



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 278 OF 2014

PRISHAR WAMBUI KAGUURA.....PLAINTIFF

VERSUS

PETER WAIHAKA KAGUURA.....1ST DEFENDANT

ELIZABETH WANJIRU WAIHAKA.....2ND DEFENDANT

SAMUEL MWANGI GACHUNGA.....3RD DEFENDANT

FLORAH NJOKI MWANGI.....4TH DEFENDANT

DISTRICT LAND REGISTRAR, MURANG'A.....5TH DEFENDANT

HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

By her Notice of Motion filed herein on 10th October 2014, the plaintiff/applicant seeks the following orders:-

1. *Spent*
2. *Spent*
3. *Spent*
4. *That the 1st and 2nd defendants by themselves be prohibited by an injunction order from disposing, wasting, transferring, alienating, charging and/or selling any portion or all that parcel of land known as Land Reference LOC 2/KANDERENDU/1511 without involving the plaintiff/applicant till this case is heard and finally disposed off.*
5. *That the 3rd and 4th defendants by themselves be prohibited by an injunction order from disposing, wasting, transferring, alienating, charging and/or selling any portion or all that parcel of land known as Land Reference No. LOC 2/KANDERENDU/1512 without involving the plaintiff/applicant till this case is heard and finally disposed off.*
6. *That the 5th defendant by himself be prohibited by an injunction order from effecting any registration regarding disposing, wasting, transferring, alienating, charging and/or selling any portion or all that parcel of land known as Land Reference No.*

LOC 2/KANDERENDU/1511 and LOC 2/KANDERENDU/1512 without involving the plaintiff/applicant till this case is heard and finally disposed off.

7. *That a permanent injunction do issue against the 1st and 2nd defendants by themselves barring them from disposing, wasting, transferring, alienating, charging and/or selling any portion or all the suit land without involving the plaintiff/applicant.*
8. *That this Honourable Court be pleased to order for revocation and/or cancellation of the subdivisions and title deeds in respect to all that parcel of land known as Land Reference No. LOC 2/KANDERENDU/1511 and LOC 2/KANDERENDU/1512.*
9. *That this Honourable Court be pleased to order for reinstatement of and/or merger and issuance of title deed for the original land known as Land Reference No. LOC 2/KANDERENDU/640 as it was before.*
10. *That a permanent injunction do issue against the 5th defendant barring him from effecting any registration regarding disposing, wasting, transferring, alienating, charging and/or selling any portion or the whole suit land without involving the plaintiff/applicant.*
11. *That this Honourable Court be pleased to order for eviction of the 3rd and 4th defendants from the suit land.*
12. *That the Officer-in-charge Makomboki Police Post to ensure peace and tranquility is observed in enforcement of this order.*
13. *That a permanent injunction do issue against the 3rd and 4th defendants barring them from trespassing and/or entering into, disposing, wasting, transferring, alienating, charging or encroaching on the suit land.*
14. *Costs be in the cause.*

The Notice of Motion is brought under **Order 40 Rules 1, 3, 5 and 10 and Order 51 Rule 1 of the Civil Procedure Rules (2010), Sections 1A, 1B and 3A of the Civil Procedure Act and Sections 80 and 81 of the Land Registration act 2012.**

The application is supported by the applicant's affidavit in which she has deponed, inter alia, as follows:-

1. *That the 1st defendant is her son and the 2nd defendant her son's wife and that at all material time, she and the 1st defendant were the registered owners of the parcel of land known as LOC 2/KANDERENDU/640 and in December 2007, she released the title thereto to the 1st defendant.*
2. *The 1st defendant then proceeded to sub-divide the said land into two parcels being LOC 2/KANDERENDU/1511 and LOC 2/KANDERENDU/1512.*
3. *The 1st defendant then had the parcel No. LOC 2/KANDERENDU/1512 registered in his name, the 2nd defendant's name and the applicant's name without her consent or knowledge.*
4. *The 1st defendant then proceeded to sell the land parcel No. LOC 2/KANDERENDU/1512 to the 3rd and 4th defendants without her consent or knowledge.*
5. *It was not until the year 2011 that the applicant discovered this and upon confronting the 1st defendant, he promised to cancel the registration but has not done so and therefore the applicant lodged a caution on land parcel No. LOC 2/KANDERENDU/1511 on 12th May 2011.*
6. *That the registration of the said land parcels in the names of the 1st, 2nd, 3rd and 4th defendants was fraudulent and without her consent and if not restrained, they will dispose and/or waste the said land hence this application.*

The 1st, 2nd, 3rd and 4th defendants/respondents filed replying affidavits in opposition to the application.

The 1st and 2nd defendants/respondents deponed that the application is fatally defective, incompetent, frivolous and an abuse of the Court process apart from being omnibus and therefore not maintainable in law. They added that the parcel of land No. LOC 2/KANDERENDU/640 was infact given to the 1st defendant/respondent and that the applicant has her own land in Kanderendu measuring 12.0 acres. They

further deponed that they hold parcel No. LOC 2/KANDERENDU/1511 while the 3rd and 4th defendants/respondents hold parcel No. LOC 2/KANDERENDU/1512 as bona fide purchasers and that this suit is therefore an afterthought and an attempt to take what is illegally their property.

