



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 765 OF 2017

VERONICA WAIRIMU NJUGUNA.....PLAINTIFF

VERSUS

JIM NJUGUNA MUTHAMA.....1ST DEFENDANT

STEPHEN GICHIA KURIA.....2ND DEFENDANT

RULING

By the Plaintiff's Notice of Motion dated 12th June, 2017 and filed on 13th June, 2017 brought pursuant to Sections 1A, 1B, 3A and 63 (E) of the Civil Procedure Act, Order 40 Rules 1, 2 and Order 51 Rule 1 of the Civil Procedure Rules, Plaintiff seeks various orders including a temporary and mandatory injunction pending the outcome of the suit.

The application is based on the following grounds which in summary is that the Plaintiff is the legal owner of plot number 241/Business Ongata Rongai hereinafter referred to as the 'suit land'. That on or about 17th April, 2003 the Plaintiff bought the suit land from one Kipkemoi K. Chesang and the same was transferred to her on 22nd April, 2003. The Plaintiff developed the suit land by constructing rental houses fetching about Kshs. 90,000 per month. In 2009 the title documents of the suit land got lost and the Plaintiff reported to the Kajiado County Council and was issued with certified copies of the original documents. On or about 29th October, 2010 the 1st Defendant sold the suit land to the 2nd Defendant and transferred the same in the names of the 2nd Defendant on 15th March, 2011 with a letter of allotment being issued to him on 22nd March, 2011.

The application is supported by the Plaintiff's affidavit where she avers that in 2009 when the title documents to the suit property went missing, she suspected the 1st Defendant to have stolen them and after reporting to the Kajiado County Council who advised her to swear an affidavit and write a formal letter requesting for reissuance of the allotment letter, she was reissued with on 18th January, 2010. She states that on 16th October, 2015 she went to inform the tenants on the suit land on change of management for purposes of collecting rent and learnt that the 2nd Defendant was the landlord and upon enquiry at the Kajiado County Council offices she discovered that the 1st Defendant had fraudulently transferred the suit land to the 2nd Defendant, on 29th October, 2010. She reiterates that the transfer was effected to the 2nd Defendant on 15th March, 2011 and a new letter of allotment issued to him on 22nd March, 2011. She insists the transfer purported to have been signed by her is a forgery as she did not sign it and the Defendants know there was no sale agreement between her and the 2nd Defendant. She confirms having reported the matter to Ongata Rongai Police Station and a forensic analysis conducted on the purported transfer document, which established that her signature appearing thereon was a forgery.

The Defendants were charged at Ngong Law Courts vide Criminal Case No. 95 of 2016 with the 2nd Defendant recording a statement at the Police station confirming he did not enter into a Sale Agreement with her and the 1st Defendant also stating to the Police that she did not sign the transfer document as alleged. She reiterates that the alleged sale by the 1st Defendant to the 2nd Defendant was fraudulent and therefore null and void, she thus claims for mesne profits of rent for the period between 2004 to date. She seeks order for cancellation of title in respect of the suit land, issued to 2nd Defendant and the same be registered in her name.

The application is opposed by the 1st Defendant who filed a replying affidavit sworn by JIM NJUGUNA MUTHAMA where he deposes that the application contains fabrications and material non disclosure calculated to mislead the Court. He states that they are married with the Plaintiff but staying apart due to irreconcilable difference and they have a pending divorce cause No. 554 of 2015 at Milimani Chief Magistrate's Court. He insists the suit land was matrimonial property, which he bought from Mr. Sang and the Plaintiff never contributed towards its acquisition and they had mutually transferred the suit land to the 2nd Defendant on 15th March, 2011 with proceeds therefrom being invested in other family businesses. He avers that the Plaintiff was well aware of the reparations of the sale of the suit land being that the 2nd Defendant acquired a good title. Further that before transfer of the suit land they used to collect rent which he stopped doing once they transferred it to the 2nd Defendant. He reiterates that the title documents never went missing as alleged by the Plaintiff and the same had been in her custody until they transferred the suit land to the 2nd Defendant. He claims since their marriage broke down in 2015, they have had disputes over their matrimonial properties and that the Plaintiff maliciously devised ways to harass and intimidate him by the use of the police where she complained in Criminal Case No. 95 of 2016 on the charge of conspiracy to defraud her of the suit land which case has now been stayed by a conservatory order issued in Judicial Review Application number 395 of 2017 in Milimani. He further avers that the Plaintiff has filed an application in court on 8th February, 2016 being ELC No. 1120 of 2015 (consolidated into HCCC No. 11 of 2016) seeking similar reliefs which matter is still pending for hearing and determination. He reaffirms that the current application is premature and an abuse of court process since the earlier application is still pending and that it lacks merit, frivolous and vexatious with the issuance of a temporary injunction unfounded since the suit land was transferred on a willing buyer, willing seller basis and the 2nd Defendant acquiring a good title as a bona fide purchaser.

