



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.684 OF 2017

JAMES MWAI KAMOTHO

(Suing as the Legal Representative of the

Estate of JOHN JOSEPH KAMOTHO).....PLAINTIFF /APPLICANT

-VERSUS-

STEPHEN NDERITU KIMANI.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated 27th July 2017, brought by the Plaintiff/Applicant herein under Sections 3A and 3 of the Civil Procedure Act and Order 40 Rules 1(a) and Rule 4(I) of the Civil Procedure Rules, wherein the Applicant has sought for the following prayers:-

a) That the Defendant be restrained whether by himself, his agents, servants employee or anyone acting under him from entering or in any way interfering with the Plaintiff's occupation and use of land parcel 9452/1 until the hearing and determination of this suit.

b) That the Defendant does pay the costs of this Application.

This Application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of the Applicant, *James Mwai Kamotho*. The grounds are:

i. That Land LR 9452/1 belongs to the Estate of John Joseph Kamotho (deceased).

ii. That the defendant has fraudulently obtained a transfer to himself of the land alleging it was sold to him by the deceased.

iii. The alleged sale and transfer is devoid of the necessary spousal and commissioner's consent and therefore it is a nullity.

iv. The family of J. J Kamotho (deceased) has had exclusive possession of the land and has placed workers on the land.

v. That on 2/6/2017, the Defendant sued the workers on the farm and in an Exparte Notice of Motion obtained orders that amount to an eviction.

vi. That if the Defendant carries out the eviction and removes the employees, he shall be able to get possession of the land.

vii. *That the Applicant has sought to be joined as a party so as to raise a preliminary objection that the court lacks jurisdiction and the matter is set for hearing on 2/8/2017.*

viii. *The Defendant will suffer no prejudice because he is not on the land and does not own the land.*

In his *Supporting Affidavit* the Applicant reiterated the contents of the grounds in support of the Application and further averred that his father purchased the suit land in **1996**, and since then the family has been cultivating the farm. That after purchase they realized there was an error on the description of the land and the **Registry Index Map (R.I.M)** and the position was communicated to the **Chief Land Registrar**, who required a surrender of the title in his father's possession to enable a Grant to be issued. He further averred that he personally lodged the conveyance documents with the Ministry of Lands for the preparation of the Grant and the Grant has not been collected by any member of the family as they were told to wait. He also averred that they were surprised when their employees were served with pleadings and a Grant allegedly issued in his father's name had been transferred to the Defendant. He further alleged that he reported the matter to the **National Land Commission**, who were also perplexed to see the documents.

The Defendant stated that the Chairman wrote a letter to the **O.C.S Kabati Police Station**, expressing doubt on the alleged transfer and he was able to get a copy of the transfer allegedly signed by his father and noted that the signature is not his father's, the document is not attested, the document is altered on the date and that the document was lodged **2½ years** after making it. He further averred that he believed his father having bought the suit land for **Kshs.6,000,000/=** could not sell it for **Kshs.3,000,000/=**, **18 years** down the line and in any event his mother is required by law to give **spousal consent** which she never did.

The Plaintiff/Applicant alleged that the filing of **Civil Suit 484 of 2017**, by the Defendant/Respondent is trying to get possession of the land after a fraudulent transfer and the orders of the court amounting to an eviction order should be final and not an interlocutory order. He alleged that the court lacked jurisdiction and indeed in his seeking to be made a party therein was to protect the land for the estate and to make an application for striking out the suit and urged the Court to allow his Application.

The Application is contested and **Stephen Nderitu Kimani** the Defendant/Respondent, filed a **Replying Affidavit**. He averred that he purchased the suit property in **June 2014**, from the deceased **John Joseph Kamotho** for **Kshs.3,000,000/=** and made subsequent payments to the deceased in full. The transfer was registered, stamp duty paid and titled deed was issued in his name by the Registrar of Titles. He further averred that he is the registered and beneficial owner of the suit property and he is currently in possession of the original Title and thus a Certificate of Title is the absolute proof of ownership.

He further contended that the records at the Land Registry indicate that he is the registered owner and thus entitled to exclusive quiet possession, occupation as against the Plaintiff and their agents and any third party. He averred that a **Search** at the **Lands Office** on the **4th May 2017** confirmed that he is duly registered owner of the suit property as evidenced by **Annexure SNK-3**. He further averred that he has at all times been in occupation of the suit property until the Applicant and their agents wrongfully trespassed on the same without his permission. He also averred that the Applicant has not exhibited any evidence to show that he is the owner of the parcel of land. He alleged that there has been no evidence to show that the Applicant has an interest in the suit property and the Instant Motion is an abuse of the court process. He also averred that any person occupying the suit property is doing so unlawfully hence a trespasser and does not deserve the exercise of discretion of this court.

