



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 130 OF 2015

ROSE WANJERI MAGWI.....1ST PLAINTIFF/APPLICANT

HABLE KAGEMA MAGWI.....2ND PLAINTIFF/APPLICANT

-VERSUS-

ARTHUR MAGWI KAGEMA.....1ST DEFENDANT/RESPONDENT

JAMES NJUKI IHURA.....2ND DEFENDANT/RESPONDENT

RULING

1. On **18th November, 2015** **Rose Wanjeri Magwi** and **Hable Kagema Magwi** (hereinafter called the applicants) brought the notice of motion dated **13th November, 2015** seeking to restrain and prohibit the 2nd respondent (James Njukia Ihura) from taking possession, entering, dispossessing, alienating, subdividing, occupying, developing, cultivating, farming or in any other way interfering with their peaceful possession, occupation and use of the parcel of land known as number **Loc.19/Gacharageini/2968** (hereinafter referred to as the suit property) pending the hearing and determination of the application and the suit herein. They also sought orders that the 2nd respondent be compelled to surrender/deposit the original title deed in respect of the suit property in court pending the hearing and determination of the suit and also that he be compelled to remove the temporary structures he allegedly erected on the suit property in defiance of a court order.
2. The application is premised on the grounds that the suit property, which is said to be family/clan property, was sold to the 2nd respondent by the 1st respondent secretly. The applicants contend that the 1st respondent was misled to sell the suit property to the 2nd respondent by the 2nd respondent and the 1st respondent's wife.
3. The applicants further contend that the 1st respondent was misled to hand over the original title deed to the suit property to the 2nd respondent for purposes of sub-division of the suit property in favour of the 2nd respondent, when the 2nd respondent had not paid the purchase price.
4. Terming the transaction entered into between the 1st and 2nd respondent illegal, the applicants contend that no consent of the Land Control Board was obtained.
5. The applicants further contend that the 2nd respondent had all along been aware of the injunction issued against the 1st respondent but chose to violate it by erecting temporary structures on the suit property. For that reason, the applicant wants the 2nd respondent to be compelled to remove the structures he allegedly erected in the suit property in defiance of court orders.

6. The application is supported by the affidavit of the 1st plaintiff/applicant (**Rose Wanjeri Magwi**) sworn on **13th November, 2013** in which the grounds on the face of the application are reiterated.

7. In support of the averments contained in the supporting affidavit, the 1st plaintiff/applicant has annexed the following documents:-

- a) Copy of official search showing that the 1st respondent is the registered proprietor of the suit property, marked **RWM-1**;
- b) Death certificate issued in respect of the 1st applicant's mother, Deborah Nyokabi Magwi (deceased) who is said to have been a wife of the 1st respondent; marked **RWM-2**;
- c) Copy of the sale agreement executed between the 1st respondent and the 2nd respondent, marked **RWM-3**;
- d) Copies of medical reports prepared in respect of the 1st respondent's health status; marked **RWM-4**;
- e) Photographs showing the structures allegedly erected on the suit property by the 2nd respondent in disobedience of court orders, marked **RWM-5**; and
- f) A police bond issued to Meshack Magwi to allegedly intimidate the applicants, marked **RWM-6**.

8. In opposing the application, the 2nd respondent filed the replying affidavit he swore on **2nd December, 2015**. In that affidavit, the 2nd respondent has, *inter alia*, explained that before entering into the impugned agreement, the 1st respondent had assured him that the property was not ancestral land; that upon execution of the sale agreement, he took possession of the portion sold to him and that he has been carrying out farming activities thereon.

9. Terming the contention that the 1st respondent lacked capacity to enter into the sale agreement a creation of the applicants, the 2nd respondent contends that the 1st respondent entered into the sale agreement voluntarily and freely. He denies the contention that he misled the 1st respondent into entering into the sale agreement and states that he acted in good faith after being approached by the 1st respondent to bail him out of the situation he was in (1st respondent needed money for food and for medical care).

