



IN THE HIGH COURT OF KENYA AT

ENVIRONMENT AND LAND COURT

ELC NO 1346 OF 2013

JOHN MUNYAO NGILAI.....1ST PLAINTIFF/ APPLICANT

BONIFACE MUTHIANI.....2ND PLAINTIFF/ APPLICANT

PATRICK MUTHUSI.....3RD PLAINTIFF /APPLICANT

PASCAL KIOKO.....4TH PLAINTIFF/ APPLICANT

PETER MUMO IVULI.....5TH PLAINTIFF/ APPLICANT

JOSEPH MBITHI NZIOKI.....6TH PLAINTIFF /APPLICANT

SCHOLASTICAH WAYUA

[IN THE ESTATE OF JOSEPH MUMO].....7TH PLAINTIFF/ APPLICANT

FASTINA MONTHE BABU.....8TH PLAINTIFF/ APPLICANT

MAGDALENE NDUNGE MUIA.....9TH PLAINTIFF/ APPLICANT

CATHERINE KIILU.....10TH PLAINTIFF/ APPLICANT

ISAAC NZOMA MUTISO.....11TH PLAINTIFF/ APPLICANT

ROSEMARY MUTINDI NZUVE.....12TH PLAINTIFF/ APPLICANT

FIDELIS MUASA MUTHUSI.....13TH PLAINTIFF/ APPLICANT

KATHUMBA KIOKO.....14TH PLAINTIFF/ APPLICANT

JAMES IVITA.....15TH PLAINTIFF/ APPLICANT

HARRISON WAMBUA MUINDE.....16TH PLAINTIFF/APPLICANT

VERSUS

RULING

The application before this court is the Notice of Motion dated 6th November 2013 brought under Order 40 Rule 1&2 of the Civil Procedure **Rules and Section 1A and 3A** of the **Civil Procedure Act** seeking for orders that an order of injunction be issued restraining the Respondent by himself, his agents, nominees and/or altering boundaries in respect of parcel of land **Machakos /Kitanga/55** in favour of any third party which land he had sold to the plaintiff/applicants and refused to surrender the title in his name until this suit is heard and determined. The applicants also seek this court to stop any process and illegal issuance of title deed by the Machakos district land office interfering with the plaintiffs/applicants parcels of land in the first instance and order status quo be maintained pending hearing and determination of the main suit and all other orders subsequent thereto this court may deem fit to grant.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of John Munyao Ngilai the 1st plaintiff who stated that between 1979 and 1985 on diverse period of time the plaintiffs/applicants purchased land from the defendant/respondent and each person was allocated a portion of land as agreed with the defendant/respondent as per the value of the land purchased and the land demarcated accordingly as per the agreed size of land. He added that the transactions involving the land was finalised over 30 years ago however individual title deeds for each portion were not issued since the mother title deed had not been processed to facilitate subdivision and issuance of respective title deeds. It was his averment that upon the purchase of the suit property, the plaintiffs/applicants obtained letters of consent pending issuance of title deeds. He stated that the initial purchasers working on the trust that they had valid ownership of the land and having followed all the requirements, some of them went ahead and sold portions of their land leading to the current number of about nineteen [19] families residing peacefully on the said suit property. That sometime in the year 2011, they learnt that the defendant/respondent had fraudulently obtained title for the entire block of the suit property measuring 29.98Ha and was issue with a title on 8th June 2010.They tried to amicably settle this matter and agreed to refund the defendant/respondent the costs he incurred in obtaining the title deed and paid further monies for facilitation of fresh applications of Land Control Board consent for subdivision of the parcel of land Machakos/Kitanga/55 into 19 portions. The defendant/respondent later applied to the land control board for consent to subdivide the suit property and the application to the Land Control Board was granted on 4th November 2011.However, the defendant/respondent refused to proceed with the process of subdivision despite having brought the surveyor to ensure that the exact portions were subdivided. The plaintiffs/applicants on finding the conduct of the defendant/respondent elusive decided to do a search on the title and found that there was a pending mutation which they were not aware of. This forced the plaintiffs/applicants to lodge a caution and they also called for a meeting at the chief's office where the defendant/respondent agreed to withdraw the mutation to have the suit property divided into two portions contrary to the agreed 19 portions. This was however not to be as the defendant/respondent went ahead and obtained the two mutations and two portions of land was the end result being number 169 and 170 and the title to the suit property was now a closed file. The deponent believes that since the land had already been sold to the plaintiffs/applicants the defendant/respondent had no right of ownership to get involved in the suit property therefore the new mutations of No. 169 and 170 are a nullity. The plaintiffs/applicants herein therefore seek the discretion of this court to grant the orders they have sought in the application.

This application is opposed. The defendant/respondent filed his grounds of opposition on 3rd February 2014 stating that the plaintiffs/applicants have not made out a prima facie case against him. That no privity of contract was established between the plaintiffs/applicants and the defendant/respondent and that this suit is not based on adverse possession.The defendant/respondent also contended that the plaintiffs/applicants' pleadings were inadequate to establish a claim against the defendant/respondent.

Written submissions were filed in court by both parties. The plaintiffs/applicants filed their submission on 19th February 2014.Their counsel submitted that the grounds of opposition filed by the defendant/respondent ought to be raised on points of law and not on factual information which should be

addressed by way of an affidavit. He submitted that the defendant/respondent's grounds of opposition did not disclose points of law therefore the court should dismiss the grounds of opposition.