It was his contention that the Applicant has not procured any evidence of fraud or misrepresentation to link him with any fraud or misrepresentation with regard to acquisition of the suit property. Further that the Applicant was duty bound to establish and demonstrate any acts on his part that would constitute illegality in the acquisition of title or property. He further alleged that the Applicant's application is bad in law, since the same matter is pending before the **Thika Chief Magistrates' Court** between the Applicant and/or his agents and the Respondent as it goes against the principle of *Res judicata*. He stated that he has a **Court Order** from the **Thika Chief Magistrates' Court**, barring the Applicant from interfering with the suit property. He contended that the Applicant has constructively acknowledged the jurisdiction of the Lower Court and is thus estopped from denying it. He urged the Court not to allow the Applicant to obtain their position of advantage through unlawful acts. He further averred that the Applicant has not demonstrated that he will suffer irreparable harm if orders are not granted. However, the Respondent would suffer if the orders sought are granted. The Defendant/Respondent urged the Court to dismiss the instant Application with costs.

This Application was canvassed by way of written submissions wherein the **Law Firm of Waithira Mwangi & Co Advocates** for the Plaintiff/Applicant filed their submissions on **17th April 2018**, and urged the Court to allow the instant Application. It was submitted that **John Joseph Kamotho** having died while title was still in his name, it was mandatory that a **Succession Cause** be filed and a Certificate of Confirmation of Grant be made before any transfer of any of his properties could be made.

Applicant relied on the case of *Chemutai Too...Vs...Nickson Kipkurui Korir & 2 Others, ELC No.51 of 2014 (OS)*, where the Court held that; *Section 26(1) (a)& (b)* of the Land Registration Act provide that a title obtained fraudulently will be challenged. It was further submitted that the acts of fraudsters will not be allowed to deprive others of a good title and the court proceeded to cancel a title that had been obtained after the death of the registered owner.

The Applicant further submitted that the suit land being agricultural land was subject to provisions of the *Land Control Board Act* and that being the case and since no Consent was obtained herein, then the transfer to the Defendant offended *Section 6* of the above Act. The Applicant relied on the case of *Benard Ngigi Hinga...Vs...Margaret Mbeere Hinga & 3 Others, HCC 61/2002*, where the court proceeded to cancel the title where there was no *Sale Agreement* and where the *Land Control Board Consent* was lacking.

The Applicant further submitted that the transfer by the Defendant was devoid of the necessary *Spousal Consent* and it contravened *Section 6* of the *Matrimonial Properties Act, 2013*, and they further relied on the case of *Edith Nyambura Mwenjera...Vs...Simon Mwenjera Ndara & 2 Others (2014)eKLR*. It was further submitted that the Family of the J.J Kamotho (deceased) has had continuous uninterrupted occupation of the land since *1996*, and that the Applicant has made a case of invalidating the Defendant's title. The Court was urged to allow the Plaintiff Application with costs.

The Defendant/Respondent through the *Firm of Osundwa & Co. Advocates* filed their written submissions on *13th April 2018*. The Defendant submitted that there are two issues for determination being:-

a) *Whether the Plaintiff was rightfully granted orders for Stay.*

b) *Whether the Plaintiff met the threshold to be granted injunctive orders herein.*

The Defendant submitted that a party to a suit is one who is either impleaded in the suit as the Plaintiff or a Defendant or as an Interested Party whose presence is necessary for the just and conclusive determination of the matter in controversy.

The Respondent relied on *Order 1 Rule 10(2) of the Civil Procedures Rules 2010*, which states:-

“The court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the court to be just order that the name of any person improperly joined whether as plaintiff or Defendant be struck out and that the name of any person who ought to have been joined whether as plaintiffs or Defendant whose presence before the court may be necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit added”.

The Defendant also relied on the *Blacks Law Dictionary* definition of a party and *Halsburys Laws of England Definition*.

The Defendant also relied on the case of *Joseph Njau Kingori...Vs... Robert Maina Chege & 3 Others*, where the Court stated that:-

“As regards the prayer that he be joined as party on his own the court has had to revisit.....It would seem that an intending party cannot come in on his own and choose which position he wants. For this reason the second prayer of the application dated 14th August 2000 fails as well.”

