



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
THIKA LAW COURTS

ELC.286 OF 2017

(FORMERLY CONSTITUTIONAL PETITION NO.106 OF 2016 - NBI)

ALFRED NGANGA NJAU.....1<sup>ST</sup> PETITIONER/APPLICANT

MARGARET NJOKI NJAU.....2<sup>ND</sup> PETITIONER/APPLICANT

- VERSUS-

THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

CHIEF MAGISTRATE'S COURT, THIKA.....2<sup>ND</sup> RESPONDENT

LEONARD NJAU NJOROGE.....3<sup>RD</sup> RESPONDENT

JOYCE WANGUI MWANGI.....4<sup>TH</sup> RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated **23<sup>rd</sup> March 2016**, brought by the Petitioners/Applicants herein who have sought for the following orders:-

**1) Spent.**

**2) That a temporary injunction order do issue restraining the 4<sup>th</sup> Respondent by herself, her agents, servants and/or employees from partitioning, entering into, alienating and/or in any way dealing with suit plot known as Title No.Ruiru/Kiu/Block 1/372 and/or interfering with the 1<sup>st</sup> Petitioner's/Applicant's quiet peaceable possession thereof, pending the hearing and determination of the application herein and the Petition.**

**3) That the costs of this application be provided for.**

**4) That such other and/or further relief be granted as this Honourable Court may deem fit and just to grant in the circumstances of this matter.**

This application is based on the following grounds:-

**i. Sometimes in 1985, the 2<sup>nd</sup> Petitioner and the 3<sup>rd</sup> Respondent who are the parents of the 1<sup>st</sup>**

***Petitioner/Applicant jointly bought a share for the 1<sup>st</sup> Petitioner/Applicant from Mwanamuki Society (the Company) and consequent to which a share certificate was issued in the name of the 1<sup>st</sup> Petitioner/Applicant. On the basis of the said share, the 1<sup>st</sup> Petitioner/Applicant was allotted Plot No.372 (original No.743)***

***ii. Vide a purported agreement dated 14<sup>th</sup> April 1988 (while the 1<sup>st</sup> Petitioner/Applicant was still a minor), the 3<sup>rd</sup> Respondent fraudulently and without the knowledge, consent and/or authority of the 2<sup>nd</sup> Petitioner/Applicant purported to sell the suit plot to the 4<sup>th</sup> Respondent.***

***iii. Sometimes in January 2011, the 1<sup>st</sup> Petitioner was summoned to appear at the DO's office on 3<sup>rd</sup> February 2011, at Githurai Land Disputes Tribunal (the Tribunal) for a hearing of an alleged dispute being DO Case No.3 of 2011, instituted by the 4<sup>th</sup> Respondent against him over the suit plot pursuant to the purported sale agreement whereas he was neither privy to the same nor had he been served with any documents in respect thereto.***

***iv. On the said 3<sup>rd</sup> February 2011, the tribunal without giving the 1<sup>st</sup> Petitioner/Applicant an opportunity of being heard proceeded to make an award in favour of the 4<sup>th</sup> Respondent vide which it ordered the 1<sup>st</sup> Petitioner/Applicant to transfer a ½ share of the suit plot to the 4<sup>th</sup> Respondent on the basis of the purported agreement for sale and which award was confirmed as a Judgement of the Chief Magistrate's Court at Thika in DO Case no.3 of 2011 on 28<sup>th</sup> March 2011.***

***v. Being aggrieved by the said award and the Judgement of the Chief Magistrate's Court at Thika, the 1<sup>st</sup> Petitioner lodged an Appeal at the High Court of Kenya at Nairobi, being Civil Appeal No.169 of 2011, but which Appeal was subsequently withdrawn on 20<sup>th</sup> May 2015, as the same was premature as the 1<sup>st</sup> Petitioner/Applicant ought to have first exhausted the remedy/procedure provided under the Land Disputes Tribunal Act No.8 of 1990 (now repealed).***

***vi. On 16<sup>th</sup> October 2015, the 1<sup>st</sup> Petitioner/Applicant filed an application at the Chief Magistrate's Court at Thika in DO Case no.3 of 2011 seeking inter alia, for an order of review and/or setting aside of the Judgement/Decree of the court aforesaid made on 28<sup>th</sup> March 2011, confirming the Tribunal's award as the Judgement of the court on the ground that the Tribunal did not have any jurisdiction to entertain the dispute since the dispute was in substance over the ownership of the suit plot which was outside the tribunal's jurisdiction.***

***vii. Vide an order made on 28<sup>th</sup> January 2016, in the said DO Case No.3 of 2011, the 1<sup>st</sup> Petitioner's/Applicant's said application for review was struck out on the ground that the Court did not have jurisdiction by dint of Section 7(2) of the Land Disputes Tribunal, Act No.8 of 1990 (now repealed) and subsequent to which the interim order of stay granted in favour of the 1<sup>st</sup> Petitioner/Applicant was discharged and/or became spent.***

