



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1380 OF 2013

JOSEPHINE WAMBUA GITHINJI.....PLAINTIFF

VERSUS

PETER GACHENGA KIMUHU1ST DEFENDANT

LUCY WANJIRU RUTHARI.....2ND DEFENDANT

LAND REGISTRAR KAJIADO COUNTY.....3RD DEFENDANT

RULING

The Plaintiffs' Application

What is before the court for determination is a Notice of Motion dated 14th October 2013 brought by the Plaintiff which was first filed in Machakos High Court as Civil Suit 97 of 2013. The suit was subsequently transferred to this Court and given a new case number as there was no Environment and Land Court at Machakos. The Plaintiff is seeking orders of a temporary injunction restraining the 2nd Defendants by herself, her representatives, agents, and/or anyone working under her authority from erecting any structures or, remaining or, occupying, alienating, dealing, subdividing, transferring and or in any other possible way transacting with all that parcel of land known as L.R. No. Kajiado/Kitengela/11081 (herein "the suit property") situated at Kitengela in Kajiado County.

The ground for the application is that the Plaintiff is the registered owner of the suit property and that after being issued with the title deed to the same, the property was subsequently without her knowledge or consent transferred by the 3rd Defendant to the 1st Defendant, who then sold and transferred it to the 2nd Defendant Further, that the 2nd Defendant is alienating the suit property by erecting a building on the suit property and/or disposing off the same to defeat this suit.

The application is supported by the Plaintiff's affidavit sworn on 14th October 2013, wherein she states that on or about the 10/11/1999 she bought the suit property from Mugumo Estates Ltd for a consideration of Kshs 200,000/=, and that upon complying with all the requisite obligations a title deed was issued to her on 23rd January 2001. She attached a copy of the said title deed. She further stated that the 3rd Defendant without any colour of right, legal reason whatsoever, or justification and without her authority, consent and/or knowledge fraudulently transferred the suit property to the 1st Defendant, and a title deed was issued to him on 7th October 2008. The Plaintiff stated that she was not a party to the sale transaction leading to the transfer of the ownership of the suit land to the 1st Defendant

The Plaintiff averred that she applied for a copy of the Green Card of the suit property which was issued

to her on 5th June 2009, and which showed that the 1st Defendant further transferred the suit land to the 2nd Defendant, to whom a title deed was issued on 20th February 2009. The Plaintiff annexed a copy of the said Green Card. She contends that the foregoing transactions show dubious fraudulent dealings with the suit property without her knowledge, consent, instructions, authority and/or directions. Further, that the 2nd Defendant is constructing a building on the suit property, and there is a high probability that she may decide to deal with the land in an adverse way to the interests of the Plaintiff in view of the pending suit herein.

The Defendants' Response

The 1st and 2nd Defendants opposed the Plaintiff's application and filed replying affidavits they swore on 13th June 2014 and 19th December 2013 respectively. The 1st Defendant averred that on or about the month of October, 2008 he entered into an agreement of sale of the suit property with the Plaintiff, who sold and subsequently transferred the said property to him for a purchase price of Kshs.1,100,000/=. Further, that the Plaintiff was well aware of the sale transaction and that she willingly and knowingly, sold and transferred the suit property to him. The 1st Defendant averred that as a result, the suit property legally vested in him after he was issued with a title deed.

The 1st Defendant further stated that that on or about November, 2008 he entered into a sale agreement with, and subsequently transferred the suit property to the 2nd Defendant for a consideration of Kshs.1,750,500/=. That subsequent to the said sale, he ceased having ownership of the suit property, having transferred a clean title to the 2nd Defendant who thereof acquired ownership of the suit property. The 1st Defendant denied any fraudulent dealing with the suit property, and stated that the Plaintiff had failed to show that the subsequent titles over the suit property issued to him and the 2nd Defendant were issued by the 3rd Defendant fraudulently.

The 1st Defendant did not attach any evidence of the sale transaction between himself and the Plaintiff, and alleges that he misplaced and/or lost all the documents pertaining to the said sale, that is, the sale agreement; the application for Land Control Board's Consent as well as the consent; the duly signed transfer documents and all other relevant documents that would support the said sale and transfer of the suit property between the Plaintiff and himself. The documents he annexed as evidence were copies of a Stamp Duty Declaration Assessment and Pay-In Slip dated 6th October, 2008, and of the Day book Number which showed that he presented the transfer for registration at the Kajiado Lands Registry on 6th October, 2008.

The 2nd Defendant on her part stated that she entered into an agreement with the 1st Defendant on 13th November 2008 to purchase the suit property for Kshs.1,750,500/=. after carrying out due diligence on the said property that indicated that the 1st Defendant was the registered owner and after getting a copy of the title deed showing the same. Further, that she subsequently applied for the consent and got the property legally transferred into her name and was issued with a good title. She annexed copies of the said sale agreement, of the transfer documents and of the 1st Defendant's title and her title to the suit property.

The 2nd Defendant further averred that she had expended money on the suit property and had obtained a loan facility from Co-operative Bank of Kenya of up to Kshs.5,000,000/= which has been charged on the said property, and she annexed a copy of the charge. Further, that should the court make adverse orders than the same will affect the rights of Co-operative Bank of Kenya, which is not a party herein. Lastly, the 2nd Defendant averred that she is an innocent purchaser who bought the suit property in good faith and for value, and that even if there was fraud or misrepresentation in alienating the suit property to the original registered proprietor, she was not party to such fraud or misrepresentation.

