAGIO/715 was registered in the names of the 2nd defendant who is deceased. The two parcels were sub-divisions of land parcel No. MWERUA/KAGIO/522 which was at all material times registered in the names of the plaintiff's deceased father **MUTURI NGURI KIMBIRU**. As indicated above, the plaintiff through an ex-parte judgment delivered by this Court on 20th March 2015 obtained orders revoking those sub-divisions for having been obtained fraudulently and declared that land parcel No. MWERUA/KAGIO/522 is the property of the deceased **MUTURI NGURI KIMBIRU**. That judgment and all consequential orders were however set aside vide this Court's ruling dated 31st March 2017. The import of that ruling was that

the position subsisting as at 12th November 2014 was reinstated which means that until set aside by another judgment of this Court, titles No. MWERUA/KAGIO/714 and 715 are good titles. In any case, no proper judgment could have been obtained against the deceased 2nd defendant without involving his Estate yet he is the registered proprietor of land parcel No. MWERUA/KAGIO/715.

As registered proprietor of land parcel No. MWERUA/KAGIO/715, the 1st defendant would therefore enjoy all the rights that are appurtenant thereto as provided by Section **24 of the Land Registration Act**. The plaintiff's case is that contrary to the 1st defendant's claim that the deceased **MUTURI NGURI KIMBIRU** sold to her the land parcel No. MWERUA/KAGIO/714, no such sale took place and that the registration of the 1st and 2nd defendants as proprietors of land parcels No. MWERUA/KAGIO/714 and 715 was done fraudulently. That may or may not be correct. That issue will have to await the determination by this Court after trial. However, the consequence of setting aside the ex-parte judgment obtained on 20th March 2015 is that the title issued to the 1st defendant in respect to land parcel No. MWERUA/KAGIO/714 remains a good title until set aside by this Court. The same applies to the title No. MWERUA/KAGIO/715 registered in the names of the 2nd defendant.

Having confirmed the above status, the 1st defendant by his application is seeking orders of inhibition against any dealings with land parcel No. MWERUA/KAGIO/522, an order restraining the plaintiff, his servants, agents and any other person whosoever from interfering with his portion of what was title No. MWERUA/KAGIO/522 or in the alternative, an order to the Land Registrar to reinstate titles No. MWERUA/KAGIO/714 and 715 to the status subsisting as at 12th November 2014 when this suit was commenced. I have already made a finding that following the setting aside of this Court's ex-parte judgment dated 20th March 2015, the position is that the 1st defendant remains the registered proprietor of land parcel No. MWERUA/KAGIO/714 while land parcel No. MWERUA/KAGIO/715 remains registered in the names of the 2nd defendant. This is pursuant to this Court's ruling dated 31st March 2015 in which I made the following substantive orders among others:

1: "The judgment dated 20th March 2015 and the evidence taken thereupto and all consequential orders in furtherance thereof are hereby set aside" Emphasis added.

The plaintiff has taken issue with the fact that the Land Registrar is not a party to this suit and therefore the orders sought are not available. However, it is the plaintiff who moved to this Court by his plaint dated 12th November 2014 and filed in this Court on the same date and he did not enjoin the Land Registrar as a party. Yet, upon getting the ex-parte orders dated 20th March 2015, he proceeded to have the said Land Registrar revoke the title No. MWERUA/KAGIO/714 and 715. He cannot now complain that the Land Registrar should have been made a party to this suit yet he was the one who filed it without enjoining the Land Registrar. That averment does not aid his case.

Having made an order reinstating land parcels No. MWERUA/KAGIO/714 and 715 to the position subsisting as at 12th November 2014, it follows that the 1st defendant as the registered proprietor of land parcel No. MWERUA/KAGIO/714 is entitled to the enjoyment of all the rights and privileges that go with such registration until the same is revoked by Court after trial. The registration of land parcel No. MWERUA/KAGIO/714 in the 1st defendant's names and also that of land parcel No. MWERUA/KAGIO/715 in the names of the deceased 2nd defendant is evidence that they are, prima facie, the absolute and indefeasible owners of those parcels of land until such registration is set aside as provided under **Section 26 (1) of the Land Registration Act**. In my view therefore, the 1st defendant has established a prima facie case as set out in the case of **GIELLA VS CASSMAN BROWN LTD 1973 E.A 358**. The 1st defendant has stated that the plaintiff has now started up-rooting the boundaries of the land parcels No. MWERUA/KAGIO/714 and 715 and erecting his own fence. That has not been rebutted and would amount to a trespass and as was held in the case of **JAJ SUPER CASH AND CARRY LTD VS NAIROBI CITY COUNCIL AND OTHERS C.A CIVIL APPEAL No. 111 of 2002:**

"This Court has recognized and held in the past that it is the trespasser who should give way

pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it”.

I would also echo the words of **WAKI J.** (as he then was) that it is no answer to any application for injunction that the applicant may be compensated in damages. No amount of money can compensate the infringement of a right or atone for a clear transgression against the law – **MOHAMED VS COMMISSIONER OF LANDS & OTHERS K.L.R (E & L) 1**. The 1st defendant has therefore met the second test in the **GIELLA** case (supra) and if there was any doubt, the balance of convenience would tilt in favour of granting the order restraining the plaintiff, his servants, agents or those acting under him from interfering with the 1st defendant’s land parcel No. MWERUA/KAGIO/714. The up-shot of the above is that 1st defendant’s Notice of Motion dated 16th June 2017 is allowed in the following terms:

1. An order is issued directing the Land Registrar to immediately reinstate titles No. MWERUA/KAGIO/714 and MWERUA/KAGIO/715 to conform with the status subsisting as at 12th November 2014 when this suit was commenced by the plaintiff.

2. An order of temporary injunction restraining the plaintiff, his agents, servants and any other person claiming through him from interfering with the 1st defendant’s title No. MWERUA/KAGIO/714 until the hearing and determination of this suit.

3. Costs shall be in the cause.

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

B.N. OLAO

JUDGE

10TH NOVEMBER, 2017

Ruling dated, delivered and signed in open Court this 10th day of November 2017 at Kerugoya

Mr. Gichuki for 1st Defendant present

Mr. Omenya for Plaintiff absent.

B.N. OLAO

JUDGE

10TH NOVEMBER, 2017