



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 4 OF 2018

LUCY WAHURA NDERITU and

DADSON NDIRITU NDIRANGU (suing as the

Administrators of the estate of

JOHN NDIRANGU NDERITU (Deceased).....1st PLAINTIFF/APPLICANT

LUCY WAHURA NDERITU.....2nd PLAINTIFF/APPLICANT

VERSUS

GLADYS GATHONI MWANGI.....1st DEFENDANT/RESPONDENT

LAND REGISTRAR, NYANDARUA

DISTRICT LAND REGISTRY.....2nd DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 18th January 2018 brought under *Section 1A, 3A and 63(e) of the Civil Procedure Act* Section 13(7) of the Environment and Land Court Act, *Order 40 Rule 1 and 2, and Order 51 Rule 1 of the Civil Procedure Rules, Article 40 of the Constitution and all other enabling provisions of the law wherein* the Applicant has prayed for the following orders;

i. Spent

ii. Spent

iii. That pending the hearing and determination of the Plaintiff's suit hereof, a temporal injunction be issued restraining the 1st Defendant her agents, servants, or any other persons whether acting on their own or on the 1st Defendant's behalf from alienating, transferring or howsoever dealing with the suit property measuring two (2) acres comprised in the Land title Number Nyandarua/Ndemi/1163 (the mother property.)

iv. That in the alternative to payer (ii) above, and pending the hearing and determination of the Plaintiff's suit hereof, a mandatory injunction do issue compelling the 1st Defendant to give and allow the Plaintiffs vacant and physical possession of the suit property measuring two(2) acres comprised in the land title number Nyandarua/Ndemi/1163.

v. Any other or further order(s) as this honorable court may deem fit to grant.

vi. The costs of this application be provided for.

2. The Application was premised on the grounds on the face of it as well as on the supporting affidavit sworn on the 18th January 2018 by Lucy Wahura Nderitu, the 1st Plaintiff/Applicant.

3. The court granted the Plaintiff/ Applicant ex-parte interim orders on the 18th January 2018 pending the hearing and determination of the application inter parte.

4. The Application was heard viva voce on the 16th April 2018 wherein counsel for the Plaintiff/Applicant relied fully on the grounds and averments contained in their supporting affidavit which had been sworn by the 2nd Plaintiff/Applicant as well as on their list of authorities to submit that the Plaintiff/Applicants were the appointed administrators and personal representatives of the estate of the deceased John Ndirangu.
5. That on the 17th July 1995, the 1st Defendant /Respondent entered into an agreement with the late John Ndirangu wherein he agreed to sell to the deceased two (2) acres of land at Ksh. 35,000/= per acre, making it a total of Ksh. 70,000/ for the two acres, to be excised from and parcel **No. Nyandarua/Ndemi/1163**.
6. That the deceased herein paid to the 1st Defendant Ksh. 65,000/ and parties agreed that the balance of Ksh 5,000/= would be paid to the 1st Defendant upon her request or otherwise on or before procuring the requisite Land Control Board Consent and clearance to transfer in favour of the deceased purchaser.
7. That subsequently the deceased purchaser was granted vacant possession of the land wherein he proceeded to cultivate thereupon and generally develop it in terms of putting up fixtures until his demise on the 5th November 2001 wherein his body was interred upon the said land.
8. In the year 2016 the Plaintiffs learnt that the 1st Defendant had acquired a title over the whole suit land being **Nyandarua/Ndemi/1163** from the 2nd Defendant herein and when they requested from the 1st Defendant herein to transfer ownership of the deceased's portion to them as his beneficiaries, the 1st Defendant informed them that she was not willing to transfer any share of the suit land as per her agreement with the deceased and further, that she was willing to refund the purchase price to them.
9. Efforts to sort the issue amicably failed as the 1st Defendant now demanded a further Ksh 40,000/=, being the current market value, from the Plaintiffs to the effect that on the 9th November 2016, the 2nd Plaintiff registered a caution over the said land and caused a demand letter to be sent to the 1st Defendant who in retaliation, caused the land to be fenced thereby evicting the Plaintiffs from thereon.
10. The Plaintiffs are apprehensive that the 1st defendant is likely to dispose of the land to a third party to their detriment hence the prayers for an injunction against her to preserve the subject suit.
11. The Plaintiffs relied on the following documents to buttress their case.
- i. A copy of the grant of letters of Administration at the Nyahururu Chief Magistrate's Court Succession Cause No. 14 of 2017.
 - ii. A copy of the sale agreement dated the 17th July 1995 between the 1st Defendant and the deceased John Ndirangu Nderitu.
 - iii. A bundle of photographs showing the developments made on the suit land, as well as the deceased's grave.
 - iv. A copy of the title deed dated the 18th September 2017 showing the 1st defendant was the registered proprietor of land parcel on the 27th November 2014.
 - v. A copy of the minutes held on the 8th November 2016 at the chiefs Office.
 - vi. A copy of the caution registered on the suit land.
 - vii. A copy of the demand letter addressed to the 1st Defendant dated the 27th November 2017.
12. Counsel for the Plaintiffs submitted while relying on the decided case of **Naftali Ruthi Kinyia vs Patrick Thuita Gachure and Another [2015] eKLR** that indeed the Plaintiff had met the conditions for granting an interlocutory injunction as set down in **Giella vs, Cassman Brown & Co. Ltd (1973) E.A 358**, namely that they had a prima facie case with a probability of success; that they might otherwise suffer irreparable injury, which cannot adequately be compensated by an award of damages unless the injunction is granted; and that the balance of convenience tilted in their favour.
13. The 1st Defendant/ Respondent while opposing the Plaintiffs' application filed her grounds of opposition dated the 31st January 2018, as well as their replying affidavit filed on the 15th March 2018 to submit that the Plaintiffs were not evicted from the suit land as they had never resided, cultivated and/or developed the same.
14. That secondly, sale and or transfer of the land in question was a transaction that had been executed in the year 1995 and the same therefore ought to have been executed within 6 years but which the Plaintiff was seeking to enforce 23 years later which action was time barred by virtue of limitation of time.
15. The 1st Defendant further submitted that the transaction herein having been in relation to the sale of agricultural land, no consent from the land Control Board had been obtained authorizing the transaction. That in the absence of consent from the land control board, therefore, she contended, the transaction became null and void for all purposes.
16. It was 1st Defendant's Counsel's contention that the Plaintiff's claim of having been in possession of the suit land for 23 years was a

