



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 288 OF 2014

GABRIEL MACHARIA NJOROGE.....PLAINTIFF

VERSUS

THE LAND REGISTRAR, MURANGA.....1ST DEFENDANT

TIRUS NYINGI NGAHU.....2ND DEFENDANT

RULING

What is before me is the plaintiff's Notice of Motion dated 30th July 2015 seeking the following orders:-

- a. *Spent.*
- b. *An order of status quo on land Loc. 9/KIRURI/1262 be issued till this application is heard and determined.*
- c. *An order of status quo be placed in Muranga Land office in respect to land parcel Loc. 9/KIRURI/1262 till this suit is heard and determined.*
- d. *The plaintiff be given leave to amend the plaint to alter a clerical error in paragraphs 3 and 4 of the plaint from Loc. 9 KIRURI/1261 to Loc. 9/KIRURI/1262.*
- e. *Any other order this Honourable Court may deem fit to grant.*
- f. *Costs of this application be awarded.*

The application is grounded on the reasons set out therein and supported by the affidavit of the plaintiff **GABRIEL MACHARIA NJOROGE** and basically, the plaintiff's complaint is that the 2nd defendant intends to sell the land parcel Loc. 9/KIRURI/1262 (the suit land) in an attempt to defeat the cause of justice which would result in irreparable loss to the plaintiff.

The 1st defendant did not file any response to that application but a defence was filed to the main suit.

The 2nd defendant objected to the application through his replying affidavit dated 28th September 2015 in which he has deponed, inter alia:-

- *That the plaintiff has no locus standi to file this suit and application.*
- *That the pleadings are contradictory and he has no intention of selling the suit land which is his matrimonial property.*
- *That the plaintiff has not met the standard set out in an application for injunctions by the case of GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358.*
- *That the application to amend "a clerical error" is not based on any legal provisions and therefore offends the provisions of the Civil Procedure Act.*

Submissions have been filed both by the firm of Kimwere and Company Advocates for the plaintiff and MJD Associates Advocates for the 2nd defendant.

I have considered the application, the rival affidavits and annexures thereto and the submissions by counsels.

It is clear from the documents herein that the suit land is a sub-division of land parcel No. Loc. 9/KIRURI/459 which has always been registered in the names of one **ANGELO KANYUANJOHI MACHARIA** (deceased) who is the father to the plaintiff. Apart from the suit land, other parcels hived from the original land are Loc. 9/KIRURI/1260 and 1261. The said **ANGELO KANYUANJOHI MACHARIA** died on or around July 1992 while property No. Loc. 9/KIRURI/459 was still charged with Barclays Bank and it is the plaintiff's case that without his knowledge or that of the beneficiaries of the Estate of the deceased, the 1st defendant and others fraudulently sub-divided land parcel No. Loc. 9/KIRURI/459 and changed its ownership.

The 2nd defendant's case, at least by his defence, is that by the time the deceased died, there was no land known as Loc. 9/KIRURI/459 as the same had already been sub-divided into Loc. 9/KIRURI/1260 to 1262 and registered as follows:-

- a. **ANGELO KANYUANJOHI MACHARIA – Loc. 9/KIRURI/1260**
- b. **ANTHONY GITERE KANYUANJOHI (Plaintiff's brother) –Loc. 9/KIRURI/1261**
- c. **ANTHONY GITERE KIRUBI – Loc. 9/KIRURI/1262.**

The conditions for the grant of an interlocutory injunction are set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** and these are:-

1. ***The applicant must show a prima facie case with a probability of success.***
2. ***An interlocutory injunction will not normally be granted unless it is demonstrated that the applicant will suffer irreparable injury that cannot be compensated by an award of damages, and***
3. ***If in doubt, the Court will determine the application on the balance of convenience.***

A prima facie case was described in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LIMITED & OTHERS 2003 K.L.R 125** as follows:-

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

And as was stated in the case of **FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALES LTD 1986 3 ALL E R 772**, the Court should take whichever course appears to carry the lower risk of injustice should it turn out to be wrong.

Before I consider the application on its merits, two issues raised by the 2nd defendant in his replying affidavit call for my determination. These are:-

1. ***That the plaintiff has no locus standi to file the suit herein and so the same is fatally defective, frivolous and an abuse of the Court process.***
2. ***That the application to amend “a clerical error” is not based on any legal provisions and offends the provisions of the Civil Procedure Act and the rules regarding amendment of pleadings.***

With regard to the plaintiff's locus standi, it is clear from the pleadings herein that he is the son of the

deceased who remains the registered proprietor of the land parcel No. Loc. 9 /KIRURI/459 whose sub-division gave rise to the suit land. It is also clear from the annexed copy of Limited grant ad litem obtained on 21st January 2014 in **HIGH COURT OF KENYA P & A CAUSE NO. 31 OF 2014** at **MURANGA** that the plaintiff has the locus standi to file this suit.