***viii. Pursuant to the said order of Chief Magistrate's Court at Thika in DO Case no.3 of 2011 of 28<sup>th</sup> March 2011, confirming the award of the Tribunal, the 4<sup>th</sup> Respondent caused herself to be registered as a co-proprietor of the suit plot with the 1<sup>st</sup> Petitioner/Applicant and is now in the process of causing the same to be partitioned into two equal portions so as to have her issued with a separate title in respect of her ½ share.***

***ix. The said Tribunal's award which was confirmed as a Judgement of this Chief Magistrate's Court at Thika in DO Case no.3 of 2011 on 28<sup>th</sup> March 2011, is not only a nullity for want of jurisdiction but the same is in violation of the 1<sup>st</sup> Petitioner's constitutional right to own property and the rules of natural justice as the 1<sup>st</sup> Petitioner/Applicant was not given an opportunity to be heard, hence the Petition herein.***

x. ***The 1<sup>st</sup> Petitioner/Applicant is apprehensive that unless the 4<sup>th</sup> Respondent is restrained by an order of this Honourable court, she will no doubt proceed to cause the partitioning of the suit plot into two portions so as to have a separate title issued to her in respect of her purported ½ share, hence the urgency.***

The application is also supported by the affidavit of ***Alfred Nganga Njau***, wherein he reiterated the contents of the Supporting Affidavit. He urged the Court to allow the instant application.

Though the Attorney General entered appearance on behalf of the 1<sup>st</sup> & 2<sup>nd</sup> Respondents, he did not file any Replying Affidavit or response to the instant Notice of Motion. The 3<sup>rd</sup> Respondent did not enter appearance nor file any response to the instant application.

However, the 4<sup>th</sup> Respondent entered appearance through the ***Law Firm of Mutua Mathuva & Co. Advocates*** and filed her Replying Affidavit on ***24<sup>th</sup> May 2016***, in opposition to the application herein.

***Joyce Wangui Mwangi***, the 4<sup>th</sup> Respondent averred that the rights of the 1<sup>st</sup> Petitioner/Applicant vis-à-vis hers in respect of the property known as ***Ruiru/Kiu Block 1/372*** have already been decided through a legal process by competent bodies as by law mandated. She further averred that the dispute having been delt by the relevant bodies and decided through a legal process, then litigation must come to an end and the dispute herein is *resjudicata*. It was her contention that the dispute having started as a land dispute matter at the Land Tribunal, then this matter could only reach the High Court as an Appeal form the Provincial Appeals Board on issues of law or Judicial Review and therefore this Court has no original jurisdiction on the dispute. She also averred that the instant application lacks merit and does not meet the threshold for grant of injunctive orders. She urged the Court to dismiss the application with costs.

The application was canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the whole pleadings and the annexures thereto. The Court will determine the issues as follows:-

It is evident that the Applicants herein have sought for an order of injunction which is an equitable relief granted at the discretion of the court. However the said discretion must be considered judicially. See the case of ***David Kamau Gakuru...Vs..National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001***, where the Court held that”-

***“It is trite that the granting of interim injunction is an exercise of Judicial discretion and an Appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially”***

Further as the Court determines the issues herein, it will take into account that at this juncture, it is not called upon to determine the disputed issues with a finality especially based on affidavit evidence. See the case of ***Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002***, where the court held that:

***“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”***

The criteria that the Court will use to determine whether the Applicant is deserving of the orders sought is the one set out in the case of ***Giella...Vs...***

***Cassman Brown & Co. Ltd 1973, EA 358***. These criterias are:

- a) ***The Applicant must establish that he has a prima facie case with probability of success.***
- b) ***That the Applicant will suffer irreparable loss which cannot be adequately compensated in***

*any way or by an award of damages.*

*c) When the Court is in doubt, to decide the case on a balance of convenience.*

The Court will now consider the available evidence and then juxtapose it with the set criteria for grant of injunctive orders to determine whether the Applicants have met the threshold for grant of the sought orders.

There is no doubt that the Applicants herein have filed a Petition against the Respondents seeking for various orders among them a declaration that the proceedings both before the Githurai Land Disputes Tribunal and the Chief Magistrate's Court at Thika being **LDT No.3 of 2011** contravened the rules of natural justice and the Applicants' rights under Articles 40(2), 47(1) and 50 of the Constitution and are thus **illegal, null and void**.

