



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIAM LAW COURTS

ELC NO. 1445 OF 2014

JOYCE WAMBUI MBAU.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

DISTRICT LANDS REGISTRAR, KAJIADO.....2ND DEFENDANT

ANDREW KIPLAIN MOKO.....3RD DEFENDANT

RULING

The application is filed by the Plaintiff seeking orders that:

- a. ***The Court be pleased to grant an order of injunction restraining the Defendants either by themselves, agents or servants from interfering with the Land Parcel No. Kajiado/Kitengela/269, approximately 50 acres pending the hearing and determination of the application and/or until further orders of the court.***
- b. ***The Court does revoke the title deed issued to third Defendant and reverse the title deed to its original owner Francis Mbau Murigi.***
- c. ***Costs of the application be provided for.***

The application is based on the grounds outlined in the application and supported by an affidavit sworn by the Plaintiff. The applicant deposes that she is the widow and administrator of the estate of **Francis Mbau Murigi**. The deponent states that the title to the suit property and other documents were burnt down in Pangani, Nairobi when her deceased husband's office caught fire. However, that the official search annexed and marked "JWM2" confirms that the suit property was transferred by the 3rd Defendant to her deceased husband on 15th June 1990. It is her disposition that the Defendants have conspired to dispose the estate of the deceased and an attempt to register a caution over the property on 6th November 2013 was frustrated by the 2nd Defendant.

The Plaintiff also swore a Supplementary Affidavit on **23rd June 2014** ***wherein she annexed a certificate of confirmation of grant dated 25th June 2003***. The said certificate indicates that she together with **Miss. Catherine Mbau** were issued with the letters of administration to the estate of **Francis Mbau Murigi**.

The 3rd Defendant, swore a Replying Affidavit on 1st July 2014, wherein he denied entering into a sale agreement with the deceased. The deponent denied that he intended to dispose off his property by way of gift or sale. The 3rd Defendant deposed that the suit parcel in dispute was unclear since the Plaintiff avers that Land Parcel **No. Kajiado/Kitengela/2692**, belongs to her whereas the Certificate of Grant of Representation contains a different Parcel **No. Kajiado/Ololutikoshi-Kitengela/197**

The Plaintiff's counsel filed submissions dated 10th October 2014, wherein counsel recapped the Plaintiff's depositions and deposed that the Defendant had not annexed any title documents to prove ownership of the suit property. Counsel also clarified that **Parcel No. Kajiado/Ololutikoshi-Kitengela/197**, is different from the suit property herein and not the subject matter of the suit. Counsels submitted that the Plaintiff had established a prima facie case by furnishing a copy of the transfer in her deceased's husband's favour and executed by the Defendant in the presence of a Magistrate. Further that the Defendant also executed the Land Board Control consent form when after consent was issued on 8th August 1989 and subsequently the mutation form approved in the year **1990**.

The Defendant's counsel filed submissions dated **21st October 2014**. It was submitted for the Defendant that the suit contravenes the provisions of **Section 4(1) (a) and (b)** of the **Limitation of Actions Act, Cap 22** as the cause of action arose in 1989. Further, that the suit also contravenes the provision of **Section 6(1) of the Land Control Act**, which requires that an application for consent to the sale of land shall be made within 6 months of making the sale agreement. Additionally, counsel submitted that the Plaintiff had not furnished the court with a written agreement to show the transaction between the deceased and the 3rd Defendant in accordance with **Section 3(3)** of the **Law of Contract Act**. It was also submitted that it was unclear as to which property the Plaintiff claimed since the confirmation of grant contained, among others, **Kajiado/Ololutikoshi-Kitengela/197** whereas the Plaintiff makes a claim over **Land Parcel Kajiado/Kitengela/2692**. On the foregoing, counsel submitted that the Plaintiff had failed to demonstrate that her deceased husband took possession of the property.

There are points of law that the Defendant has raised in his submission. First is the issue of the Limitation of Actions Act. The Defendant submits that the suit contravenes **Section 4 (1) (a) and (b)** which bars actions founded on contract to be brought after the end of 6 years. It is the Defendant's averment that the suit is time barred since the cause of action arose 1989. However, the Plaintiff in her Supporting Affidavit deposed that she had recently heard rumors that the Defendants were conspiring to dispose the estate of the deceased and even attempted to have a caution registered on 6th November 2013. Whereas the suit property is said to have been transferred in 1989, the cause of action in the suit herein did not arise until when the Plaintiff learnt of the Defendants' alleged plans. As regards the Land Control Board consent, the Defendant submitted and referred this court to the statutory provisions and authorities on the mandatory requirement of obtaining the requisite consents. The Plaintiff however annexed copies of a letter of consent signed by the Chairman of the Board on 8th August 1989, with reference to the application made on 14th June 1989. On the foregoing, I find that these two objections do not stand.

Moving on to the merits of the application, the court is set to establish whether the Plaintiff has met the threshold to warrant the grant of injunction orders pending the determination of suit. As pointed out by both parties, the principles to be established in considering an application for injunction was set out in the celebrated case of **Giella v Cassman Brown & Co. Ltd (1973) E.A 358**.

The first principle is whether the Plaintiff has established a prima facie case with chances of success. Vide the submissions of counsel for the Plaintiff; it has been made clear that the Certificate of Confirmation of Grant dated 25th June 2003, only serves to show that the Plaintiff is the widow and legal representative of the estate of **Francis Mbau Murugi**. Therefore, the property in dispute is **Kajiado/Kitengela/2692 not Kajiado/Ololutikoshi-Kitengela /197** listed in the said Grant.

The Plaintiff deposed that the title to the property burnt down in her deceased husband's office but availed copies of a certificate of official search, transfer and letter of consent from the Board exhibiting the transaction between her husband and the 3rd Defendant. I do note that the search was conducted on **1st**

November 2001, over 13 years ago. This document evidently does not tell the court the current state of affairs. However, in view of the transfer document in favour of the deceased, this court is satisfied that the estate has substantial interest over the suit property which this court has a duty to protect. The court takes cognizance of the fact that it is a 50 acre property which has obviously appreciated in value. Consequently, I find that the Plaintiff stands to suffer irreparable loss in the event that the injunction is not granted. Furthermore, this court is not in doubt, but even if it were, the balance of convenience tilts in favour of the Plaintiff.

Prayer 3 of the application is a mandatory order of injunction. The Court of Appeal in the case of **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109** stated that for a mandatory injunction to issue, there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once. On careful perusal of the pleadings and annexures presented by the parties, this court is reluctant to grant the order of mandatory injunction at the interlocutory stage. Whereas the Plaintiff has demonstrated substantial interest over the property, the Defendant has equally raised the question whether there was a written agreement which will be adjudicated over upon trial. This prayer is therefore declined.

Having now considered the Notice of Motion dated **25th November 2013**, and the annexure too and the written submissions, the Court makes the following orders.

- 1. The Defendants are hereby restrained from interfering with or in any way alienating Land Parcel No. Kajiado/Kitengela/2692, pending the hearing and determination of the suit.***
- 2. Costs shall be in the cause.***

It is so ordered.

Dated, Signed and delivered this 27th day of February, **2015**

L.N. GACHERU

JUDGE

In the Presence of:-

Mutali for the Plaintiff/Applicant

None attendance for the 1st and 2nd Defendants

None attendance for the 3rd Defendant

Lerionka: Court Clerk

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above Counsels.

L. GACHERU

JUDGE