



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 292 OF 2014

PRISHAR WAMBUI KAGUURA.....PLAINTIFF

VERSUS

PETER WAITHAKA KAGUURA.....1ST DEFENDANT

ELIZABETH WANJIRU WAITHAKA2ND DEFENDANT

PETER KANINI MUGO3RD DEFENDANT

RULING

On 12th November 2014, the plaintiff/applicant filed this suit against the defendants/respondents seeking a permanent injunction to restrain the 1st and 2nd defendants/respondents from entering into agreements affecting the land known as LOC 2/KANDERENDU/1511 (herein referred to as the suit land) with third parties without involving her and also a permanent injunction to restrain the 3rd defendant/respondents from trespassing, disposing, wasting,

transferring, alienating, charging, encroaching or in any manner dealing in or selling the suit land. She also sought general damages for trespass to be borne by the 3rd defendant/respondent plus costs and interest.

Simultaneously with the filing of this suit, the plaintiff/respondent also moved the Court under Order 40 of the Civil Procedure Rules and other enabling provisions of the law seeking the following orders:-

1. *Spent*
2. *Spent*
3. *Spent*
4. *Spent*
5. *Spent*
6. *Spent*
7. *That the 1st and 2nd defendants/respondents by themselves be barred by an injunction order from entering into agreements affecting all the land known as Land Reference No.*

LOC 2/KANDENDERU/1511 without involving the plaintiff/applicant till this case is heard and finally disposed off.

8. That the 3rd defendant/respondent by himself, his employees, servants or agents be barred by a injunction order from trespassing, disposing, wasting, transferring, alienating, charging, encroaching or in any other manner dealing with land reference No. LOC 2/KANDENDERU/1511 till this case is heard and finally disposed off.

9. That costs be in the cause.

The application which is supported by the affidavit of the plaintiff/applicant is based on the grounds that the 1st and 2nd defendants/respondents have leased the suit land to the 3rd defendant/respondent without her consent and the 3rd defendant/respondent and his employees, servants and agents have started plucking tea leaves on the suit land without the consent of the plaintiff/applicant yet that land is her livelihood. In her affidavit in support of the application, the plaintiff/applicant has deponed that both herself and the 1st and 2nd defendants/respondents are the registered owners of the suit land in which the 1st and 2nd defendants/respondents live. Previously the land was known as LOC 2/KANDENDERU/640 before the 1st and 2nd defendants/respondents fraudulently sub-divided it into the parcels namely LOC 2/KANDENDERU/1511 and LOC 2/KANDENDERU/1512. that they have all enjoyed quiet possession of the suit land until November 2014 when the 3rd defendant/respondent, his agents, servants and other employees trespassed onto the same and started picking tea which she planted in the 1990s. Upon enquiry, she learnt that the 1st and 2nd defendants/respondents had entered into a long term lease with the 3rd defendant/respondent to pick the tea and deliver it to Makomboki Tea Factory without involving her.

The defendants/respondents filed a joint replying affidavit in which they deponed, inter alia, that the plaintiff/applicant is the mother to the 1st defendant/respondent who is the husband to the 2nd defendant/respondent while the 3rd defendant/respondent is a purchaser for value of 1.5 acres out of the suit land which has always been registered in the names of the 1st and 2nd defendants/respondents until 25th January 2011 when the plaintiff/applicant fraudulently caused the insertion of her name on the aforesaid title. That on 24th September 2014, the 1st and 2nd defendants/respondents sold a portion measuring 1.5 acres out of the suit land to the 3rd defendant/respondent who took possession of it and that the plaintiff/applicant is in possession of another parcel of land LOC 2/KANDENDERU/045 where she resides.

In a further affidavit, however, the plaintiff/applicant reiterated that she and 1st and 2nd defendants/respondents are the registered owners of the suit land although even the name of the 2nd defendant/respondent was inserted fraudulently. She added further that she did not know about the sale agreement between the 1st and 2nd defendants/respondents and the 3rd defendant/respondent until she saw the replying affidavit and in any event, that agreement is null and void since she was not involved and even if she has another parcel of land elsewhere, that does not give the defendants/respondents the right to deprive her of the suit land.

Submissions have been filed by both Mr. Maina for the plaintiff/applicant and Mr. Ngigi for the defendant/respondent.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsels.

This being an application for temporary injunction, it has to be considered in light of the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 C.A 358** which are:-

1. The applicant must show a prima facie case with a probability of success

2. *An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not otherwise be adequately compensated by an award of damages*

3. *If in doubt, the Court will decide the application on a balance of convenience.*

A prima facie case was defined by the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD C.A CIVIL APPEAL NO. 39 of 2002 (2003 e K.L.R)** 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”

It must also be remembered that being an equitable remedy, an injunction will not be granted where it is demonstrated that the applicant has not approached the Court with clean hands. Finally, as was held in the case of **FILMS ROVER INTERNATIONAL 1980 3 ALL. E.R 772**, the Court should take the course that appears to carry the lower risk of injustice.

