



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 284 OF 2014

ALICE WARIGIA JOHN..... PLAINTIFF/APPLICANT

JANE WANJA KURIA

SUING AS LEGAL REPRESENTATIVE) OF ESTATE OF LATE

LUCAS KURIA NJIRI).....1ST DEFENDANT/RESPONDENT

LILIAN MUTHONI MBUGUA.....2ND DEFENDANT/RESPONDENT

REGISTRAR OF LANDS KIAMBU DISTRICT

LAND REGISTRY.....3RD DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 11th March 2014 in which the Plaintiff/Applicant seeks orders of temporary injunction restraining the Defendants/Respondents from selling, transferring or in any way dealing with the properties identified as Ndumberi/Ndumberi/3950-3954 (hereinafter referred to as the “suit properties”) pending the hearing and determination of this Application and suit, that the court do order that the Land Registrar Kiambu District Land Registry do cancel entry dated 31st January 2014 on green card closing the title Ndumberi/Ndumberi/1042 and/or cancel the title deeds for the suit properties and finally that the costs of this Application be awarded to the Plaintiff/Applicant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Alice Warigia John, sworn on 11th March 2014 in which she averred that on 13th February 2014 some unknown people accompanied by the 1st and 2nd Defendants came to their land being Ndumberi/Ndumberi/1042, surveyed it and erected beacons thereon. She further averred that upon making enquiry from the 1st and 2nd Defendants on whose authority the land was being subdivided they responded that the court had directed they sub-divide and take up their share. She further averred that on 14th February 2014 she was informed that title to Ndumberi/Ndumberi/1042 had been closed and new title deeds issued for the suit properties which are subdivisions thereof. She further stated that she later came to learn of the existence of a case at the Kiambu Chief Magistrate’s Court in which she and her son James Waithaka Njere had been sued by the 1st and 2nd Defendants which she was never

aware of. She further stated that the 1st and 2nd Defendants failed to disclose to the court that they did not serve her with the court documents and further that they lied having served her son who is based in the United States of America. In conclusion, she stated that the 1st and 2nd Defendants unilaterally decided to subdivide the land and allocated themselves larger portions than they should have taken.

The Application is contested. The 1st Defendant, Jane Wanja Kuria, filed a Notice of Preliminary Objection dated 24th March 2014 stating that the Application is hopelessly misconceived at law, frivolous, totally devoid of merit and mala fides and an abuse of court process. The 1st Defendant further filed her Replying Affidavit sworn on 5th April 2014 in which she averred that she is a widow of the late Lucas Kuria Njiri and the administratrix of his estate. She further averred that prior to the death of her husband, Lucas Kuria Njiri together with Mbugua Njiri (also deceased) now represented by the 2nd Defendant, James Waithaka Njeere and the Plaintiff were jointly registered as tenant's in equal shares of the property identified as Ndumberi/Ndumberi/1042. She further averred that following the unfortunate passing of her husband Lucas Kuria Njiri and his brother Mbugua Njiri, she and the 2nd Defendant took out letters of administration and confirmed grants of their respective husband's estates and were duly entered into the green card for that land representing their late husbands' respective shares. She further stated that there have been numerous attempts both at the nuclear and extended family levels to persuade the Plaintiff to agree to equal distribution of the property. She further averred that there was a consistent rejection by the Plaintiff of the 1st Defendant being allowed to inherit her late husband's share. She further disclosed that the Plaintiff was demanding the inclusion of a 5th person - Fraciah Njoki Kinyua - to which the 1st Defendant is opposed. She confirmed that both she and the 2nd Defendant proceeded to apply for consent to subdivide the land before the Kiambu Municipality Land Control Board, representing equal shares of all the parties in the green card, which was granted. She further confirmed that the subdivision was overseen by the Government District Surveyor Kiambu. She further stated that she had no option but to file a suit being **Kiambu CMCC 164 of 2013** for orders to execute the approved mutation forms. She concluded that the orders in that suit were granted and there has been no application for review or to set aside the proceedings of that suit by the Plaintiff to warrant the proceedings to be a nullity. She also said that the 1st and 2nd Defendants already hold titles measuring quarter acres each, leaving the Plaintiff and her son half acre held by them jointly to divide in the manner proposed by the Plaintiff.

The Application is further contested by the 2nd Defendant/Respondent, Lillian Muthoni Mbugua, who filed her Replying Affidavit filed on 6th May 2014 in which she made similar averments as those of the 1st Defendant.

The Plaintiff/Applicant and the 2nd Defendant filed their written submissions.

In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“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.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

Does the Plaintiff/Applicant have a genuine and arguable case? It has been disclosed that prior to the subdivision of the land parcel known as Ndumberi/Ndumberi/1042 into the suit properties, the Plaintiff refused to sign the mutation forms forcing the 1st and 2nd Defendant to file suit for this purpose being **Kiambu CMCC 164 of 2013**. In that suit, the court established that the 1st and 2nd Defendants were entitled to the subdivision of Ndumberi/Ndumberi/1042 as per their claim. In the face of the refusal of the Plaintiff to sign the approved mutation forms, the court went ahead to order that the Executive Officer do sign them and this was done. To my mind, the very issues that were considered by the court in **Kiambu CMCC 164 of 2013** are the same issues that the Plaintiff is raising in this present suit. The Plaintiff did not appeal against the Judgment in that suit nor did she request for a review of the same. This scenario raises the issue of whether this suit is res judicata. The law pertaining to the doctrine of res judicata is captured under **Section 7 of the Civil Procedure Act** which provides as follows-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

In light of the foregoing, I am convinced that the court in **Kiambu CMCC 164 of 2013** conclusively determined the ownership of the suit properties and as a result this instant suit is res judicata and cannot stand.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“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...”

Arising from the foregoing, I hereby dismiss this suit with costs to the Defendants.

DELIVERED AND SIGNED IN NAIROBI THIS 24TH

DAY OF APRIL 2015

MARY M. GITUMBI

JUDGE