



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC CIVIL SUIT NO. 1424 OF 2014

SUSAN NJERI KARO..... PLAINTIFF/APPLICANT

VERSUS

CATHERINE NJERI NOROGE

T/A LICAT ENTERPRISE.....1ST DEFENDANT/RESPONDENT

LAND REGISTRAR,KIAMBU2ND DEFENDANT/RESPONDENT

AND

SARAH WAIRIMU NJOROGE.....3RD DEFENDANT/RESPONDENT

RULING

The matter coming up for determination is the Plaintiff's /Applicant's Notice of Motion dated *7th November 2014*, brought under *Order 40 Rules 1,3,4 & 6 of the Civil Procedure Rules, Section 1A ,1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya* and all enabling provisions of Law.

The applicant has sought for these orders:-

1. *That this honourable court be pleased to issue a permanent order of injunction restraining the Defendants ,whether by themselves ,their servants, agents employees and/or any other person acting on their authority and/or instructions from selling, transferring, sub-dividing, leasing, charging or in any other way with land parcel No.Kabete/ Kibichiko/ 2669 in Kiambu pending hearing and determination of this case.*
2. *That the 2nd Defendant/Respondent be directed to place a restriction on the Title Deed for land parcel No. Kabete/ Kibichiko/ 2669 pending hearing and determination of this suit herein.*
3. *That cost of the application be provided for.*

The application is supported by the grounds stated on the face of the application and on the Supporting Affidavit of *Susan Njeri Karo*, the applicant herein. These grounds are:-

- a. *The applicant is the bonafide rightful and lawful owner of all that parcel of land known as No. Kabete/ Kibichiko/ 2669 situated at Kiambu County by virtue of possessing a valid and indefeasible Title thereof issued to her by the Land Registrar Kiambu on 14th October, 2013.*

- b. *The Applicant in the month of November 2013, applied for soft loan from the 1st Respondent and was granted Kshs.100,000/= and deposited her title to land parcel No. Kabete/ Kibichiko/ 2669 as security.*
- c. *The applicant repaid the initial loan by paying a total sum of Kshs.166,000/= but the 1st Respondent refused to release the Applicant's title demanding a further Kshs.300,000/= which she termed as accrued interest and penalties.*
- d. *By use of threats, intimidations and tricks, the 1st Respondent forced the Applicant to sign an agreement after she was informed that they were doing some adjustments to the original loan application and she was never given a copy of the said agreement.*
- e. *That by a further agreement dated 16th May 2014, the 1st Respondent unlawfully ,illegally and under duress made the applicant sign yet another agreement where she is now claiming a total of Kshs.4,170,000/= in the 1st Respondents head office.*
- f. *In the meantime, the 1st Respondent had on 22nd January, 2014 fraudulently and unlawfully transferred the applicants land parcel No. Kabete/ Kibichiko/ 2669 to her name.*
- g. *That after fraudulent and unlawfully transferring the said title into her name the 1st Respondent is now in the process of searching for buyers to sell off the said portion to third parties to defeat the ends of justice and Applicants proprietary interest thereof.*
- h. *That the applicant filed a caution to the said property on 27th October 2014, but the 2nd Respondent is yet to act on the same and the Applicant is now seized with information that the 1st Respondent has found a buyer and is about to sell the said parcel of land.*
- i. *That it is therefore in the best interest of justice that this Honourable Court do issue restraining orders against the Defendants to preserve the land parcel No. Kabete/ Kibichiko/ 2669 pending hearing of this case.*
- j. *That no prejudice and/or embarrassment will be occasioned by the Respondents if the orders sought are granted save for damages which can adequately be compensated.*

In her Supporting Affidavit, the applicant averred that this is the only property that she inherited from her deceased husband and it is a prime property touching on the main road. She further averred that it is to the best interest of justice that this Court does issue restraining orders against the Defendants to preserve the land parcel **No. Kabete/ Kibichiko/ 2669** , pending the hearing of this case.

In her further affidavit, the applicant averred that the acts of the 1st Respondent are unlawful and illegal and should be stopped by the Court as the purported transfer is intended to defeat justice. Further that the Respondent does not have any interest in the suit land registerable and she cannot claim proprietary right and the purported transfer is illegal and unlawful. She further averred that the 1st Respondent has committed acts of **fraud** and she should be cited by this Court for doing so when this matter still pending in court.

The application is opposed. **Catherine Njeri Njoroge** , the 1st Defendant filed her Replying Affidavit and denied the averments contained in the plaintiff's /applicant's supporting Affidavit.