The Respondent therefore submitted that the Applicant lacked *locus standi* to seek orders of Stay prayed in this Application.

The Respondent further relied on the case of *Serve in Love Africa Trust (Sila Trust)...Vs...County Government of Uasin Gishu (2016) eKLR*, where the court held that:-

“...the mere fact that they have an interest to defend the suit does not automatically make them parties thereto. As they are not the primary parties in the suit and they are not named in the pleadings as interested parties, the applicants ought to have followed the procedure described by the Law in Order 1 Rule 10(2) of the Civil Procedure Rules and had themselves formally added as parties to the suit before attempting to participate in the proceedings.”

It was submitted that the Application is incompetent, misconceived and ought to be struck out. For this they relied on the case of Rose Florence Wanjiru...Vs....Standard Chartered Bank Kenya Ltd & Another (2015) eKLR, where the Court referred to the case of Sammy M. Wamer, Commissioner of Insurance & Others...Vs...Kiragu Holdings Limited, Civil Suit No.67 of 2012 (2013) eKLR, where the court held that:-

‘.....It is only after a party has been joined in a proceeding that it can purport to participate and seek relief in such proceeding. There is no dispute that the 1st interested party did not seek leave to be joined in this proceedings. No order of joinder was ever made. To that extent the 1st interested party is a stranger to these proceedings. It cannot properly agitate any cause before this courtA party who approaches a court of law through the window or backdoor cannot expect to be entertained howsoever serious his interest may be. In this case there having been no leave sought and/or granted, the 1st interested party’s application is incompetent’

The Respondent further submitted that the Plaintiff is duty bound to demonstrate and establish any act on his part that would constitute illegality in the acquisition of the title or property and failing to do so, the prayers sought in the Application should be disallowed for want of a *prima facie* case.

The Court has now carefully considered the pleadings in general and the annexures thereto. The Court has also considered the written submissions and the cited authorities together with the relevant provisions of law and makes the following rendition:-

The Applicant has hinged his application under Order 40 Rule 1(a) which provides that wherein it is proved by affidavit that any suit is *in danger* of being *wasted, damaged* or *alienated* or is *wrongfully sold* in execution of a decree, the court may grant temporary injunction restraining the Defendant from *wasting, damaging, alienating, removal* or *disposition* of the said property.

Further, the application is anchored under Section 3A which donates to court the inherent power to make such orders that are necessary for the end of justice to be met and also to prevent abuse of the court process.

As the Court embarks in determination of the instant application, it will take into account the above provisions of law.

The Applicant has sought for *Stay of Execution* of the *Exparte Orders* issued on *6th June 2017* in *Thika CMCC No.484 of 2017*, until the hearing and determination of this application. Though the grant of the said Orders were opposed by the Respondent, the Court finds that the said *Stay of Execution* was to operate until the determination of this application. Since the court is determining the *Notice of Motion* dated *27th July 2017* now, then the Court finds *prayer No.(b)* of the said *Notice of Motion* application as having served its purpose and this Court will not therefore determine extension of the said Stay Order since Applicant sought Stay of the same until the hearing and determination of the application.

The Applicant was also granted temporary Orders of Injunction and in *prayer No.(d)*, he sought for grant of the said Orders of Injunction until the hearing and determination of this suit.

The question now for determination is whether the *temporary Orders of Injunction* granted on *27th July 2017*, should be confirmed until the suit is heard and determined.

The Court will take into account that at this stage, it is not called upon to determine the disputed facts with finality given that the only available evidence now is affidavits evidence which cannot be subjected to the usual test of cross-examination to determine its veracity. See the case of Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999, where the Court held that:-

“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

Further, the Court will also take note that grant of injunctive relief is the discretion of the court and which discretion must be exercised judicially. See the case of Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised”.

The Court will be guided by the principles set out in the case of *Giella...Vs...Cassman Brown & Co. Ltd 1973 E.A 358*. These principles are:-

- a) *The Applicant must establish that he has a prima facie case with probability of success.*
- b) *That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.*
- c) *When the Court is in doubt, to decide the case on a balance of convenience.*

Has the Applicant established that he has a *prima-facie* case with probability of success"

There is no doubt that at the moment, the suit property *LR.No.9452/7*, is registered in the name of *Stephen Nderitu Kimani*, having been registered so on *21st February 2017* for a consideration of *Kshs.3,000,000/=*. However, there is no doubt that the suit property had earlier been registered in the name of *John Joseph Kamotho (deceased)* who was the father to the Plaintiff herein.