There is also no doubt that out of the above referred proceedings, the 4<sup>th</sup> Respondent was declared entitled to ½ share from the suit property. Flowing from the said decision of the tribunal, the 4<sup>th</sup> Respondent became a joint registered owner of the suit property **No.Ruiru/Kiu/Block 1/372** as is evident from the certificate of title issued on **17<sup>th</sup> June 2011** marked as **ANN 5b**. The certificate of official search marked **ANN 5(a)** dated **7<sup>th</sup> May 2015**, also shows that the proprietors of the suit property as at that time were **Joyce Wangui Mwangi** and **Alfred Nganga Njau**, the 1<sup>st</sup> Petitioner herein. Therefore, it is evident that the 1<sup>st</sup> Petitioner and the 4<sup>th</sup> Respondent are joint owners of the suit property.

The Petitioner has alleged that the 4<sup>th</sup> Respondent has sought to be allowed to partition the joint ownership and obtain a title deed in her own name as an absolute owner of her ½ share of the suit property. The 4<sup>th</sup> Respondent has not denied that allegation. Her response or averment in the Replying Affidavit was more in response to the Petition than the instant Notice of Motion.

The Applicants have alleged that the process that brought about the instant certificate of title was flawed. The Petitioners have sought for orders of quashing the proceedings that brought about the registration of the 4<sup>th</sup> Respondent as a joint owner of the suit property. The 4<sup>th</sup> Respondent has averred that the said process was without any flaw and was a legal process which this Court should endorse. Further that the matter has been determined through a legal process and it is therefore *resjudicata*.

However, the Court finds that the issue of whether the process that brought about the title deed herein was legal or not is a disputed issue. That issue can only be determined after the evidence has been availed orally at the main trial, where the said evidence will be tested through the usual criteria of cross examination. For now, this Court cannot arrive at a determination that the registration of the 4<sup>th</sup> Respondent herein as a joint proprietor of the suit property was flawed.

The 4<sup>th</sup> Respondent is a registered joint proprietor of the suit property who has rights and privileges as provided by Sections 24 and 25 of the Land Registration Act. The said registration makes the 4<sup>th</sup> Respondent an **absolute** and **indefeasible** owner of the said suit property. This indefeasibility can only be challenged as provided by Section 26(1) (a)&(b) of the Land Registration Act, being:-

***(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.***

On whether the title deed in issue was acquired through fraud, misrepresentation or illegally or through corrupt scheme, is an issue that can only be determined after calling of evidence in the main trial. At this juncture this Court cannot find and hold that the 4<sup>th</sup> Respondent's registration was obtained through fraud or illegally. That is a disputed issue that will await the calling of evidence. Therefore, this Court finds that the Applicants have not established that they have a prima-facie case with probability of success.

Having found that the Applicants have not established that they have a prima-facie case with probability of success, the Court finds no reason to consider the 2<sup>nd</sup> limb of ***Giella...Vs...Cassman Brown(supra)*** as the said conditions are sequential. See the case of ***The Attorney General...Vs.... Kenya Commercial Bank Ltd, Afraha Educational Development Co. Ltd & Others, Nakuru CCC No.260 of 2004***, where the Court held that:-

***“The Judge should address himself sequentially on the conditions for granting an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title in dispute and therefore has not demonstrated that it has a prima-facie case with probability of success, no interlocutory injunction would be available.”***

On the balance of convenience, the Court finds that it tilts in favour of maintaining the status quo. The status quo herein is that the suit property should remain registered in favour of both the 1<sup>st</sup> Petitioner and the 4<sup>th</sup> Respondent, pending the hearing and determination of the Petition herein. However the 4<sup>th</sup> Respondent is restrained from severing or partitioning the title herein until the matter is heard and determined.

Having now considered the instant Notice of Motion and the submissions herein, the Court finds that the said application will be determined on the balance of convenience which tilts in favour of maintaining the status quo prevailing in the following terms:-

***a) A temporary injunction order do issue restraining the 4<sup>th</sup> Respondent, herself, her agents, servants and/or employees from partitioning and/or alienating the suit property herein LR.No.Ruiru/Kiu Block 1/372, pending the hearing and determination of the Petition herein.***

***b) Costs of the application be in the cause.***

***c) The parties to prepare the main Petition for hearing within the next 45 days from the date hereof and the said Petition be fixed for hearing expeditiously so that the underlying issues are resolved at once.***

It is so ordered.

Dated, Signed and Delivered at Thika this 18<sup>th</sup> day of ***December 2017***.

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Kaniaru holding brief for Mr. Kimondo for Petitioners/Applicants

Mr. Kaburu holding brief for Mathuva for 4<sup>th</sup> Respondent

No appearance for 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup> Respondent

No appearance for 3<sup>rd</sup> Respondent

Diana- Court clerk.

**L. GACHERU**

**JUDGE**

**18/12/2017**

**Court** – Ruling read in open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

**18/12/2017**