The application is opposed by the 2nd Defendant who filed grounds of objection and replying affidavit sworn by STEPHEN GICHIA KURIA where he deposes that the supporting affidavit is full of half truths, calculated to mislead the court and the application lacks merit, is bad in law as it seeks final orders at an interlocutory stage. He states that he is the legal owner of the suit land and currently in possession as a transfer was effected to him on 15th March, 2011 with a new letter of allotment being issued on 22nd March, 2011. He claims he is a purchaser for value without any notice of fraud and was surprised when the applicant started raising issues regarding his ownership around December, 2015, almost 5 – ¼ years from the time he purchased the plot and took over actual possession. He contends that the 1st Defendant informed him in 2010 that he purchased the suit land from Kipkemboi K. Chesang and registered in his wife's name and that they were selling it with express authority from his wife as they intended to raise funds for completion of their Thika road project. Further that since the scope of the wife's employment demanded and involved extensive travels, it was normal in their marriage for him to sign documents on her behalf but he would ensure they have occasion to meet before completion of the transaction. He confirms undertaking due diligence at the Ol Kejuado County Council offices and paying the 1st Defendant for the suit land as follows: On 29th October, 2010 – Kshs 2 million; 4th January, 2011 – Kshs 2 million; on 14th April, 2011 – Kshs. 150 000; on diverse dates Kshs. 200,000 and electricity deposit refund of Kshs. 37, 500. He reiterates that he met the 1st Defendant's wife after completing the payments for the suit land in early 2011 where they confirmed that they would hand over possession of the suit land to him and ask their caretaker to inform the tenants to pay rent into his company account. He reiterates that they handed over to him the transfer documents, a copy of Plaintiff's KRA PIN and a transfer was effected in March, 2011. He insists the Plaintiff has chosen to drag him into their personal issues and it is untrue that she was not aware of the sale of the suit land. He denies being involved in the fraud and states

that the Plaintiff has not tabled any documentary proof of income from the suit land and that her claim on the loss of the letters of allotment are questionable as she purportedly wrote a letter in the year 2010 and presented it to the County Government of Kajiado in 2016. Further, that it is inconceivable and incomprehensible how she could have been sitting for over five (5) years without receiving rent. He admits having been charged alongside the 1st Defendant in the Ngong Criminal Case number 95 of 2016 but the same was withdrawn against him when he filed the JR Case No. 482 of 2016 challenging the charges against him having been a bona fide purchaser for value without notice of any alleged fraud. He reiterates that the Plaintiff does not have clean hands and has not established a prima facie case with a probability of success.

The Plaintiff filed a supplementary affidavit sworn by VERONICA WAIRIMU NJUGUNA where she reiterated the facts of her claim and denied giving authority to the 1st Defendant to sell the suit land. She insists no Sale Agreement has been produced and the 2nd Defendant did not acquire a good title. She claims she never collected rent from the suit land and was surprised to learn of the transfer, insists her title was stolen and she never signed any transfer document in regard to the suit property. She denies backdating her letter dated 18th January, 2010 and that the criminal case in Ngong was instigated by malice, meeting the 2nd Defendant at ivory motors offices and giving her express authority for the transfer of the suit land. She further denies attempting to defraud the 1st Defendant and admits providing rent estimates as she has never collected rent from the suit premises and that the 2nd Defendant is in occupation of the suit premises. She further insists her claim for rent is not statute barred and seeks the injunctive orders sought.