Further **Sarah Wairimu Njoroge** was joined as a 3rd Defendant on **10th February 2015** . She averred that she is a registered owner of the land known as **No.Kabete/ Kibichiko/ 2669** . That the said parcel vested in her through purchase vide sale agreement dated **12th November 2014**. It was her contention that she was not privy to the dispute between the Plaintiff and the 1st Defendant and that her Title Deed to the suit property is sacrosanct.

The Plaintiff/Applicant had on its application dated **16th December 2014**, sought for orders that the 2nd

Defendant and 3rd Defendant/Respondent be restrained by an order of this court from interfering and or further dealing in whichever manner with land parcel known as **No.Kabete/ Kibichiko/ 2669**, pending the hearing and determination of the Notice of Motion dated **7th November 2014**, and that costs be provided for. That application was premised on the grounds stated on the face of the said application and the supporting affidavit of **Susan Njeri Karo**. Among the grounds are :-

- i. ***That when the 1st respondent was served with the pleadings herein on 12th November 2014, and immediately upon such service, she proceeded to her lawyer and purported to sell the said property to the proposed interested party who is her sister and on the following day the 13th November 2014, she transferred the suit property to the said interested party .***

The parties herein were directed by the Court to canvass this Notice of Motion by way of Written Submissions. The Law Firm of **Gathii Irungu & Co. Advocates** for the Plaintiff/Applicant filed their submissions on **28th May 2015**, whereas the firm of **Gitau S M & Co Advocates** filed their written submissions on **10th June 2015**. The 2nd Defendant, who is the Land Registrar, Kiambu did not enter appearance nor file any documents in response to this application.

The Court has now carefully considered the Instant Notice of Motion, the annexures thereto and the written submissions. The Court now makes the following findings:-

There is no doubt that the applicant herein **Susan Njeri Karo** was registered as the proprietor of LR No. **No.Kabete/ Kibichiko/ 2669** on **14th October 2013**. There is also no doubt that the applicant herein did acknowledge owing the 1st Defendant **Kshs.2620,000/=** through the agreement dated **16th May 2014**, and marked **SNK 3**. It is also evident that the applicant did deposit her title deed with the 1st Defendant which was to be surrendered to her once the balance had been cleared. There is also no doubt that as per the certificate of search marked **SNK4**, the suit was registered in the name of the 1st Defendant **Catherine Njeri Njoroge** on 22nd January 2014. There is also an application to lodge caution dated 27th October 2014, lodged by **Susan Njeri Karo** the applicant herein. This suit or claim was filed on 10th November 2014, and from the affidavit of service sworn by **Daniel Marai Mwaura**, the suit documents were served on 1st Defendant **Catherine Njeri Njoroge** on 12th November 2014. The 1st defendant's **Advocates Gitau S M Advocate** filed a Notice of Appointment on 18th November 2014. It is also evident from annexure **SNK3**, on the Notice of Motion dated 16th December 2014, that the said **Catherine Njeri Njoroge** entered into a sale agreement with **Susan Wairimu Njoroge** on 12th November 2014, the same day that she received the suit documents. The 1st Defendant allegedly entered into a sale agreement with **Sarah Wairimu Njoroge** whom the applicant has alleged is the sister to the 1st Defendant on 12th November 2014, for sale of **No.Kabete/ Kibichiko/ 2669** , suit property for a consideration of **Kshs.6000,000/=** . It is surprising that the suit property got registered in the name of the said **Sarah Wairimu Njoroge** in a record time on 13th November 2014. This was during the subsistence of this suit and the 1st Defendant was aware of the existence of the suit as she had been served with the suit documents as per the affidavit of service sworn by **Daniel Marai Mwaura** on 18th November 2014. At this time in point, the suit property is now registered in the name of **Sarah Wairimu Njoroge** , the 3rd Defendant. The applicant has alleged that this registration was done through fraud and intimidation.

The applicant has sought for injunctive orders which are opposed. At this juncture, the court is only required to determine whether the applicant is deserving of the injunctive orders on the usual criteria without having to determine the issues in controversy with finality. The criteria for grant of injunctive orders were laid down in the case of **Giella Vs Casman Brown & Co.Ltd 1973 EA 358**. These conditions 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.*

Has the applicant been able to establish the above stated conditions?.

Firstly, the applicant needed to establish that she has a prima facie case with probability of success at the trial. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125**, the Court described prima facie case as:-

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

From the above description, it is clear that prima facie case mean more than an arguable case. The evidence must show an infringement of a right and the probability of success of the applicant's case at the trial.