Bearing in mind the above principles, is the plaintiff/applicant entitled to the orders of injunction sought in her application dated 12th November 2014? It is clear from both the certificate of search annexed to the plaintiff/applicant's supporting affidavit (**PWK 1**) and also the copy of register annexed to the replying affidavit of the defendants/respondents (also marked **PWK 1**) that the suit land is registered in the joint names of the plaintiff/applicant and the 1st and 2nd defendant/respondents. The 1st and 2nd defendant/respondents however claim in paragraph 5 of their replying affidavit that in fact on 25th January 2011, the plaintiff/applicant “**fraudulently**” caused her name to be inserted on the title. On the other hand, in her further affidavit, the plaintiff/applicant has deponed in paragraph 4 that although she and the 1st and 2nd defendant/respondents are the registered owners of the suit land, “**the name of the 2nd defendant appears there fraudulently**”. Therefore, whereas the title document in respect to the suit land recognizes the plaintiff/applicant and the 1st and 2nd defendant/respondents as the joint owners of the suit land, there are claims that the insertion of the plaintiff/applicant and the 2nd defendant/respondents names on the title was done fraudulently. The issue as to whether those names were fraudulently inserted on the title document are matter for trial and cannot be determined at this stage. For now, this Court is entitled under **Section 37(2) of the Registered Land Act** (now repealed), under which the title to the suit land was registered, to hold that the copies of certificate of search and register are prime facie evidence that the suit land is registered in the joint names of the plaintiff/applicant and the 1st and 2nd defendant/respondent herein. All of them are therefore entitled to the interest and rights conferred and protected by **Section 27 and 28 of the repealed Registered Land Act**. In the circumstances, any disposition in the suit land can only be made by the joint proprietors as provided under **Section 102(a) of the repealed Registered Land Act**.

With respect to the 1st and 2nd defendant/respondents, the plaintiff/applicant seeks orders that they be restrained from entering into any agreements affecting the suit land without informing her. She is not seeking to stop them from entering the suit land and she cannot possibly succeed in such a claim because they too own the land. I am satisfied that the plaintiff/applicant has established a prima facie case to justify the orders sought against the 1st and 2nd defendant/respondents. In their replying affidavit, the three defendant/respondents have annexed a sale agreement (**PWK 2**) dated 24th September 2014 by which the 1st and 2nd defendant/respondents sold 1.5 acres out of the suit land to the 3rd defendant/respondent at a consideration of Ksh. 2,000,000/= . The plaintiff/applicant was not a party to that agreement yet she is also an owner of the suit land. The law requires that she be involved and that was therefore a clear transgression of the law and therefore establishes a prima facie case that warrants the orders sought by the plaintiff/applicant herein as against the 1st and 2nd defendant/respondents.

The same case applies with respect to the orders for injunction as against the 3rd defendant/respondent.

The 3rd defendant/respondent alleges in paragraph 10 of the replying affidavit that he has already taken possession of the land and therefore this application is over-taken by events. However, in so far as the plaintiff/applicant was not involved in the agreement by which the 3rd defendant/respondent acquired a portion of the suit land, he remains a trespasser to that land because the law was flouted during that transaction. **MADAN J.A** (as he then was) captured it very clearly in **ALKMAN VS MUCHOKI 1984 K.L.R 353 at page 359** as follows:-

“Those who flout the law by infringing the rightful title of others and blatantly admit it, ought to be restrained by injunction. If I am adding a new dimension for the grant of an interlocutory injunction, be it so. Equity will not assist law breakers”

It is clear from the above that the plaintiff/applicant has established a prima facie case to warrant the orders sought against the defendants/respondents herein.

On the issue of adequacy of damages being sufficient for the injury that the plaintiff/applicant might otherwise suffer, again I can do no more than quote the late **MADAN J.A** (as he then was) in the **ALKMAN** case (supra) where he said at **page 359** that:-

“It was therefore a limited approach by the learned Judge to say that the injury which the plaintiffs may have suffered as a result of the defendant’s trespass or acts were capable of compensation by an award of damages. I will not subscribe to the theory that a wrong-doer can keep what he has taken because he can pay for it”

The above was approved by the Court of Appeal in **JAJ SUPER CASH AND CARRY LTD VS NAIROBI CITY COUNCIL AND TWO OTHERS C.A CIVIL APPEAL NO. 111 of 2002** in the following terms:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong does cannot keep what he has taken because he can pay for it”.

That is the predicament in which the 3rd defendant/respondent finds himself. True he bought a portion of the suit land from the 1st and 2nd defendants/respondents. However, the plaintiff/applicant is a joint owner of the land and was not involved. Prima facie, therefore, the 3rd defendant/respondent remains a trespasser on the suit land and must be enjoined.

Ultimately therefore, upon considering all the matters herein, I am satisfied that the plaintiff/applicant is deserving of the orders sought in the Notice of Motion filed herein on 12th November 2014. That application is accordingly allowed as prayed with costs being in the cause.

B.N. OLAO

JUDGE

9TH OCTOBER, 2015

9/10/2015

Before

B.N. Olao – Judge

Gichia – CC

No appearance for Plaintiff/Applicant

Mr. Abubakar for Ngigi for Defendant/Respondent – present

COURT: Ruling delivered this 9th day of October, 2015 in open Court

No appearance for Plaintiff/Applicant

Mr. Abubakar for Ngigi for Defendant/Respondent present.

B.N. OLAO

JUDGE

9TH OCTOBER, 2015