



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC .NO. 1214 OF 2014

WILFRED GAKUYA WAWERU & JOYCE WAMBUI MBAI

Suing as the legal representatives of the estate of

JEMIMAH NYAMBURA GAKUYA (DECEASED).....PLAINIFF/APPLICANT

=VERUS=

DANILE MBOCHA NGARE.....1ST DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR,

NAIROBI COUNTY2nd DEFENDANT/RESPONDENT

RULING

The matter coming up for determination is the plaintiff/Applicants Notice of Motion dated **12th September, 2014** brought against the Defendants herein and brought under **Order 40 Rule 7 of the Civil Procedure Rules** seeking for these Orders:-

- a. *That the Court be pleased to grant an Order restraining the 1st Defendant, his servants, workmen and agents from entering on the Plaintiffs property that is Title No. Nairobi/Block 110/213 , claiming ownership of it, or from selling or purporting to sell the same or from in any way interfering with the plaintiffs use and enjoyment of the said property pending the hearing and determination of this suit.*
- b. *That the 2nd Defendant be served with these Orders so as to ensure compliance.*
- c. *That cost of this application be borne by the 1st Defendant/Respondent.*

The application is premised on the grounds stated on the face of the application and on supporting Affidavit of **Wilfred Gakuya Waweru** .

These grounds are:

- i. *That the Plaintiff/Applicant is the legal owner of the said Title No. Nairobi Block 110/213.*

- ii. That the 1st Defendant/Respondent has fraudulently obtained a Title Deed for the Plaintiffs said property in his name.
- iii. That unless the 1st Defendant/Respondent is restrained by an Order of this Honourable Court, he will dispose of the Plaintiffs property to the detriment of the Plaintiff/Applicant herein.

The applicant **Wilfred Gakuya Waweru** in his supporting Affidavit averred that his deceased mother, **Jemimah Nyambura Gakuya** was the owner of Plot No. 6622 in **Thome Farmers Company 1 Ltd**. Having purchased the same in the year 1986 . Further that his mother utilized the plot from 1988 to the year 2000 by planting Napier grass. After her demise his sister **Nelly Waithera Waiganjo** took possession of the plot and utilized the Napier grass until 2008 when she left it to **Elizabeth Nyakiringa Mutia** , his other sister . He further averred that his mother never applied for title deed for the said plot and in June 2014, the 1st Defendant visited the suit plot and declared ownership of the same by producing a copy of Title Deed . He contended that the said Title Deed by 1st Defendant was obtained fraudulently and illegally and should be cancelled. He urged the Court to allow his application.

The application is contested. The 1st Defendant **Daniel Mbocha Ngare** filed his Replying Affidavit and averred that the application herein is malicious, frivolous and an attempt to waste judicial time. Further that the applicants are not entitled to the Orders sought as the supporting Affidavit contains unsubstantiated allegations without concrete proof. He contended that he is the legal and rightful owner of the parcel of land known as *Nairobi/Block 110/213*, having inherited the same from his deceased father **Michael Mbocha**, who had registered the land in his name in the year 1996. Further that he was re-issued with the Title deed after the original was destroyed on 21st March 2014. It was his contention that as a registered proprietor of the parcel of land, he holds an indefeasible title and further the application is unmerited as the alleged purchaser was never registered as a proprietor of the said plot. Further that the attached payment receipts do not prove ownership of the plot. He contended that there was no prove that Plot No. 662 was in fact Nairobi **block 110/213** and he also denied any allegations of fraud. He urged the Court to dismiss the applicant's application.

In response thereto, the applicant filed a further affidavit and averred that there was no evidence that any original title was issued in the year 1996 and that it was lost /destroyed and that the loss was reported to the Police and the gazzement done by the Land Registrar. Further, that the 1st Respondent did not provide any evidence that his father or himself were shareholders of **Thome Farmers Company 1** and neither did he state where his father obtained the land from yet all the parcels of land belonged to the said company. Furthermore, the 1st Defendant had never taken possession of the said parcel of land since 1996 nor sought to evict the applicants herein. Therefore the 1st Defendant's title deed was obtained fraudulently, and backdated to 1996.

The parties herein canvassed this Notice of Motion by way of Written Submissions which I have carefully considered. I have also considered the pleadings in general, the relevant laws and I make these findings;

The applicants herein have sought for an injunctive relief which is an equitable remedy. The said remedy is granted at the discretion of the Court; however such discretion must be exercised judiciously. See **Hasmukh Khetshi Shah Vs Tinga Tranders Ltd, Civil Appeal No. 326 of 2002 (2002) KLR 4628, where the court held that;**

“It must be stated at the outset that the granting of the interim Injunction is an exercise of judicial discretion”

In deciding whether to grant the Orders sought or not, I will be guided by the principles set out in the case of **Giella Vs Cassman Brown & Co.Ltd (1973) EA 358**, where the Court held that;

“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”.

The applicant therefore needed to establish that he has a prima facie case with probability of success. In the case of ***Mr Rao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 123***, 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 other”.