10. With regard to the contention that the transaction is illegal for want of the consent of the Land Control Board, he explains that he applied for the consent but the application was not processed because of the applicants' interference.

11. As for the contention that he disobeyed court orders, he explains that this court has never issued any orders of injunction against him.

12. For the foregoing reasons, he terms the application misconceived and an abuse of the process of the court.

13. In support of the averments contained in his affidavit, the 2nd respondent has annexed the following documents to the affidavit:-

- i) A copy of the sale agreement executed between him and the 1st respondent marked **JNI-1**;
- ii) Photographs showing his activities in the suit property, marked **JNI-2**; and
- iii) Copy of application he made for consent to sub-divide and transfer a portion of the suit property, marked **JNI-3**.

14. When the matter came up for hearing, counsel for the applicants, **Mr. Kimondo**, informed the court that the gist of the applicants claim against the 2nd respondent is that by the time the 2nd respondent took possession of the portion he is said to have purchased from the 1st respondent one of their brothers, not a party to the suit, had avocado trees which the 2nd respondent prevents him from tendering and picking.

15. Explaining that the 2nd respondent claims to have bought only 4 acres out of the total acreage of the suit property (20 acres), Mr. Kimotho urged the court to order that the title deed in respect of the suit property be deposited in court for safe keeping pending the hearing and determination of the suit herein.

16. Counsel for the 2nd respondent, **Mr. Kabue**, pointed out that the prayers sought in the notice of motion herein are mandatory in nature and submitted that for the orders to issue, the applicants must demonstrate existence of special and exceptional circumstances.

17. Concerning the prayer for surrender/deposit of the title deed in court for safe keeping, he submitted that there is no such prayer in the amended plaint.

18. Arguing that the legality of the agreement executed between the 1st and 2nd respondent can only be determined after full trial, he submitted that the rights of the 2nd respondent as a bona fide purchaser should be upheld.

19. In a rejoinder, Mr. Kimondo pointed out that in the amended plaint, the applicants have prayed for cancellation of the title and maintained that for preservation of the title, the order for surrender/deposit of the title in court should be made.

20. Maintaining that the consent of the Land Control Board to transfer was not obtained, he maintained that the transaction entered into between the 1st and 2nd respondent is illegal.

Analysis and determination:-

21. The application herein being for issuance of a temporary injunction, the applicants must satisfy the conditions set down in the celebrated case of **Giella v. Cassman Brown (1973) EA 358**. In that case it was held:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

22. As pointed out above, the first condition that the applicants must satisfy is that they have a *prima facie* case with a probability of success.

23. The term *prima facie* case was described in the case of **Mrao v. First American Bank of Kenya Limited & 2 others (2003) KLR 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.”

24. In determining whether the applicants have a *prima facie* case with a probability of success against the 2nd respondent, I begin by pointing out that from the plaint filed in this suit, it is clear that before the plaintiffs filed the instant suit and instant notice of motion, the 2nd respondent had, pursuant to the agreement executed between him and the 1st respondent, taken possession of the portion of the suit property sold to him. In this regard see paragraphs **11(a), (f), (g); 13 and 18 in which the plaintiffs**

have averred as follows:-

“11(b) Allowing the ...2nd Defendant to enter upon the land with his own surveyor to demarcate the land, mark the boundaries and erect beacons of the sub-division portion, proceed to clear tea bushes on the sub-division portion and commence construction to the exclusion of the plaintiffs...”

f). Purporting to take possession of the land by misleading the 1st defendant to allow him construct, develop, cultivate and farm the land before completion of the transaction for sale of the land while allegedly having paid a paltry 12.5% of the purchase price..

13...the 2nd defendant has already sent people to clear and sub-divide portions in a bid to take immediate possession and occupation of the land even before he has paid the purchase price and/or completed the transaction...

18. the 2nd defendant has taken advantage of the 1st defendant’s lack of knowledge to his benefit by commencing construction and development on the property to the prejudice of the plaintiffs and the 1st defendant.”

