



**Winfred Wangari Chege v Faiz Hassan Azzubedi, Chief Registrar of Titles & Attorney General
(Environment & Land Case 135 of 2014) [2015] KEELC 855 (KLR) (27 April 2015) (Ruling)**

Winfred Wangari Chege v Faiz Hassan Azzubedi & 2 others [2015] eKLR

Neutral citation: [2015] KEELC 855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 135 OF 2014**

LN GACHERU, J

APRIL 27, 2015

BETWEEN

WINFRED WANGARI CHEGE PLAINTIFF

AND

FAIZ HASSAN AZZUBEDI 1ST DEFENDANT

THE CHIEF REGISTRAR OF TITLES 2ND DEFENDANT

THE HON. ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. The application before this court for consideration is the Notice of Motion dated 12th February 2014 brought under order 40 Rule 1,2,3,4, Order 51 of the Civil Procedure Rules section 26 (1) (a) of the [Land Registration Act](#) seeking for orders that
 1. A permanent injunction the 1st defendant his agents, servants, employees from entering upon, taking possession, constructing or in any other way from interfering with the property known as LR No 7785/263 pending the hearing and determination of this suit .
 2. The 2nd defendant be restrained from cancelling the certificate of title issued to the plaintiff for LR No 7785/263(IR NO. 132028)[suit property]
 3. The 2nd defendant be order to cancel the certificate of Title issued in favour of the 1st defendant being (I.R. NO 108103)
 4. The 1st defendant do vacate and remove or remove or demolish all the buildings unlawfully erected on the property known as LR No 7785/263 and in default the applicant be allowed to demolish the said buildings on her plot at the 1st defendants costs.



2. The application is premised on the grounds stated on the face of the application and the applicant's supporting affidavit who stated that she is the registered owner of the suit property having purchased it from Mae Properties Limited in 1989. After obtaining the certificate of title she sent her land agents to the property where they discovered that there were some developments on the plot and found that the 1st defendant had trespassed onto her land. She further averred that the ministry of lands and the directorate of survey engaged with the parties' advocates but could not solve the dispute because the survey officers confiscated the deed plan that was attached to the certificate of title claiming that it was stolen from their file. The officials at the ministry of lands have threatened to cancel her title. Further, the 1st defendant has refused to vacate from the property and continues to construct notwithstanding that he has no right to the property. She now fears that unless the court issues the orders of injunction the 1st defendant may dispose, sell mortgage or adversely deal with the property to her detriment as she is likely to suffer irreparable loss and damage.
3. This application is opposed by the 1st defendant who filed grounds of opposition and a replying affidavit. He stated that he was the registered proprietor of the suit property having bought it in 2008 and is in actual possession. He further averred that he is undertaking construction on the property. He further averred that the search at the Ministry of lands showed that the suit property that was registered in his name was in the mother title. He stated that the parties herein met the land registrar who after checking their records confirmed that both titles were genuinely recorded and wrote to the survey of Kenya advising them on the two deed plans. He contends that an officer at the Survey of Kenya offices confiscated the deed plan to his title allegedly because it had the original signature and ought to be their copy which actions are irregular, illegal and fraudulent considering that he was the registered proprietor as a purchaser for value. He also claimed that the plaintiff is guilty of laches for having known of his occupation and development of the suit property since 2001 and chose never to take action. Further, he claims that the plaintiff has not satisfied the basic principles of granting an injunction as she has failed to prove a prima facie case with probabilities of success and has also failed to satisfy the honorable court that an award of damages cannot adequately compensate her if her case is thrown out.
4. In a rejoinder, the plaintiff filed a supplementary affidavit stating that she has not been indolent as claimed by the 1st defendant as she had been directly pursuing the matter with the relevant government authority. That the confiscation of the deed plan from the 1st defendant by the officers at the survey department showed that he did not have a genuine title to the property.
5. Parties filed written submissions in pursuance to an order of the court. The plaintiff in her submissions stated that she was the legal owner of the suit property therefore the rights conferred to her by registration are not defeasible as stated in section 26 of the *Land Registration Act*. She stated that she has a certificate of title and a deed plan therefore she has a prima facie case with a probability of success. She further submitted that the 1st respondent was constructing on the suit property which was valued at Ksh 30,000,000/= in 2010 and has gone up to Ksh 50,000,000/= therefore she may suffer loss to the extent of the stated sums if the respondent continues developing the property yet the 1st defendant has not shown that he is able to pay Ksh 50,000,000/= in the event the property is found to be hers. Further she submitted that she has been denied the opportunity to develop her property. She therefore sought that the court preserve the property in its state until the matter is heard and determined on a balance of convenience and also to forestall loss to the plaintiff. She relied on the case of *Giella – vs- Cassman Brawl Limited* [1972] on the principles of granting an injunction and *George Orango Orago –vs- George Liewa Jalango & 3 others CA No 62 of 2009* where the Court of Appeal held that the purpose of a temporary injunction is to conserve the subject matter pending the determination of the suit concerning the property and urged the court to be guided by these authorities.