On their part, the 3rd and 4th defendants/respondents also in a joint replying affidavit deponed that when they bought the parcel

of land Reference No. LOC 2/KANDERENDU/1512 at the price of Ksh. 350,000/= in 2010, the parcel of land Reference No. LOC 2/KANDERENDU/640 was registered in the names of the 1st and 2nd defendants/respondents and that the applicant is aware about the transaction because they have been living on the said parcel of land which is next to the applicant's land.

The applicant filed a further affidavit in which she denied that her application is an abuse of the Court process adding that the parcel of land Reference No. LOC 2/KANDERENDU/640 which was registered jointly in her name and that of the 1st defendant/respondent was fraudulently sub-divided by him behind her back and she reported to the police. A copy of her complaint was annexed to the further affidavit.

The 5th and 6th defendants did not file any reply to the application but have filed a defence to the suit.

When counsels for the applicant and the 1st, 2nd, 3rd and 4th defendants/respondents appeared before me on 20th April 2015, it was agreed that the application be canvassed by way of written submissions. All the parties thereafter filed their submissions.

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

This application, which I have reproduced above, seeks wide ranging remedies which include a permanent injunction, cancellation of a title deed and an order of eviction of the 3rd and 4th defendants/respondents from the suit land. The issuance of a permanent injunction at an interlocutory stage is a very rare procedure as it may have the effect of finally disposing the suit – **YEGO VS TUIYA & ANOTHER C.A. CIVIL APPEAL NO. 73 of 1985 (1986 K.L.R 726)**. The remedies of cancellation of title deed or eviction of the 3rd and 4th defendant/respondents will have to await the trial of this dispute and are therefore not available at this stage.

What this Court will be concerned with at this stage is whether the 1st, 2nd, 3rd and 4th defendants/respondents can, pending the hearing of this suit be restrained from wasting, disposing, transferring, alienating, charging or selling the parcels of land Reference No. LOC 2/KANDERENDU/1511 and LOC 2/KANDERENDU/1512 (herein the suit properties) without involving the applicant.

An application for temporary injunction such as this one has to be determined in line with the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

1. ***The applicant must show a prima facie case with a probability of success at the trial.***
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 determine the application on a balance of convenience.***

What is 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)** in the following words:-

“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”.

A temporary injunction being an equitable remedy, it will not be granted where it can be demonstrated that the applicant has not

approached the Court with clean hands. Further, as was held in the case of **FILMS ROVER INTERNATIONAL 1980 3 ALL. E.R. 772**, the Court considering such an application should take the course that appears to carry the lower risk of injustice.

This Court shall be guided by the above principles in determining this application. According to the applicant, the original parcel of land No. Reference LOC 2/KANDERENDU/640 was registered in her name and that of the 1st defendant/respondent and that sometime in December 2007, she released the original title deed to the 1st defendant/respondent only to discover later that he had sub-divided it into two portions namely LOC 2/KANDERENDU/1511 which he registered in her names and also names of the 1st and 2nd defendants/respondents and LOC 2/KANDERENDU/1512 which he sold to the 3rd and 4th defendants/respondents. All this was done without her consent or knowledge. The applicant is therefore alleging fraud on the part of the 1st, 2nd, 3rd and 4th defendants/respondents. That may very well be so but an allegation of fraud is a serious one which cannot be determined at this stage and will have to await the hearing of the suit. Suffice it to state that the Green Card for the original LOC 2/KANDERENDU/640 was not part of the documents availed for my perusal. All I have are the certificates of search for the suit properties and also for parcel No. LOC 2/KANDERENDU/640 which shows that as at 15th July 2009, the said parcel was registered in the names of the 1st and 2nd defendants/respondents. There are no sale agreements showing when the 3rd and 4th defendants/respondents bought their respective portions. These will obviously be matters for the trial Court. For now, the suit properties are registered in the names of the 1st, 2nd, 3rd and 4th defendants/respondents and indeed parcel No. LOC 2/KANDERENDU/1511 is also registered in the names of the applicant. Until that registration is confirmed to have been fraudulently procured, it shall vest in the person in whose names it appears, the absolute ownership of the land together with all the rights and privileges belonging or appurtenant thereto. In light of the above, it would be a rare case indeed for a Court to injunct an owner of land. The 3rd and 4th defendants/respondents have deponed that they live on the land parcel No. LOC 2/KANDERENDU/1512 since 2010 having developed the same and it is not clear how they can again waste it.

In view of my findings above, it is clear that the applicant has not satisfied the first limb of the **GIELLA** case (supra) and therefore I need not consider the other limbs.

Ultimately therefore, having considered all the matters herein, I find that the applicant's Notice of Motion dated 9th October 2014 and filed herein on 10th October 2014 is not well merited. The same is accordingly dismissed with costs being in the cause.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2015

27/11/2015

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Maina for Plaintiff – absent

Ms Thungu for Wangari for 3rd and 4th Defendants - present

COURT: Ruling dated, signed and delivered this 27th day of November, 2015 in open Court.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2015