



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 131 OF 2015

NANCY WANGARI MUTHEE 1ST PLAINTIFF

ESTHER NYAGUTHII MUTHEE 2ND PLAINTIFF

(Both suing as the legal representatives and administrators of the estate of WILFRED MUTHEE KAHINDO)

VERSUS

MARGARET NYAMBURA GAKUBU 1ST DEFENDANT

WILSON WAHIKA MWANGI 2ND DEFENDANT

DAVID GAKURE GICHERU 3RD DEFENDANT

RULING

1. The notice of motion dated **27th April, 2015** brought under **Order 40 Rule 1** of the Civil Procedure Rules and **Section 68** of the Land Registration Act, 2012 seeks an order of inhibition to inhibit the registration of any transfer, charge lease, disposition or any other dealings over title No. **Tigithi/Matanya Block1/192 (Burguret)** (hereinafter referred to as the suit property) pending the hearing and determination of the current application and the suit and costs.

2. The application is premised on the grounds that the 3rd defendant is in the process of disposing off the suit property to a third party which is the only family land available to the plaintiffs and their siblings and where two of their family members remains are interred; that if the inhibition order sought is not granted and the suit property is transferred to a third party, then the plaintiffs' claim will be defeated and will occasion them untold suffering and irreparable loss and damage.

3. The application is supported by the 1st plaintiff's affidavit sworn on **27th April, 2015** in which she has deponed that the suit property initially belonged to their late father Wilfred Muthee Kahindo who was registered as proprietor and who when alive, made it clear to all that this was family property which should never be sold. She states that on 14th August, 2014 she conducted a search on the suit property which showed that the same was now registered in the 1st defendant's name. The search also revealed their nephew had registered a caution against the title and she proceeded to apply for one herself on 8th October, 2014 although the same was never registered.

4. Upon conducting a further search on 6th February, 2015 she found that the suit property had on 21st January, 2015 been transferred to the 2nd defendant who subsequently transferred it to the 3rd defendant. It is her contention that by the time the 2nd and 3rd defendants purchased the suit property, they were well aware of the plaintiffs claim as they had on several occasions tried to access the land but had been repulsed by the plaintiffs and their neighbours. She states that the 3rd defendant has since brought a surveyor to the suit property to subdivide the same into smaller portions to be sold off to unsuspecting third parties which if not stopped will defeat the plaintiffs interest.

5. To support their case and prove their interest in the suit property, the plaintiffs have annexed to their affidavit a death certificate of their late father as NWM1, a letter from the chief Tigithi Location dated 30th September, 2014 as NWM2, Letters of administration *ad litem* dated 21st January, 2015 as NWM3, an extract of a green card for Tigithi/Matanya Block1/192 (Burguret) as NWM4, a certificate of official search for Tigithi/Matanya Block1/192 (Burguret) as NWM5, an application for caution dated 8th October 2014 as NWM6, a payment receipt for the caution as NWM7, a certificate of search for Tigithi/Matanya Block1/192 (Burguret) dated 6th February as NWM8 and a certificate of search for Tigithi/Matanya Block1/192 (Burguret) dated 8th April, 2015 as NWM9. The plaintiff also relied on the following authorities:-

a) **Mary Wariti Kirumba vs Rose Nyokabi Ndung'u** [2014] eKLR – Nairobi ELC civil suit No. 31 of 2013.

b) **Wilson Waithaka Gitau vs Kenya Winston Company Limited** [2013] eKLR – Nairobi ELC suit No. 131 of 2007

c) **Falcon properties Limited vs Tom chore Odiara & 2 others** [2013] eKLR – Nairobi (Milimani Commercial Courts) ELC Case No. 450 of 2012.

6. The application is opposed by both the 1st and 2nd defendants. The 1st defendant swore his replying affidavit on 6th July, 2015 and the 2nd defendant on 22nd June, 2015. In her replying affidavit, the 1st defendant deposes that she has been the absolute proprietor of the suit property since 2002 when the same was transferred to her by her late husband (and father to the plaintiffs). She states that she has never held the suit property in trust for the plaintiffs and that the plaintiffs' mother had been given her own parcel of land measuring 9 acres which the plaintiffs have since sold. She admits having sold the suit property to the 2nd defendant on 19th November, 2014 and urges the court to dismiss the application with costs.

7. In support of her case, the 1st defendant has attached a certificate of official search for Tigithi/Matanya Block1/192 (Burguret) dated 21st November, 2014 as MNG1 and a sale agreement dated 19th November, 2014 between herself and the 2nd defendant as MNG2.