6. The 1st defendant filed his written submissions on 22nd July 2014. He submitted that the plaintiff had not satisfied the threshold of granting of the equitable orders of injunction as a court of law as a court of law cannot issue orders in vain. He stated that he is the registered proprietor of the suit property and in occupation therein with developments of over 22 million. He also submitted that there was no danger of the likelihood of the 1st defendant disposing off the suit property as it is his interest that the suit be decided on merit to avoid any other third party claims on the property. He further submitted that the plaintiff had no cause of action against the 1st defendant but the 2nd defendant who is the keeper of the land title records in Kenya and should the plaintiff's claim succeed she can only be entitled to indemnity pursuant to section 81 and 82 of the [Land Registration Act](#) .
7. He also submitted that his registration was first in time as opposed to the plaintiff's registration of title therefore it takes precedence over the plaintiff's title. He concluded by stating that the application seeks to settle the prayers in the plaint through the application as they are provided as substantive prayers in the application before the court and replicated in the plaint. He submitted that the weighty issues and allegations of fraud cannot be tested by affidavit evidence but only through viva voce evidence to prove their veracity.
8. I have carefully considered the Affidavits, the written submissions and the authorities relied on. This is an injunction application and the principles applicable are well settled in *Giella –vs- Cassman Brown Limited* [1978 EA358 .That the Applicant must establish a prima facie case with a probability of success, that the applicant must demonstrate that damages will not be an adequate remedy and that if the court is in doubt on the foregoing, it determine the matter on a balance of convenience.
9. I have before me two title deeds, one issued to the plaintiff under the RTA on 15th March 2011 and another issued to the 1st defendant under the RTA on 15th May 2008. Counsel for the parties confirmed to me that both these titles relate to one and the same piece of land. The 2nd defendant's Principle Registrar of Titles in the letter dated 22nd December 2011 acknowledged that there are two sets of deed plans bearing the same deed plan number and two certificates of title issued to two different people. This being an interlocutory application I am, at this stage, not required to make any ultimate findings in the matter. All I can say is that having carefully perused the pleadings and annexures to the affidavits of the parties herein, I find that there are areas that require evidence before the court make a determination on who between the plaintiff and the 1st defendant is the legal owner of the suit property. This court cannot decipher how for instance two titles could be issued in respect of the same piece of land considering that one title stands for one property therefore it is obvious in this suit that one of the two titles is a forgery which this court cannot tell before it hears evidence on the matter .
10. The parties have through their affidavits give conflicting accounts on how they acquired title and how the Ministry of land and the survey of Kenya has handled this matter the proper evidence can only be determined by the experts at the main hearing. I note that the 1st defendant has been undertaking developments on the suit property as exhibited in his annexures and that fact being confirmed by the plaintiff the court can only preserve the suit property pending the outcome of the final judgment after parties have been heard on merit.
11. However, this finding notwithstanding, on the material placed before me I am satisfied that the plaintiff has made out a prima facie case with a probability of success. I therefore grant the injunction but not in the way it is sought. Instead I order that the 1st defendant by himself, his agents, servants or employees are hereby restrained from carrying out any further developments, temporary or permanent, on the suit property until this suit is heard and determined on merit.



12. Prayers No 3, 4, 5 and 6 cannot be granted at this point but to await the determination of the main suit . Costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF APRIL, 2015

L.GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of ;-

Mr Mureithi holding brief M/s Muendo for the Plaintiff/Applicant

None apperance for the 1st, 2nd & 3rd Defendant/Respondent though notified.

Court Clerk : Hilda