It is evident that the applicant did borrow money from the 1st Defendant and deposited her title deed with the 1st Defendant. It is also evident that from the agreement dated 16th May 2014, that the 1st Defendant was to surrender back the title deed to the Plaintiff/Applicant once she has cleared the final balance. However from the official search dated 16th May 2014, this suit land was already in the name of the 1st Defendant. If the applicant owed the 1st Defendant money, then 1st Defendant would have sought to recover it as a civil debt.

The 1st Defendant alleged that Plaintiff/Applicant signed the transfer documents voluntarily. However, the Plaintiff/Applicant has denied that assertion and alleged that she was intimidated and coerced to sign the said transfer documents. The issue of whether the Plaintiff /Applicant signed the said transfer documents voluntarily or not cannot be determined at this juncture through affidavit evidence by calling of evidence in the main trial which evidence, but will have to be tested through cross-examination. The Plaintiff alleged that her land was transferred to the 1st Defendant and later to the 2nd Defendant through fraud.

It is evident that the suit property is now in the name of the 3rd Defendant herein ***Sarah Wairimu Njoroge*** who got registered on 13th November 2014, while this suit was in existence. The 1st Defendant knew that the Plaintiff had filed this suit but she went ahead and transferred the suit to the 3rd Defendant who is allegedly her sister. Was that action undertaken to forestall this case?.

Though Section 26(1) of the Land Registration Act confers ***absolute*** and ***indefeasible*** ownership to a proprietor who has been registered as the owner of any land, such ownership can be challenged if the registration was acquired through ***fraud, misrepresentation*** through unlawful or ***unprocedurally means*** or through a ***corrupt means***. The Court notes that the 3rd Defendant allegedly entered into a sale agreement on 12th November 2014, with the 1st Defendant and was registered a proprietor of the suit land on 13th November 2014. That is such a record time and the Court needs to interrogate whether that registration was procedural or not. The 3rd Defendant title can therefore be challenged as provided by Section 26(1), (a)& (b) of the Land Registration Act.

The Plaintiff/Applicant's evidence shows that her right to ownership of the suit property has been infringed. The Court therefore finds that the applicant has established that she has a prima facie case with probability of success.

On the second limb of whether the applicant will suffer irreparable loss which cannot be compensated by an award of damages, the applicant alleged that the suit land was inherited from her late husband. Now the suit land is in the name of a 3rd party. The issue of whether she intended to sell the suit land or not is in dispute. If the suit land is left unpreserved, then the 3rd Defendant can deal with it as she wishes or

pleases. That would mean the Plaintiff would likely be deprived of ownership of her suit property. Given that she inherited the same from her deceased husband, the court finds that she has some sentimental attachment to it and the court further finds that no amount of money would compensate her loss. For that reason the court finds that the applicant has been able to establish that she will suffer irreparable loss which cannot be compensated by an award of damages.

On the third principle of if the Court is in doubt to decide the matter on a balance of convenience, the court finds that the balance of convenience tilts in favour of preserving the suit property until the issues in dispute are resolved in the main trial. The preservation of this suit property would be by restraining any further dealings on the suit property herein. The restraining of such dealings would be by an order of injunction and also by directing the and 2nd defendant herein to place a restriction on the suit property until the suit herein is heard and determined.

Having now carefully considered the Notices of Motion dated **7th November 2014**, and **16th December 2014**, prayer No.3, the court finds that the final result is that the applicant deserves the order sought herein. The court consequently allows prayers No.3 and 4 of the Notice of Motion dated 7th of **November 2016**, and prayer No.3 of the Notice of Motion dated **16th December 2014**, and the said orders to remain in force until the suit is heard and determined.

The costs of this application shall be to the Plaintiff/Applicant to be borne by the 1st and 3rd Defendants/Respondents.

Further the parties to ensure that they have complied with Order 11 expeditiously so that this suit can be heard and determined the soonest for the issues in dispute to be resolved with finality.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **4th** day of **March, 2016**.

L.GACHERU

JUDGE

4/3/2016

Before L. Gacheru Judge

Hilda : Court Clerk

Mrs Muhuhu holding brief for Mr Gathii Irungu for the Plaintiff/Applicant

Mr Nzioki holding brief for Mr Gitau for the Respondent/Defendant

L.GACHERU

JUDGE

Court:

Ruling read in open Court, in the presence of the above advocates and absence of 2nd Defendants/Respondents by Plaintiff/Applicant

L.GACHERU

JUDGE