8. In his replying affidavit, the 2nd defendant deposes that he purchased the suit property from the registered owner who is the 1st defendant herein and has since sold the same to the 3rd defendant who has obtained a tile deed in his name. To support his case, he has attached two sale agreements, one dated 19th November, 2014 between himself and 1st defendant and the other dated 26th February, 2015 between himself and the 3rd defendant.

9. The 3rd defendant filed his statement of defence on 5th June 2015, but did not respond to the application.

10. When the application came for interparties hearing on 16th September, 2015 **Mr Mwangi** counsel for the plaintiffs, **Mr. Wachira** on behalf of **Mr. Wanjohi** for the 3rd defendant and the 2nd defendant **Wilson Mwangi**, all chose to solely rely on their affidavits and authorities filed. The 1st defendant did not attend court.

The Law applicable to the application

11. The application herein being one for issuance of a temporary injunction, to succeed in their quest to restrain the defendants, in particular the 3rd defendant from dealing with the suit property, the plaintiffs must satisfy the conditions enunciated in the celebrated case of **Giella v. Cassman Brown** (1973) E.A 358 that is to say, the plaintiffs must:-

- (i) Demonstrate that they have a *prima facie* case with a probability of success;
- (ii) Prove that damages are not adequate to compensate them for the loss that they may suffer if the prayer for temporary injunction is denied;
- (iii) If the court is in doubt, it will determine the case on a balance of probabilities.

12. The conditions outlined in the *Giella* Case (Supra) are sequential **“So that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed”** See ***Kenya Commercial Finance Company Ltd Vs Afraha Education Society*** [2001] 1 E.A. 86 and ***Karen Bypass Estate Ltd V. Print Avenue & Company Ltd***, Nairobi HCCC No. 284 Of 2013 [2014]Eklr.

13. Turning to the current case, the first question to be determined is whether the plaintiffs have established a *prima facie* case with a probability of success.

With regard to this question, it is important to start by pointing out that the 3rd defendant is a holder of a title issued to him under the Land Registration Act, No. 3 of 2012. By dint of the provisions of **Section 26** of that Act, this court is enjoined to treat a title issued by the Registrar as *prima facie* evidence that the person thereon is the absolute owner of the property.

14. In applying the foregoing provisions of the law to the circumstances of this case, the law is tilted in favour of the 3rd defendant who has a title to the suit property. see **Section 26** of the Land Registration Act, No.3 of 2012 which provides:-

“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as 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 that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

15. The plaintiffs have among their documents, attached an extract of a green card for Tigithi/Matanya Block1/192 (Burguret) as NWM4. Entries No.4 and 5 on that green card reveal that the 1st defendant was registered as the owner of the suit property on 18th December, 2002 and was issued with a title deed. The plaintiffs father died on 14th May, 2006. From the pleadings and annexures, it is clear that no action was taken between 2002 and 2006 and it was only after their fathers death that a caution was registered by Wilfred Muthee Kahindo, their nephew on 30th June,2006.

16. Although the plaintiffs allege fraud on the part of the 1st defendant on how she obtained her title, they have offered no explanation on why they waited until after their fathers death in 2006 to register a caution on the suit property and only filed suit after the said property had been disposed off to the 2nd defendant in 2015.They have also not demonstrated that the 2nd and 3rd defendants were aware of the applicants interest in the suit property when the 1st defendant sold the suit property to the 2nd defendant. They have

also provided no proof that the 2nd and 3rd defendants knowingly pertook in the alleged fraudulent dealings concerning the suit property.

17. **Section 109** of the Evidence Act Cap 80 is clear that ;

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

In the instance suit the burden to prove the alleged fraud lies with the plaintiffs who have failed to adduced any evidence in support of those allegations.

18. Further, despite the plaintiffs having deponed that they have always been in possession and occupation of the suit property even after the same had been sold to the 2nd and 3rd defendants, they have adduced no evidence capable of proving that fact. To establish that fact, the applicants should at least have produced evidence of their alleged activities on the suit property by, say, production of photographs. Without any evidence of their alleged activities on the suit property, their allegations remain merely as such. In view of the foregoing, I find and hold that the plaintiff has not demonstrated a *prima facie* case with a probability of success.

19. Having failed to demonstrate that they are in possession and/or occupation of the suit property, I am convinced that any loss occasioned to them can be compensated by way of damages.

20. Since I am not in doubt, I find it unnecessary to address the third limb of balance probabilities.

21. The upshot of the foregoing is that the application has no merit and it is dismissed with costs to the 1st and 2nd defendants.

Dated, signed and delivered at Nyeri this 12th day of November, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kimunya h/b for Mr. Mwangi for the plaintiffs

N/A for the 1st defendant

N/A for the 2nd defendant

N/A for the 3rd defendant

Court assistant - Lydia