On whether the plaintiffs/applicants should be granted the order of injunction as prayed for, counsel relied on the case of **Giella-vs- Cassman Brown Limited [1973] EA 358**. Counsel added that the plaintiffs/applicants had shown that they had a prima facie case as they purchased the suit property between 1979 and 1985 then obtained consent letters in addition, they immediately took possession and settled on the land and made development therein. They also submitted that the suit property was fraudulently registered in the name of the defendant/respondent without following the due process because the title was issued without the property being surveyed. They also contended that the defendant/respondent registered the suit property alone excluding the beneficiaries by failing to disclose that he had sold and transferred the land to the plaintiffs/applicants.

On the limb that unless the order is granted the applicant will suffer irreparably, the plaintiffs/applicants submitted that they were already settled on the suit property and made developments for over a period of 30 years. The plaintiffs/applicants' counsel further submitted that the defendant/respondent has subdivided the suit property into two portions which has resulted in having the original title file being closed in order to have the two parcels No. 169 and 170 which will irreparably cause damage to the plaintiffs/applicants. They finally submitted that the balance of convenience tilted in their favour.

The defendant/respondent filed his written submissions on 25th February 2014 and submitted that the suit being agricultural land, consent to transfer ought to have been obtained within six months from the date of purchase of the land. This he submitted already lapsed 30 years ago. He further submitted that on that basis, there can never be an order to compel the defendant/respondent to transfer land to the plaintiffs/applicants when there is no evidence of consent to transfer the same being obtained within six (6) months from the date of the purchase.

I have considered the pleadings, the written submissions and the authorities cited by the parties herein. The plaintiffs/applicants' counsel raised the issue that the defendant/respondent's grounds of opposition ought to be dismissed for the reason that the grounds of opposition should be on points of law and not on factual information. In my opinion the plaintiffs/applicants counsel seems to confuse the principle of "Preliminary Objection" and "Grounds of opposition/objection". A preliminary objection is on a pure point of law which is resolved without considering the merits of the application before the court. On the other hand Grounds of opposition/objection is provided in Order 50 Rule 16 of the Civil Procedure Rules where it states:

"Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition if any not less than three days before the date of hearing". This means that the defendant/respondent may either file a replying affidavit or grounds of opposition in order to oppose an application. Certainly, while a replying affidavit deals with matters of fact raised in any application under the grounds of opposition if any, usually matters of law and procedure are dealt with in grounds of opposition. In practice a defendant/respondent may choose to oppose an application by filing either a statement of grounds of opposition or relying on a replying affidavit only. Either path leads to the same end; that is enabling the court arrive to a decision. Therefore it was proper for the defendant/respondent to oppose this application by filing and serving a statement of grounds of opposition.

Having stated so, I now revert to the main issue for this court's determination which is whether the plaintiffs have made out a case to warrant the relief it seeks in their application. The principles for the grant of injunction are well settled in the case of **Giella Vs Cassman Brown & Company Limited [1973] E.A. 358**. When a litigant approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set. The plaintiff must demonstrate a prima facie case with a probability of success; secondly, he must show that he stands to suffer irreparable harm not compensable in damages; and lastly, if in doubt, the court must weigh the balance of convenience. The applicant must show or prove that the aim of the temporary injunction is to maintain the Status Quo until the determination of the

whole dispute. **Section 63(e) Civil Procedure Act** gives this Honourable Court power to grant orders of a temporary injunction in all cases in which it appears to it to be just and convenient to do so to restrain any person from doing acts

At the heart of this suit is a dispute over ownership of the suit land. The disputants have laid claim to **LR No. Machakos /Kitanga /55**. The determination of the legal owner is the true sphere of the trial court on tested evidence after the parties have been cross examined on their statements and documents. However the plaintiffs/applicants are apprehensive that if the orders sought re not granted the sui property will be transferred to third parties and the boundaries altered yet they had purchased the said property earlier. The suit property is registered in the name of the defendant and title was issued to him on 14th June 2010. The certificate of official search dated 5th July 2013 shows that the title to the suit property was closed on upon the subdivision and there are two new parcels as No 169 and 170. I have also perused the annexures annexed to the Replying Affidavit and note that all the annexures comprise of consent letters and searches to the suit property. There is no agreement of sale between the plaintiffs/applicants and the defendant/respondent, the consents presented cannot amount to ownership of title to the suit property. Finally, the plaintiffs/applicants have come to court after the defendant/respondent has closed the title in which the title to this suit is premised and two other titles have emanated therefrom. It is therefore safe to state that the title being disputed by the plaintiffs/applicants is non-existent. The court has reiterated that it cannot embarrass itself by entertaining an action in which the relief claimed cannot be enforced or make an order that cannot be lawfully enforced. Injunctions generally operate upon unperformed and unexecuted future, rather than past acts. The plaintiffs/applicants had the knowledge that the defendant/respondent was infringing on their rights but did nothing until the defendant has now implemented the mutation of the title that is time the plaintiffs' now come to court seeking for relief, the plaintiffs are guilty of inaction of having in the suit property for 30 years without striving to acquire their titles. What baffle this court are the monies they supposedly gave the defendant/respondent in the guise of getting consents on their behalf and reimbursing the defendant's expense in getting his title deed. This court finds that granting the orders sought would be infringing on the rights of the defendant/respondent and as a result he would suffer loss.

Having now carefully considered the Notice of Motion dated 6th November, 2013 and the Written Submissions herein, I find that the said application is not merited. Consequently the said application is dismissed entirely with costs to the Defendant/Respondent.

It is so ordered.

Dated, Signed and delivered this **25th day of July, 2014**

L. GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiffs/Applicants

None attendance for Defendant/Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE