



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC SUIT NO. 462 OF 2012

JAMES MUKURIA NJOROGE CV

(Suing as the Administrator of the Estate of the late

NJOROGE THIRU..... PLAINTIFF

VERSUS

JOSEPH MURAYA GACHUHI.....1ST DEFENDANT

JORETH LIMITED.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

RULING

The Application

The Plaintiff in his application brought by way of a Notice of Motion dated 31st July 2012 is seeking a temporary injunction against the Defendants to restrain them from entering, possessing, constructing, selling or in any manner dealing with the property known as L.R 13330/592 (hereinafter “the suit property”), pending the hearing and determination of this suit. The Plaintiff’s application is based on the grounds given on the face of the Notice of Motion and in his supporting affidavit and further affidavit sworn on on 31st July 2012 and 15th March 2013 respectively.

The Plaintiff states that he is the administrator of the estate of the late Njoroge Thairu and attached letters of administration issued to him in Kiambu SRMC Succession Cause 116 of 1995. He claims that the Deceased prior to his death was a member of Thome Farmers No. 5 Ltd, and he attached a copy of the Deceased’s share certificate. Further, that pursuant to the ownership of the said shares the Deceased was allocated plot No. 173 which was registered as L.R 13330/592, and after the said allocation he took possession of the property.

The Plaintiff claimed that the suit property has been in possession of his family since it was allocated, that they undertake farming on the same and have leased part of it to a garage. He annexed photographs of the suit property. He further stated that after the Deceased’s death, he was advised by M/s Thome Farmers No. 5 Ltd that he should make the required payments to the firm of Kimani Kahiro & Associates Advocates with a view to obtaining the title for the suit property, and he annexed copies of receipts for the payments made to the said Advocates. The Plaintiff stated that Thome Farmers No. 5 Ltd bought the property from the 2nd Defendant which is the registered owner of the said property, and which was supposed to transfer allocated plots to individuals shareholders of Thome Farmers No. 5 Ltd.

However that having waited for the issuance of his title from the 2nd Defendant in vain, he learnt the 1st Defendant herein had been given a transfer by Joreth Limited and certificate of title for the said plot being L.R 13330/592, which is now registered in his name with effect from 19th June 2012. He annexed copies of the two documents. Further, that the said transfer is purported to have been signed by James Njenga Karume and Margaret Wairimu Magugu as directors of Joreth Ltd on the 12th April 2012, yet Mr. James Njenga Karume died on the 24th February 2012 and therefore could not have signed the transfer on the 19th April 2012.

The Plaintiff further stated that by the time the 2nd Defendant was selling the suit property to the 1st Defendant, it was aware that he had paid the sum of Kshs.200,000/= for the same, having paid the firm of Kimani Kahiro & Associates Kshs.196,000/= in addition to the Kshs.5,500/= paid to M/s Kamwere & Associates. Further, that M/s Kimani Kahiro had by that time also remitted a sum of Kshs.110,000/= to the 2nd Defendant on his behalf, after retaining some of the monies owed to him as fees, as was mutually agreed with the directors of the 2nd Defendant. The Plaintiff attached a copy of a letter to this effect dated 17th October 2011 from Kimani Kahiro Advocates to the 2nd Defendant, and also filed an affidavit sworn on 15th March 2013 by Ernest Kahiro Kimani an Advocate with Kimani Kahiro Advocates attesting to the foregoing facts.

The Defendants' Response

The 1st Defendant opposed the Plaintiff's Notice of Motion in a Replying affidavit sworn on 14th September 2013, wherein he stated that he is the registered proprietor of the suit property and annexed a copy of the certificate of title. He confirmed that he bought the suit property from the 2nd Defendant in July 2011 for a sum of Kshs.10,000,000/= and that they duly signed a Sale Agreement to that effect, a copy of which was annexed. Subsequently, that a transfer of the suit property in his favour was duly prepared which was signed in November 2011 by the directors of the Joreth Limited, the late James Njenga Karume and Mrs. Margaret Wairimu Magugu.

However, that there was a delay in registration of the transfer documents and the said transfer documents were only presented for registration at the land offices sometimes in May 2012 by Messers Kagwe Kamau & Karanja Advocates, who were acting for both the vendor and the purchaser. The 1st Defendant stated that the allegation that the transfer is a forgery is therefore not correct.

The 1st Defendant further stated that at the time of entering into the sale agreement for the suit property, the same was registered in the name of the 2nd Defendant and a certificate of title had already been issued in the 2nd Defendant's favour. Further, that there was no caveat and/or any other restriction registered against the title by the Plaintiff to indicate his interest if at all, nor was there any person in occupation of the suit property.

The 2nd Defendant opposed the Plaintiff's Notice of Motion in a Replying affidavit and further affidavit sworn on 14th September 2013 and 8th April 2013 respectively by its Director, Duncan Ndegwa. The deponent stated that

the 2nd Defendant is and was at all material times the lawful owner of the suit land, which originally comprised of approximately four hundred and twenty nine acres, and he annexed a copy of the original title to the suit property. The deponent gave a detailed account of the history of the suit land which originally comprised of two parcels of land which were subsequently amalgamated into one parcel presently known as Land Reference number 13330. Further, that before the amalgamation of the two titles the 2nd Defendant had caused the said property to be subdivided into plots.

The deponent explained that the 2nd Defendant caused a notice to be published in the "*Saturday Nation*" Newspaper of 30th July 2005 requesting individuals wishing to take advantage of a consent order in **Nairobi HCCC No. 6206 of 1992- Joreth Limited versus Kabue & Others**, to contact its Advocates

within 30 days. Further, that the 2nd Defendant had also earlier caused a notice to be inserted in the *Nation Daily Newspaper* of 23rd July 2005 in which it asserted its sole legal proprietary rights over the entire land Reference Number 13330 of which the suit property is a portion. The deponent annexed copies of the said advertisements.

The deponent denied that the 2nd Defendant at any time sold the suit property to Thome Farmers No. 5 Limited and/or the late Njoroge Thiaru, and stated that it has all through retained the exclusive ownership of the suit land. Further, that Thome Farmers No. 5 Limited is a total stranger to the Plaintiff, and that no connection between them, nor between the Plaintiff and the suit land has been demonstrated.

On the allegation that the Plaintiff paid some money to Kimani Kahiro & Company Advocates, the deponent stated that he was not aware of the same, and that even if the money was paid it is clear that it was not paid within a period of six months as per the court order issued in **HCCC No. 6206 of 1992 - Joreth Limited versus Lewis Kibue & others**. Further, that considering the fact that the confirmation of grant for the estate of the late Njoroge Thiaru has not been issued to date, the Plaintiff does not have capacity to claim the suit property in and or under his name.

Lastly, the deponent stated that the transfer documents for land reference number 13330/592 in favour of the 1st Defendant were properly signed and the transfer is legitimate. Further, that there was no fraud and /or forgery as alleged by the Plaintiff, as the registered owner of the suit land, the 2nd Defendant herein, duly signed the transfer documents in exercise of its proprietary right.

The 3rd Defendant's did not file any response to the Plaintiff's application.

The Submissions

The parties were directed to file and serve written submissions in which they reiterated the averments made in their pleadings. The Plaintiff's counsel filed submissions dated 12th July 2013 and further submissions dated 5th August 2013. He argued that from the Plaintiff had demonstrated a *prima facie* case as he had established that by the time of the transfer in favour of the 1st Defendant, he had paid Kshs 200,000/= for the suit property of which the 2nd Defendant was aware. He also relied on section 80 of the Land Registration Act of 2012 to argue that the registration of the suit property in the 1st Defendant's name can be rectified as it was obtained by fraud.

The 1st and 2nd Defendants' counsel filed submissions dated 8th July 2013, and relied on section 23 of the repealed Registration of Titles Act to argue that the Plaintiff has not proved any ground to impeach or defeat the 1st Defendant's title to the suit property. Further, that the 2nd Defendant had explained that there was no fraud or forgery in the transfer of the suit property to the 1st Defendant.

The counsel further submitted that the Plaintiff had not satisfied the conditions for the grant of the orders of injunction as he has not proved he has a *prima facie* case with the probability of success, nor had he established what irreparable loss he stands to suffer. Further, that any claim the Plaintiff has lies in compensation by way of damages since the 1st Defendant is the registered owner of the suit property. The counsel relied on the decision in **Dr. N.K. arap Ngok vs Justice Moiwo ole Keiwa & 4 Others, Nairobi Civil Appeal No 60 of 1997** in this regard.

The Issues and Determination

I have read and carefully considered the pleadings, annexed evidence and submissions made by the Plaintiff and Defendants. The issue arising herein is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** to be granted a temporary injunction. The requirement for the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the

balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. I note from the Plaintiff's Complaint dated 31st July 2012 that he is seeking a cancellation of the title issued to the 1st Defendant with respect to the suit property, and an injunction restraining the 1st & 2nd Defendants from disposing of, trespassing upon, or in any other manner dealing with the said property. The Plaintiff averred in the said Complaint that the 2nd Defendant fraudulently and illegally transferred the said property to the 1st Defendant.

The Plaintiff in his application for a temporary injunction has relied on the shareholder certificate issued to his deceased father by Thome Farmers No.5, and evidence of payments he made to the firm of Advocates who acted for the 2nd Defendant. He also relied on the transfer signed by the 2nd Defendant in favour of the 1st Defendant as evidence of the fraudulent transfer of the suit property. The 1st and 2nd Defendants have on the other hand brought evidence of their title to the suit property and to LR 33330 respectively.

I find that in these circumstances, the Plaintiff has not established a *prima facie* case since he has not brought any evidence of a title to the suit property held by Thome Farmers No 5 Ltd, from whom he claims to derive his interest in the suit property, or of any agreement entered into with the 2nd Defendant who were the registered owner of the suit property at the time he took possession of the same. While it is the case that the Plaintiff brought evidence of payments he made to the 2nd Defendant's Advocates purchase the suit property, this is a loss that can be adequately compensated in damages in the event that the Plaintiff succeeds in his suit.

Lastly, the allegations of fraudulent transfer of the suit property to the 1st Defendant cannot be established without the benefit of a full hearing. In addition, as the suit property is now registered in the name of the 1st Defendant, this court is guided by the decision of the Court of Appeal in **Dr. Joseph arap Ngok vs Justice Moijo ole Keiwa & 4 Others, Nairobi CA No 60 of 1997** that in the cases of double allocation a party who has been issued with a good title takes precedence over other equitable rights to the title in its finding that no *prima facie* case has been shown by the Plaintiff. However, the issue as to whether the title issued to the 1st Defendant with respect to the suit property is good title will also have to be determined after full trial and not at this stage.

The Plaintiff's Notice of Motion dated 31st July 2012 is accordingly denied for the foregoing reasons. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 19th day of May, 2014.

P. NYAMWEYA

JUDGE