All the parties filed their respective written submissions, which were highlighted on 23rd October, 2017 that I have considered.

Analysis and Determination

Upon perusal of the application together with the supporting affidavit, the replying affidavits and the parties' submissions, at this juncture the only issue for determination is whether the interim and mandatory injunctions sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"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."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, it is not in dispute that the Plaintiff and the 1st Defendant are husband and wife who are currently estranged with a pending divorce case. It is also not in dispute that the suit land previously belonged to the Plaintiff but the same was sold to the 2nd Defendant in March 2011 by the 1st Defendant who claimed Plaintiff had granted him authority. What is in dispute is the Plaintiff's contention that she was the proprietor of the suit land until March 2011 when the 1st Defendant fraudulently sold it to the 2nd Defendant without her consent with the 2nd Defendant being granted new letters of allotment in his name. The 2nd Defendant insists that after he took possession of the suit land, he has been collecting rent therefrom for over 5 years without any interference from anybody. The Plaintiff claims she only learnt of the transfer much later as she was not collecting rent from the suit land. The 2nd Defendant admits he did

not enter into a sale agreement with the Plaintiff but did so with the 1st Defendant, and only met the Plaintiff after he had finished paying the purchase price. The 2nd Defendant however states that he later met the Plaintiff when he was handed over the transfer documents and allowed to take possession of the suit land. The Plaintiff alleges fraud on the part of the Defendants' and I note that they were even charged at the Ngong Law Courts, but later discharged. The mere allegations of fraud raise a triable issue and I am persuaded by the case of **UCB Vs Mukoome Agencies (1982) HCB22** 'that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'. In the instant case I find that it would be pertinent if the Plaintiff is granted an opportunity to be heard to enable the court make a determination on the ownership of the suit land.

In the circumstances, I find that the Plaintiff has indeed established a prima facie with a probability of success.

On the second principle as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and 2nd Defendant claim ownership of the suit land and admit that the 2nd Defendant is the one in possession. The Plaintiff does not dispute that the 2nd Defendant has been collecting rent from the suit land for over 5 years. This fact is also admitted by the 1st Defendant who confirms the suit land was sold to the 2nd Defendant. From these facts, I note that the Plaintiff has actually been guilty of laches as the 2nd Defendant has collected rent from the suit land for over 5 years and she has never intervened. Except for preserving the title to the suit land at this juncture, I do not see what irreparable harm the Plaintiff will suffer which cannot be compensated by way of damages.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the property is not preserved, it may be wasted away.

On the issue of a mandatory injunction, an applicant must prove that it is a clear case that the Court will be assured that the same will succeed after the trial. In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal stated that, ' **a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.**'

The mandatory injunction sought by the Plaintiff for cancellation of title to the suit land and re entry thereon can only be granted in special circumstances where the Court thinks it ought to be decided at once, and after full trial, it will be evident that the injunction was properly granted. Even though both the Plaintiff and 2nd Defendant are both staking a claim to the suit land with the 2nd Defendant having bought it in 2011 through the 1st Defendant.

The Court has taken judicial notice that the 2nd Defendant has been in actual possession of the suit land for over 5 years and collecting rent therefrom. It is in these circumstances that I decline to grant the mandatory injunction sought for the removal of cancellation of title and re-entry pending the determination of the suit.

Since both the Plaintiff and the 2nd Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and the 2nd Defendant who was an innocent purchaser for value having been in possession for over 5 years and collecting rents therefrom, the Court finds that these are issues best determined at a full trial, I will decline to grant the orders as sought but will proceed to make the following order:

An inhibition order be and hereby registered by the Kajiado County Government Land Registrar as against plot number 241/Business Ongata Rongai of any dealings, transfer, lease or charge pending the

hearing and determination of the suit.

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated, Signed and Delivered in Kajiado this 13th day of December 2017

CHRISTINE OCHIENG

JUDGE

Present:

Karanja for 2nd Respondent

N/A for Uvyu for Applicant

N/A for Koceyo for 1st Respondent