The Submissions

The Plaintiff's application was canvassed by way of written submissions. The Plaintiff's counsel filed

submissions dated 11th February 2014 wherein he relied on the decisions in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** and **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003 KLR 1215** to argue that the Plaintiff had shown a *prima facie* case, as she had shown her title to the suit property and the 1st Defendant had not explained how he obtained the title of the suit property from the 3rd Defendant. Further that the Plaintiff had demonstrated that there was fraud involved in the sale of the suit property as the purchase price paid by the 1st Defendant shown in the green card of the suit property was Kshs 50,000/= when the Plaintiff had purchased it for Kshs 200,000/= .

The Plaintiff also relied on various decisions including **Olympic Sports House Ltd vs School Equipment Centre, Nairobi H.C.C.C No 190 of 2012**; **Payless Car Hire and Tours Ltd vs Imperial Bank, HCCC No 33 of 2011**; **Kamorero River Farm Ltd & 3 Others vs National Bank of Kenya Ltd, (2002) 2 KLR 207**; and **Waithaka vs Industrial and Commercial Development Corporation , (2001) KLR 374** for the position that it is not always mandatory that where damages are an adequate remedy an injunction cannot issue, and submitted that no party should be allowed to ride roughshod on the rights of another simply because they can pay damages. Lastly, the Plaintiff submitted that the balance of convenience tilted in her favour as granting the injunction would be aiding the law.

The 1st Defendant filed submissions dated 13th June 2014 wherein he reiterated the facts of his case, and submitted that the Plaintiff had failed to show a *prima facie* case as she had not shown any particulars of fraud in the dealings by the 1st Defendant over the suit property, and since the 1st Defendant had demonstrated that there was a seller/buyer relationship between him and the Plaintiff. Further, that the Plaintiff had not shown the loss and prejudice that she will suffer if the orders sought are not granted, or that she will suffer irreparable damage that cannot be compensated by way of damages.

The 2nd Defendant in submissions dated 14th February 2014 reiterated the facts of her case and argued that she is an innocent purchaser for value without notice. She relied on the decisions in **Lawrence P. Mukiri vs Attorney General & 4 Others, HCCC No. 169 of 2008**, and **Eunice Grace Njambi Kamau & Another vs Attorney General & 5 Others, (2013) e KLR** that a third party purchaser for value with no notice of any defect in the title has a defence against a claim by a prior equitable owner.

The 2nd Defendant further submitted that the Plaintiff had not met the threshold for the grant of a temporary injunction set out in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, as she had not shown a *prima facie* case for reasons that she had not adduced any evidence to show that the 2nd Defendant was issued with her title deed fraudulently. Further, that she had also been guilty of delay in bringing her application in 2013 after the 2nd Defendant was issued with title in 2008, and the equitable remedy of an injunction is not available to her as equity only aids the vigilant.

Lastly, the 2nd Defendant relying on the decision in **Karen Bypass Estate Ltd vs Print Avenue and Company Limited, HCCC No. 248 of 2013** argued that since the Plaintiff had failed to meet the first condition of a *prima facie* case, there was no need to address the other two conditions as to adequacy of damages and balance of convenience. The 2nd Defendant however also submitted that the Plaintiff she can be adequately compensated by way of damages by the 1st and 3rd Defendants if she is successful in her claim.

The Issues and Determination

I have read and carefully considered the pleadings, annexed evidence and submissions made by the parties herein. The issue to be determined is whether the Plaintiff has met the threshold for the grant of the temporary injunction sought. The principles in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to 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. A *prima facie* case was defined by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215 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.”

The Plaintiff relies on her title to the suit property in this respect, and has contended that she did not sell the suit property to the 1st Defendant or authorize or consent to any such sale. The 1st Defendant argues that there was such a sale but did not bring any evidence to support his claims. In the circumstances this court finds that the Plaintiff has shown a *prima facie* case, and that damages will not be an adequate remedy, as neither the 1st Defendant nor 2nd Defendant pleaded that they were ready, willing and able to compensate the Plaintiff by way of damages. It is also my view that the mere existence of two titles over the same property is also *prima facie* evidence of fraud and/or irregularity as to the dealings with the said property, although such fraud can only be definitively established after full trial.

As regards the 2nd Defendant’s plea of being a purchaser for value without notice and thus having acquired good title, this can only be established after full trial, and also after a determination as to who has proper title to the suit property as between the Plaintiff and 1st Defendant. However, this Court does note that the 2nd Defendant is in possession of the suit property, and has charged the said property to a financial institution, and also alleges to have commenced construction thereon. Any further construction she therefore undertakes on the suit property will be with the full knowledge of the risk that she faces in the event that the Plaintiff succeeds in her suit. It will also be necessary in this regard for the 2nd Defendant to join the Cooperative Bank of Kenya to this suit as an affected party.

This Court will only partially allow the Plaintiff’s application arising from the foregoing reasons. I accordingly order that the 2nd Defendant by herself, her representatives, agents, and/or anyone working under her authority be and is hereby restrained from selling, alienating, subdividing, transferring and or in any other way disposing of the parcel of land known as L.R. No. Kajiado/Kitengela/11081 situated at Kitengela in Kajiado County.

The costs of the Plaintiff’s Notice of Motion dated 14th October 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____4th ____ day of ___August____, 2014.

P. NYAMWEYA

JUDGE