It is also evident that the Plaintiff/Applicant is the administrator of the Estate of *John Joseph Kamotho (deceased)* having acquired *Limited Grant of Letters of Administration* on *10th July 2017* and therefore has capacity to bring this suit on behalf of the estate of *John Joseph Kamotho*. The Applicant has alleged that the said late *John Joseph Kamotho* purchased the suit property in *1996*, from one *Sylvia Frase* in *1996* for *Kshs.6,000,000/=* as is evident from the *Sale Agreement* dated *19th June 1996*. The Grant attached to the Defendant's/Respondent's pleadings shows the suit property was sold to him for *Kshs.3,000,000/=*. The Applicant alleged that a suit property purchased in *1996* for *Kshs.6,000,000/=* could certainly not be sold for *Kshs.3,000,000/=* in the *year 2014*.

The Applicant further alleged that his father (deceased) did not obtain the Grant from the Ministry of Lands and so could not have transferred the suit property to the Defendant herein. Though the Applicant has raised serious issues of fraud, the Court finds that the said issues cannot be determined at this juncture through affidavit evidence. The issue of whether the suit property was transferred to the Defendant illegally or fraudulently can only be determined after calling of evidence at the main trial. However, even if the Defendant is in possession of a Grant, the said Grant has been questioned by the *National Land Commission* and issues of fraud have been raised by the said Commission. It is evident that *Section 26(1)(a)&(b)* of the *Land Registration Act* provides that a Certificate of title can be challenged if the same was obtained through *fraud, misrepresentation* or through *corrupt* scheme. The Defendant's title has been challenged by the Applicant herein. Therefore the Applicant has established that though the title is not in the name of the late *John Joseph Kamotho*, there is a possibility that the same was registered in the name of the Defendant through irregular means.

Therefore, the suit property needs to be preserved and for the above reasons, the Applicant has established that he has a *prima-facie* case with probability of success.

On whether the Applicant will suffer irreparable loss which cannot be compensated by an award of damages, it is evident that the Defendant/Respondent herein had obtained *temporary Orders of Injunction* against the employees of the Plaintiff/Applicant herein. It was alleged that the Defendant/Respondent was trying to use the said temporary Orders of Injunction to gain access to the suit property and the Applicant fear was once the Defendant/Respondent gain access to the suit property, there was danger of the said land would be *wasted, damaged, alienated* and/or *disposed off*, at the detriment of the Plaintiff/Applicant. Though the suit property can be quantified, the Applicant finds that the estate of *John Joseph Kamotho's* (deceased) right to property will have been infringed and the said crystalized right cannot be equated to any monetary value. See the case of *Olympic Sport House Ltd...Vs...School Equipment Centre Ltd HCC No. 190 of 2012*, where the court held that:

"Damages are not and cannot be substitute for the loss which is occasioned by a clear breach of the Law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an Order of Injunction"

Therefore, the Court finds that the Applicant has established that he will suffer irreparable loss which cannot be compensated by an award of damages.

On the balance of convenience, the Court finds that it tilts in favour of maintaining the *status quo* and the *status quo* herein is that the estate of **John Joseph Kamotho** has been in possession of the suit property and it should remain in such possession until the suit is heard and determined. The suit property herein should be preserved by maintaining *the status quo* herein. See the case of **Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

“The general principle which has been applied by this court is where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.

Having now carefully considered the available evidence, the Court finds that the Applicant has established all the principles for grant of injunctive orders as stated in the case of **Giella..Vs...Cassman Brown (supra)**.

For the above reasons, the Court allows the Plaintiff’s/Applicant’s ***Notice of Motion*** application dated **27th July 2017** entirely in terms of ***prayer No.(d)*** with costs to the Applicant.

Further, as provided by **Section 3A** of the **Civil Procedure Act**, the Court directs that ***Thika CMCC No.484 of 2017***, be ***transferred*** to this court and be ***consolidated*** with the present suit since the two matters involve the same subject matter being ***LR.No.9452/1***.

It is so ordered.

Dated, Signed and Delivered at Thika this 10th day of December, 2018.

L. GACHERU

JUDGE

10/12/18

In the presence of

No appearance for Plaintiff/Applicant

M/S Ngira holding brief for Mr. Osundwa for Defendant/Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE

10/12/18



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