



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 213 OF 2014

FLORENCE NJOKI NDUATI.....1ST PLAINTIFF

JOHESTER MERCHANTS LIMITED.....2ND PLAINTIFF

VERSUS

ABRAHAM THUO KIBE.....DEFENDANT

RULING

The Plaintiff's Application

The application before the court is a Notice of Motion dated 24th February 2014 filed by the Plaintiff, seeking orders of a temporary injunction against the Defendant to restrain him from either selling, charging, trespassing onto, working on, taking possession of, or in any other way dealing with land parcel number Kikuyu/Kikuyu Block 1/606 (hereinafter referred to as “the suit property”), pending the hearing and determination of this suit.

The grounds for the application are that the Plaintiff is in possession of the suit property and that the Defendant has fraudulently caused the registration of said property in his name when it should have been in the Plaintiffs’ names, and is in breach of the sale agreement over the said parcel of land. Further, that the Defendant is colluding with the District Land Registrar to remove the caution lodged against the title to facilitate a further illegal transfer.

The 1st Plaintiff in a supporting affidavit sworn on 24th February 2014 explained that her deceased husband purchased the suit property, and she annexed the agreement of sale. Further, that the said property was subsequently transferred to Joseph Geturiri Mukabi and then to the Defendant. She attached copies of the original lease and current certificate of lease.

The 1st Plaintiff stated that when she discovered that the land had been transferred to the Defendant’s name in 2012, she placed a caution against the title, and she annexed a copy of the search hereto showing the same. However, that the Defendant has made attempts through the District Land Registrar to remove the caution, as shown by a letter dated 25th March 2013 which was served upon the 1st Plaintiff on 30th October, 2013. The 1st Plaintiff is apprehensive that the Defendant intends to transfer the suit property to a third party.

The Defendant's Response

The Defendant filed a replying affidavit he swore on 10th April 2014. He stated that he purchased the suit property without any notice of any claim by the Plaintiffs, and as such they have no *locus standi* or any legal capacity to institute the suit against him, and should instead sue the vendors or the parties who sold them the property.

Further, that the sale agreement annexed by the 1st Plaintiff was entered into by the 2nd Plaintiff, which 2nd Plaintiff has not given any authority to the 1st Plaintiff to plead on its behalf or to institute this suit, and has not sworn any verifying affidavit in support of the suit. The Defendant contended that the suit against him should therefore be struck off.

The Issues and Determination

The parties were directed to file written submissions on the Plaintiffs' application. The Plaintiffs' counsel filed submissions dated 16th July 2014 while the Defendant's counsel filed submissions dated 8th October 2014. I have read and carefully considered the pleadings filed and submissions made by the parties herein. The question to be determined is whether the Plaintiffs have met the threshold for the grant of temporary orders of injunction.

I will therefore proceed to determine the Plaintiffs' Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These 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 answer is whether the Plaintiffs have 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] eKLR** 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 1st Plaintiff in the Plaint filed herein dated 24th February 2014 claims that she is the widow of John Nduati Kariuki who was a director and shareholder of the 2nd Plaintiff company, and that the said company purchased the suit property. Further, that the Defendant is the inheritor of the said property from Joseph Geturiri Mukabi, Martin Mukabi and Bernard Gatambia Mukabi, who were the vendors in the sale agreement entered into with the 2nd Plaintiff. The Plaintiffs are in their Plaint seeking an injunction against the Defendant restraining him from taking possession, trespassing on or transferring the suit property, a declaration that the transfer of the suit property to the Defendant was fraudulent, a cancellation of his name as the proprietor of the said property and that the same be registered in the 1st Plaintiff's name.

The Plaintiffs have submitted that they have shown a *prima facie* case as they have brought evidence of the sale agreement entered into by the 2nd Plaintiff with respect to the suit property, and by reason of being in possession of the suit property pursuant to the said sale and in possession of the original title having obtained the same at the time of the sale transaction. Further, that the balance of convenience as a result tilts in their favour.

The Defendant on the other hand submitted that there is no contractual relationship between himself and the Plaintiffs, as the sale agreement with respect to the suit property was entered into between the 2nd Plaintiff and parties who are not party to this suit. Further, that the 1st Plaintiff has no *locus standi* to

bring this suit as she was not a party to the sale agreement and has no evidence to show that her deceased husband was a shareholder and director of the 2nd Plaintiff. Lastly, the Defendant submitted that no verifying affidavit was filed by any director and/or official of the 2nd Plaintiff as required by Order 4 Rule 2 of the Civil Procedure Rules, neither has the 1st Plaintiff been authorized to file any pleadings on behalf of the company in accordance with Order 4 Rule 4 of the Civil Procedure Rules.

I have perused the sale agreement relied upon by the 1st Plaintiff. I note that it was entered into by the 2nd Plaintiff and Joseph Geturiri Mukabi, Martin Mukabi and Bernard Gatambia Mukabi. The 1st Plaintiff claims that she is the widow and administrator of the estate of John Nduati Kariuki who she avers was a director of the 2nd Plaintiff. She however did not bring any evidence of such directorship. I have also noted the arguments raised by the Defendant as regards the non-compliance with the procedural aspects of filing of this suit and application by the 2nd Plaintiff. However, I do not find the procedural lapses to be fatal as they can be rectified by the filing of the necessary documents.

I also note that the Defendant has not brought any evidence to show how he came to be registered proprietor of the suit property, and particularly of the sale agreement by which he alleged he acquired the property. In the circumstances I find that the Plaintiffs' application will have to be decided on the basis of a balance of convenience as the Plaintiffs have demonstrated their interests in the suit property arising of the sale of the same to the 2nd Plaintiff. I also note in this regard that the Plaintiffs have been in possession of the suit property since the said sale, and that this fact was not controverted by the Defendant. I therefore find for these reasons that the balance of convenience tilts in favour of the Plaintiffs.

I accordingly order as follows:

1. That pending the hearing and determination of the suit filed herein or until further orders, the *status quo* to be maintained as follows:
 - a. The Plaintiffs and Defendant by themselves or through their representatives, agents or servants shall not sell, transfer, lease, charge or in any other manner alienate or dispose of the parcel of land known as Kikuyu/Kikuyu Block 1/606.
 - b. The Defendant either by himself or through his representatives, agents or servants is restrained from interfering in any manner with the Plaintiffs' occupation and possession of land known as Kikuyu/Kikuyu Block 1/606.
2. The costs of the Plaintiff's Notice of Motion dated 24th February 2014 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____3rd____ day of ____December____, 2014.

P. NYAMWEYA

JUDGE