And with regard to the 2nd defendant's averment that the application seeking leave to amend the pleadings does not cite the legal provisions upon which it is founded, that complaint is correct. The application before me only cites **Section 3A of the Civil Procedure Act, Order 40 of the Civil Procedure Rules** and **Section 68 of the Land Registration Act of 2012**. Certainly the drafting of the application could have been better. It is not even clear what the applicant means by "*status quo*". **Order 40 of the Civil Procedure Rules** governs the issue of temporary injunctions and interlocutory orders while **Section 68 of the Land Registration Act** grants the Court powers to inhibit the registration of any dealings with land until further orders. The power to amend pleadings is donated by **Section 100 of the Civil Procedure Act** and **Order 8 of the Civil Procedure Rules**. I must caution counsel about the importance of proper pleadings.

Having said so, it is clear that the failure to cite the legal provision on which an application is founded shall not of itself defeat such an application. **Order 51 Rule 10 of the Civil Procedure Rules** provides as follows:-

1. ***"Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule"***
2. ***"No application shall be defeated on a technicality or for want of form that does not affect the substance of the application"***

I would also consider the failure to cite the correct legal provision on which any application is founded to be a mere technicality curable by the provisions of **Article 159(2) (d) of the Constitution**.

One of the prayers sought herein is leave to amend the plaint in paragraphs 3 and 4 to read Loc. 9/KIRURI/1262 instead of Loc. 9/KIRURI/1261. Amendment of pleadings may be done at any time during the proceedings for purposes of determining the real question in controversy between the parties. The overriding consideration in an application for leave to amend is whether such amendment is necessary for the just determination of the controversy between the parties and should therefore be freely allowed unless the opposite side would be prejudiced – see **ANDREW OUKO VS KENYA COMMERCIAL BANK & OTHERS 2014 e K.L.R** and also **CENTRAL BANK LIMITED VS TRUST BANK LIMITED 2000 2 E.A 365**. In the case now before me, what is sought to be amended is a clerical error. No prejudice has been caused to the defendant and this suit has not even commenced trial. That application is allowed as prayed.

Going back to the substantive application, it cites both **Order 40 of the Civil Procedure Rules** and **Section 68 of the Land Registration Act** none of which deal with the so called order of "*status quo*" referred to in the application. This Court will therefore deal with the application as one seeking injunctive relief and orders of inhibition.

As to whether or not the plaintiff has established a prima facie case, it is not in dispute that the plaintiff has been granted Limited letters of administration ad litem with respect to the Estate of the deceased who is his father, for purposes of filing this suit. It is also common ground that the deceased is the registered proprietor of land parcel No. Loc. 9/KIRURI/459 from which the suit land was hived. It is not clear when the said land was sub-divided because no documents were availed by either of the parties herein to show when that was done. Indeed no green cards or application for consent were annexed. What is clear from the letter dated 23rd August 2010 from Barclays Bank of Kenya is that the Bank holds the title to land parcel No. Loc. 9/KIRURI/459 which is in the business name of **BEALLY PROMOTERS** which is the plaintiff's business name. The issue that will no doubt engage this Court at the trial of this dispute is how the suit land and others were hived off from land parcel No. Loc. 9/KIRURI/459 when the title is still held as security for a loan advanced to a Company associated with the plaintiff. In his plaint herein,

the plaintiff had pleaded, inter alia, that the defendants fraudulently transferred land parcel No. Loc.9 KIRURI/459 and sub-divided it into Loc. 9/KIRURI/1260, 1261 and 1262 when the title is charged and without the knowledge of the registered owner. On the face of it, this allegation does not appear to be unfounded.

Further, it is an offence under **Section 45 of the Law of Succession Act** to intermeddle with the property of a deceased person. Similarly, there can be no sub-division of property of a deceased before the grant has been confirmed and there is no evidence that any grant has been confirmed with respect to the Estate of the deceased herein as provided under **Section 55 of the Law of Succession Act**. Of course whether or not the sub-division of land parcel No. Loc. 9/KIRURI/459 was fraudulent will be a matter to be determined at the trial by evidence. For now, what the plaintiff is required to do is establish a prima facie case with a probability of success and on the material available before me, he has surmounted the first test in the **GIELLA** case (supra).

On the issue of irreparable injury that cannot be compensated by an award of damages, the suit land herein appears to be part of the un-distributed Estate of the deceased and not property that was acquired through a purchase and with a known value. I would borrow the words of the late **Madan J.A** (as he then was) in **ALKMAN VS MUCHOKI 1984 K.L.R 353**, that equity follows the law and where the law is flouted, as appears to be the case in this matter, then the party infringing it should be enjoined.

Ultimately therefore, upon considering all the evidence herein, I am satisfied that the plaintiff is entitled to the orders sought in the Notice of Motion dated 30th July 2015. The same is therefore allowed as prayed. Costs in the cause.

It is further directed that the orders granted being in the nature of a temporary injunction, the parties herein to comply with the provisions of **Order II Civil Procedure Rules** and have this matter heard and determined in the next twelve months.

It is so ordered.

B.N. OLAO

JUDGE

8TH APRIL, 2016

Ruling delivered this 8th day of April 2016 in open Court

Ms Jimbera for the 2nd Defendant present

Mr. Macharia for Mr. Kimwere for the Plaintiff present

No appearance for the 1st Defendant.

B.N. OLAO

JUDGE

8TH APRIL, 2016

MS JIMBERA - We seek 30 days to appeal

MR. MACHARIA - No objection.

COURT - Leave granted as prayed.

B.N. OLAO

JUDGE

8TH APRIL, 2016