



IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL MISC. NO. 409 OF 2013

STANLEY WAICHIGO NGUMBA.....1ST PLAINTIFF

STANLEY KINUTHIA MWANGI WANDAKA2ND PLAINTIFF

PAUL KAMATU NGUGI3RD PLAINTIFF

JOSEPH MBIRURI WAWERU 4TH PLAINTIFF

ARTHUR GACHONDE KIHARA5TH PLAINTIFF

EARNEST WAMBURU MBARI 6TH PLAINTIFF

ESTHER WANJIRU 7TH PLAINTIFF

VERSUS

KYANJAU HOUSING CO-OPERATIVE SOCIETY 1ST DEFENDANT

CONTOUR ESTATES LIMITED 2ND DEFENDANT

RULING

The plaintiffs application dated 26/3/2013 filed on the same date seeks an order of injunction restraining the Defendants from surveying, subdividing, developing, selling, transferring, disposing or in any manner alienating or interfering in any manner whatsoever with plot **NOS. Thika Municipality/Block 18/1706, 17-7, 1708, 1709, 1710,1711,1712, 1715 and 1717** pending the hearing and determination of the suit. The plaintiffs claim they are the registered owners of these parcels of land which they state were resultant subdivisions of Title Number **Thika Municipality block 18/290**. The plaintiffs aver that the Defendants have entered onto the plaintiffs plots and are further subdividing the same and are apprehensive the Defendants intend to alienate the plaintiff parcels to other persons to the prejudice of the plaintiffs.

The Defendants through a replying affidavit by one **Michael N. Njonge**, secretary of the 1st Defendant aver that parcel Number **Thika Municipality Block 18/290** which the plaintiff claim to have been subdivided to produce the resultant subtitles claimed by the plaintiffs is intact and has never been subdivided. The plaintiffs in the supporting affidavit sworn by one **Stanley Waichigo Ngumba** the 1st

plaintiff on 26th March 2013 have annexed copies of certificates of lease and letters of allotment respecting the suit parcels of land issued on diverse dates together marked as “SWN1” to illustrate the plaintiffs ownership claims to the said subtitles.

The court on 26/3/2013 issued an interim order of injunction at the ex parte stage and this order was extended on diverse dates when the matter came up for hearing/mention of the interlocutory application. The Defendants vide an application by way of Notice of Motion dated 19th March 2014 applied to the court to discharge and set aside the interim ex parte orders issued by the court on 26th March 2013 and all the consequential orders arising therefrom. By the same application the Defendants sought an order for the **District Surveyor Thika** to provide a detailed report relating to land parcel **Thika Municipality Block 18/290** and whether the said parcel of land is intact and/or subdivided into parcel Number **Thika Municipality Block 18/1706, 1707, 1708, 1709, 1710, 1711, 1712, 1715 and 1717** or not. The Defendants base their application on the grounds that the plaintiffs have not prosecuted their application dated 26/3/2013 since obtaining the interim orders which situation is causing hardship to the Defendants. The Defendants argue that the plaintiffs are abusing the process of the court. The plaintiffs vide the replying affidavit sworn by **Paul Mwangi Ndungu** the Advocate for the plaintiffs sought to explain the delay in the prosecution of the plaintiffs application. These two applications are the subject of this ruling.

The parties filed written submissions as per the court's directions on both applications. I have reviewed the pleadings and the affidavits and annexures in support of both applications. As regards the plaintiffs application dated 26th March 2013 I have perused and reviewed the annexures to the affidavit in support and it cannot be denied the Ministry of Lands and settlement approved some subdivision scheme relating to **L.R. NO.10226/2/R** out of which the parcels of land now claimed by the plaintiffs came from. The individual letters of allotment from the Ministry of Lands made to the individual persons refer to the specific titles claimed by the plaintiffs. Titles to these subtitles were processed and certificates of lease issued to the owners whereupon they became the registered owners and as such owners would be entitled to the protection of the law unless it is proved that they acquired the title through fraud or misrepresentation or acquired the same unlawfully and illegally or through a corrupt scheme.

In the present case the issue is whether the plaintiffs acquired their titles regularly and/or whether they acquired the same fraudulently or through misrepresentation in which case the titles would be liable to be challenged under section 26(1) (a) and (b) of the Land Registration Act **NO. 3 of 2012**. On the basis of the material placed before the court it is not possible at this stage to determine whether the parcel of land the plaintiffs claim was subdivided was Title Number **Thika Municipality Block 18/290** which the Defendants claim is still intact and not subdivided. I am of the view that it is only through adducing of evidence that the issue can be resolved at the trial and not at this interlocutory stage. The annexed letters of allotment by the plaintiffs show that there was a subdivision scheme that the Commissioner of Lands approved. Did it relate to title Block **18/290** or to another property and if so which is this other property and where would it be located on the ground? These I feel are issues that can only be conclusively answered at the trial.

Having regard to the pleadings and the totality of the evidence and material placed before the court I am not persuaded that this is a case where the principle consideration should be whether the conditions for the grant of an interlocutory injunction as established in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** should be the sole basis to consider whether or not to grant an injunction but rather what the justice of the matter might require. The plaintiffs may not necessarily have satisfied the first condition of establishing a prima facie case with a probability of success but they have shown that they hold titles which prima facie they appear to have obtained regularly. They state the Defendants are causing or threatening interference their titles by entering and effecting further subdivisions. The Defendants allege it is their land **Thika Municipality Block 18/290** that they are dealing with and have exhibited title to the land and thus the issue does arise whether indeed this land would be the same one the Commissioner of Lands approved a subdivision scheme of and allotted parcels to the plaintiffs. As observed earlier, only evidence at the trial can assist the court to arrive at a definite conclusion. Thus my view is that all the attendant facts and the surrounding circumstances ought to be taken into account by the court in determining whether to grant an interlocutory injunction which ordinarily should be granted where a prima facie case with probability of success has been demonstrated

and where damages would not be an adequate remedy. However in situations and/or circumstances as in the present case where both the plaintiffs and the defendants are staking claim to the suit property and each party demonstrates a basis for their claim, the court should consider making an order that will preserve the subject matter pending the hearing and determination of the case so that the successful party at end of the trial has something to lay their hands on as the subject matter will have been preserved. In matters such as the present one the best interest of the parties may be served by acknowledging right from the beginning that engaging in interlocutory applications is unlikely to advance the course of justice as between the parties and settle for an order that preserves and/or maintains the status quo until the case is heard and determined. That would enable the parties to focus on having the case heard and determined on merits on an expeditious basis

The **Hon. Chief Justice** vide **Kenya Gazette Notice NO. 5178** published Practice Directions on proceedings in the ELC and under practice direction 28(k) it is provided:

28.”In addition to the matters contained in order 11, Rule 3 of the Civil Procedure Rules, 2010, the following are the orders/directions that may be issued by a Judge during a pretrial conference.

(K) Where appropriate, the issuance of conservatory orders or maintenance of status quo until a matter is fully and finally determined”.

Although this matter is not before me at the stage of a pretrial conference my view is that a judge is not precluded from considering the grant of a conservatory order at any stage of the proceedings where the situation demands. I have having regard to all the material placed before me and the parties submissions determined that the order that commends itself and that will serve the ends of justice of both parties is a conservatory order requiring that the parties do maintain the obtaining status quo until the case is heard and determined. In the meantime pending the hearing of the suit no party shall sell subdivide alienate, transfer or dispose of the suit property and/or construct or effect any permanent developments on the suit property.

To facilitate the hearing of the case I direct that the parties make full compliance with order II of the Civil Procedure Rules within 45 days of this ruling and thereafter to fix the matter for trial conference before any ELC Judge.

Each party to meet their own costs of the application.

Orders accordingly.

Ruling dated, signed and delivered at Nairobi this...**28th**day of...**October**.....2014.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiffs

..... For the Defendants