25. It is also noteworthy that whereas the applicants’ claim is based on alleged wrongdoing by the 2nd respondent and in particular the contention that the 2nd respondent and the 1st respondent’s wife misled the 1st respondent to enter into the impugned agreement when he had no capacity to do so, the 1st respondent, through his statements of defence, denied any wrongdoing on the part of the 2nd respondent. He also denied the contention that he had no capacity to enter into the sale agreement.

26. With regard to want of the Consent of the Land Control Board to sub-divide and transfer the portion he sold to the 2nd respondent, the 1st respondent blames the applicants for interfering with the process and maintains that he entered into the impugned agreement freely and voluntarily.

27. Whereas the applicants have imputed wrongdoing on the part of the 2nd respondent, they led no evidence capable of either proving any wrongdoing on his part and/or want of capacity on the 1st respondent to enter into the impugned transaction.

28. It is not enough for the applicants to impute wrongdoing on the part of the 1st respondent; they ought to have led evidence capable of proving the alleged improprieties on the part of the 1st respondent. This is so because the transaction has been given a clean bill of health by the very person said to have been misled by the 2nd respondent.

29. Although the applicants challenged the capacity of the 1st respondent to enter into the impugned agreement and presented medical reports concerning the medical status of the 1st respondent, I find those medical reports to be incapable, at this stage of the proceedings of proving that the 1st respondent had no capacity to enter into the impugned agreement. I say so because there is a possibility of those medical reports having been made particularly to influence the outcome of this case. The contents of those medical reports have not been tested by cross-examining the makers.

30. On whether the impugned transaction is void for want of the consent of the Land Control Board, there being no evidence that the Land Control Board was seized with the application and refused to grant it as contemplated under **Section 9** as read with **Section 8** of the Land Control Act, I am, unable at this juncture, to agree with the applicants’ contention that the impugned agreement is illegal or void. The same is merely voidable.

31. It is also clear from the pleadings filed in this suit and the evidence adduced in respect thereof that some of the activities sought to be restrained and prohibited like taking possession and developing the portion of the suit property had happened before the applicants moved to court. That factual situation leads to the question, can an injunction be issued to restrain what has already happened?

32. The answer to this question is negative. In this regard the case of **Stanley Kirui v. Westlands Pride Limited (2013) eKLR** it where it was held:-

“...the court cannot injunct what has already happened. I will be guided by the findings in case of Mavoloni company Ltd vs Standard Chartered Estate Management Ltd, Civil Appeal No. 266 of 1997 (1997) LLR 5086, where the court held that “an injunction cannot be granted once the event intended to be injuncted has been overtaken by events.” Similar findings were held in the case of Esso Kenya Ltd Vs Mark Makwata Kiya, Civil Appeal No. 69 of 1991 where it was stated “an injunction cannot issue to restrain an event that has taken place.”

33. The upshot of the foregoing is that the applicants have not established a *prima facie* case with a probability of success.

34. Having found that the applicants have not established a prima facie case with probability of success, I need not consider the other tests enunciated in the case of **Giella v. Cassman Brown (supra)**. In this regard see the case of **Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) 1 EA 86** where the Court of Appeal held:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

35. Besides the prayer for injunction, the applicants also sought an order to compel the 2nd respondent to surrender/deposit the title to the suit property in court. With regard to that prayer, I note that the applicants have lodged a caution to restrain dealings with the property without their involvement. In my view that caution properly addresses their concerns.

36. On whether the applicants have proved that the 2nd respondent effected the impugned developments on the suit property when there existed a court order restraining those dealings, I reiterate my finding that by the time the applicants moved to court, the 2nd respondent had already taken possession of the suit property and began carrying out the impugned developments. That being the case, he cannot be said to have acted in defiance of the orders issued by this court.

37. The upshot of the foregoing is that the notice of motion dated 13th November, 2015 has no merit. I, consequently, dismiss it with costs to the respondents.

Dated, signed and delivered at Nyeri this 9th day of May, 2016.

L. N. Waithaka

JUDGE

In the presence of:

Mr. Kimondo for plaintiff/applicant

Mr. Kabue for defendant/respondents

Court assistant - Lydia