In the instant suit, the applicants have herein alleged that they are the legal representative of the Estate of ***Jemimah Nyambura Gakuya*** who owned plot ***No. 662 Thome Farmer Company 1 Ltd***. That the applicants family has been in occupation of the suit plot until sometimes in June 2014 while the 1st Defendant laid claim to the suit plot. The 1st Defendant produced a copy of Title Deed for plot ***No Nairobi Block 110/213*** which the applicants believe was obtained fraudulently. The 1st Defendant on his part alleged that he got registered first in the year 1996 after he was given the suit plot by his father one ***Daniel Mbocha***.

What is clear and not in doubt is that the late ***Jemimah Nyambura Gakuya*** owned plot ***No. 662 in Thome Farmers Company 1 Ltd***. What is also not in doubt is that the 1st Defendant is the registered owner of ***Nairobi Block 110/213***. However, what is not clear is whether plot ***No. 662 Thome Farmers Company 1 Ltd*** is the same as ***Nairobi Block 213***. That aspect can only be cleared by officials from the said ***Thome Farmers Company 1 Ltd*** and government survey through a full trial. At this juncture, the Court is certain that the suit plot is owned by the 1st Defendant as he is the registered proprietor. That position is supported by the provisions of ***Sections 26(1) of Land Registration Act 2012***, which provides that:-

“ The certificate of Title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of the proprietor shall not be subject to challenge except”.

- i. *On the grounds of fraud, or misrepresentation to which the person is proved to be a party of*
- ii. *Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

The applicants have alleged that they are the rightful owner of the suit plot. However, at the moment, the Court cannot hold with certainty whether the suit plot ***No. 662*** is the same as ***Nairobi Block 110/213***. Even if the suit plot is ***Nairobi Block 110/213***, the 1st Defendant is the registered proprietor therefore that is ***prima facie*** evidence that he is the indefeasible and absolute owner.

The applicant has alleged the 1st Defendant obtained his Title Deed fraudulently. Fraud is one of the grounds that can lead to a certificate of Title being challenged. However, such challenge can only be done through calling of evidence in a full trial but not through affidavits evidence. For now and prima facially, the 1st Defendant is the absolute and indefeasible owner of the suit land.

Having found that the 1st Defendant is the registered owner of ***Nairobi Block 110/213*** which the Court is not certain whether it is the same as plot ***662 Thome Farmers Company 1 Ltd***, the Court finds that the applicants have not established that they have a prima facie case with probability of success.

On the second principle, the applicants needed to establish that they will suffer irreparable loss and injury which cannot be compensated by an award of damages . The applicants have alleged that their mother was in possession of the suit land from 1988 to 2000 wherein, she is only cultivating Napier grass. She however never got title deed nor got registered as the proprietor of the suit land. There are no developments on the suit land. The value of the suit plot can be quantified and in case the main suit would be decided in favour of the applicant, the value of the suit land can be quantified and applicants compensated with costs or monetary terms see the case of **Wairimu Mureithi Vs City Council of Nairobi , Civil Appeal No. 5 of 1979 KLR 332 396** where it was held that: -

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”. (See American Cynamid Company Vs Ethicon Ltd (1975)AC 396).

The applicants herein are only growing napier grass on the suit plot. They have not put up any development and they have therefore not established that failure to grant the injunction will result in them suffering irreparable loss or injury which cannot be compensated by an award of damages .

On the 3rd principle, of if the Court is in doubt, to decide on a balance of convenience, the Court finds that it is indeed doubtful whether plot No. 662 is the same as ***Nairobi Block 110/213*** . However what is not in doubt is that the plot which the applicants’ mother had used since 1988 to 2000 and later the applicant’s family is the same plot being claimed by the 1st Defendant. The applicants have been in possession of the suit plot .Though the 1st Defendant alleged that he obtained the Title Deed in 1996, no evidence that he ever took possession of the same. The Court finds that the balance of convenience herein tilts in favour of the applicants who have been in possession of the suit plot since 2000 after the demise of their mother ***Jemimah Nyambura Gakuya***.

Having considered the circumstances of this case, the court finds that the most convenient arrangements would be maintenance of the **Status Quo** prevailing before June 2014. The Status Quo therefore was that the applicants family was in occupation of the suit plot . The said Status Quo should therefore prevail. I will be guided in the case of **James Jamwa Ndeda Vs Dorine Alouch, Kisumu High Court, Civil No. 136 of 2007,** where the Court held that:-

“ The balance of convenience would tilt in favour of the Defendant who is in actual occupation of the suit land rather than the Plaintiff who may be in occupation by remote control”.

It is evident that the 1st Defendant has never been in occupation of the suit plot . The balance of convenience tilts in favor of the applicants herein.

From the foregoing, the Court finds that the applicants Notice of Motion dated 12th September, 2014 is merited. The same is allowed entirely in terms of prayers No. 4 and 5 . The costs of the application shall be in the cause.

However, the applicant to ensure the main suit is set down expeditiously within the next 12 months. Failure to do so, the injunction order will stand discharged automatically unless otherwise extended by the Order of this Court.

It is so ordered.

Dated, Signed and delivered this **20th day of February 2015**

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of

Mr Waithaka holding brief Karunga for the Plaintiff/Applicant

M/s Otieno for the 1st Defendant/Respondent

Kamau : Court Clerk

L. GACHERU

JUDGE

20.2.2015