falsehood given that the deceased passed away on the 5th November 2001 making it 17 years. That further there was no evidence that the Plaintiffs had been in continuous and uninterrupted possession of the suit land for more than 12 years for the Plaintiffs to now claim adverse possession of the same.

17. Further that paragraph 6 of the said agreement was clear to the effect that if there was breach of the agreement, on the side of the seller, she shall refund the principle amount together with 50% of interest. Which suggested that the parties had foreseen the possibility of the breach and therefore the court cannot be made to rewrite the agreement for them.

18. That the Plaintiffs had not established the principles as laid down in the case of **Giella vs. Cassman Brown (supra)** as they had not established a prima facie case with a probability of success because the agreement was void for their being lack of the Land Control board consent and that the same was barred by the reason that it was time barred. That further they stood to suffer no irreparable injury as they had never occupied the suit land which the 1st Defendant has always been in possession of.

19. The issue for determination by this court is whether the plaintiff established a case to enable this court grant it the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the order of injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.(E.A. Industries v. Trufoods, [1972] E.A. 420.)”

20. In the present case, there is no dispute going by annexure relied upon by the Plaintiff herein, that the 1st Defendant was the registered proprietor of land parcel No. **Nyandarua/Ndemi/1163** on the 27th November 2014.

21. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows.

Section 25 (1) provides:-

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-

a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and

b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

22. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship section 26 (1) provides:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except

a. on the ground of fraud or misrepresentation to which the person is proved to be a party, or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

23. The Applicant has argued and asserted that the 1st Respondent's title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence that the Government has recalled and/or revoked the title. Both the Land Registration Act section 26 (1) that provide for the indefeasibility of title and Article 40 (6) of the Constitution envisage that where a registered title is impugned on the grounds set out in the provisions, that due process would be followed to have such title revoked, cancelled and/or annulled. The courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

24. Equity aids the vigilant not the indolent. It is not in contention that the Applicants herein were evicted in the year 2016, and/or and are no longer in possession of the suit land either way, they did not take any legal action for almost two years down the line and now have come to court seeking for the said orders.

25. The 1st Respondent is entitled to observance of due process to have her title cancelled, revoked and/or annulled. The Applicant did not follow due process to have the Respondent's title impugned for any reason.

26. The 1st Respondent having demonstrated that she was the registered owner of the suit property namely No. **Nyandarua/Ndemi/1163** and having been issued with a title, prima facie her title is indefeasible and the burden shifts to the Applicant to show or demonstrate that the title is challengeable within the provisions of the law.

27. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 1st Respondent's title but the mere proof that she holds a duly registered certificate, which on the face of it was properly acquired is sufficient to lead the court to hold that the Applicant has not established that there is a prima facie case.

28. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

29. Consequently, I dismiss the application dated 18th January 2018 and set aside the interim orders issued thereon the 18th January 2018, with costs to the 1st Respondent herein.

30. Parties to comply with the provisions of order 11 within the next 21 days for the hearing of the main suit herein.

Dated and delivered at Nyahururu this 19th day of June 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE