



Case Number:	ELC 867 of 2014
Date Delivered:	05 May 2015
Case Class:	Civil
Court:	Environment and Land Court at Nairobi
Case Action:	Ruling
Judge:	Onguto Joseph Louis Omondi
Citation:	Joseph Karanja Gatuthu & 2 others v Jotham Njami Mwariri & 3 others [2015] eKLR
Advocates:	Mr. Njuguna instructed by the firm of Njuguna & Partners Advocates for the Plaintiffs Mr. Gathaara instructed by the firm of Gichure & Associates Advocates for the 2nd and 4th Defendants Mr. Ngugi instructed by the firm of C.M. Ngugi Rebiro & Co. Advocates for the 1st Defendant Mr. Muturi instructed by the firm of Muturi Kamande & Co. Advocates for the 3rd Defendant
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE

ENVIRONMENTAL AND LAND COURT NAIROBI

ELC NO. 867 OF 2014

JOSEPH KARANJA GATUTHU1ST PLAINTIFF

PETER NJUGUNA GATUTHU2ND PLAINTIFF

SAMUEL NJUGUNA GATUTHU3RD PLAINTIFF

VERSUS

JOTHAM NJAMI MWARIRI.....1ST DEFENDANT

HANNAH NJERINAIROBI2ND DEFENDANT

MONICAH GATUTHU3RD DEFENDANT

GATUTHU NJUGUNA ESTATES LIMITED.....4TH DEFENDANT

RULING

Introduction

1. Two applications call for determination herein. Both applications brought by way of Notice of Motion were filed by the Plaintiffs. The first was filed on 8 July 2014 while the second was filed on 23rd February 2015.

2. The applications seek injunctive orders against mainly the 1st Defendant. The first of the two applications seeks orders that pending hearing and determination of the suit herein on its merits, the 1st Defendant be enjoined from selling, transferring, leasing, charging or otherwise alienating Land Reference Number 4953/478 (I.R 13765) (**'the suit property'**) . The second application seeks two substantive orders namely; that pending determination of this suit the 1st Defendant be restrained from demolishing or otherwise altering the buildings and or structures erected on the suit property and or terminating or otherwise interfering with the various tenants' tenancies and secondly, that pending determination of the suit herein all the rent being collected from the tenants of the suit property be deposited in an escrow account in the joint names of the Plaintiffs' Advocates and the 1st Defendant's Advocates. The Plaintiffs also seek costs of both applications.

Factual Background

3. Both applications pegged their foundation on three affidavits sworn by the 1st Plaintiff as well as on the grounds stated on the face of each application. While the 1st and 3rd Defendants opposed the

application, the 2nd and 4th Defendants supported the applications. The Plaintiffs as well as the Defendants also swore and filed various Supplementary and Further affidavits.

4. The Plaintiffs' claim can be briefly stated as follows.

5. The Plaintiffs are beneficiaries of the estate of the late Gatuthu Njuguna. Until his demise on 19th January 1988, Gatuthu Njuguna was the registered proprietor of the suit property. Gatuthu Njuguna dictated in his written Will that the 2nd and 3rd Defendants together with the third of his widows Esther Mumbi, who has also since met her demise, were to be trustees of all the beneficiaries of Gatuthu Njuguna's estate through a limited liability company being the 4th Defendant. The executor of the Will duly honored the wishes of the testator and incorporated the 4th Defendant on 25th March 1988. The 2nd and 3rd Defendants as well as the late Esther Mumbi were shareholders of the issued shares of the 4th Defendant. In July 2010, the suit property was transferred to the 4th Defendant presumably to be held in trust for all the beneficiaries. Then in March 2012, allegedly in breach of the trust the Defendants are stated to have transferred the property to the 1st Defendant. The transfer is stated to have been effected at a gross undervalue and without the consent of the Plaintiffs as well as other beneficiaries. The Plaintiffs also claim that the purchase price was never paid and or accounted for.

6. In response, the 1st Defendant has denied any fraud or illegal dealing or irregular transfer of the suit property. To the 1st Defendant the transaction was clean and he paid value for the suit property. The 1st Defendant also stated that he has previously been arraigned before a court of law, charged with the offence of defrauding the estate of Gatuthu Njuguna as well as forging signatures, duly prosecuted and then acquitted or discharged unconditionally. The 1st Defendant also took the position that he had previously dealt with the 2nd, 3rd and 4th Defendants without similar complaints from the Plaintiffs. The 1st Defendant then confirmed the purchase price paid as having been Kshs. 32,250,000/=, paid to all beneficiaries including the Plaintiffs.

7. In support of his contentions, the 1st Defendant availed the proceedings in criminal case number 1022 of 2012 as well as the sale Agreement and the Instrument of Transfer besides a Schedule of payments to the beneficiaries.

8. The 2nd Defendant swore an affidavit on 11 December 2014 on behalf of both herself and the 3rd Defendant. Stripped to detail, the 2nd Defendant's affidavit was to the effect that the two defendants had rented part of the suit property to the 1st Defendant in 2010. That in 2010, they wanted to refurbish the suit property and approached the 1st Defendant, who is a brother in law to the 3rd Plaintiff, to lend them money to enable them undertake the repairs. In May 2010, the 1st Defendant advanced them Kshs. 6,000,000/= and thereafter another Kshs. 12,000,000/= making an aggregate of Kshs. 18,000,000/= by April 2011. In consideration, the 3rd Defendant released the original title document to the 1st Defendant as security. When the 2nd and 3rd Defendants were unable to repay the 1st Defendant the latter offered to purchase the suit property but the offer was rejected. The 1st Defendant then sought that the other two defendants formally acknowledge their indebtedness and the two defendants were made to attend before an advocate in Thika where they thumb-printed a document. It later turned out that the 1st Defendant had transferred the suit property to himself and this prompted the 2nd and 3rd Defendants to cause the executor to lodge a complaint with the criminal department leading to the 1st Defendant being charged with various offences after the 1st Defendant refused to retransfer the suit property to the 4th Defendant or to pay the market price thereof. To the 2nd and 3rd Defendants, the 1st Defendant acquired

the property through deceit and fraud.

9. The approach by the 2nd Defendant was later to be recanted by the 3rd Defendant who swore an affidavit on 9 March 2015 claiming that she never authorized nor acknowledged the 2nd Defendant's affidavit. The 3rd Defendant instead stated that together with the 2nd Defendant and as directors of the 4th Defendant they had negotiated with and agreed to sell to the 1st Defendant the suit property and that at the time of execution of the sale Agreement the 1st Defendant was owed no less than Kshs. 23,962,100/= by the estate . The 3rd Defendant deponed that the 4th Defendant freely sold the suit property to the 1st Defendant.

Law and Submissions

10. At this stage of the proceedings, I need determine two basic questions. Have the Plaintiffs established a prima facie case with chances of success" If so, will the Plaintiffs suffer irreparably if no injunction is granted" If I am in doubt on any of the questions then I have to rest my determination on whether or not to grant the injunctions sought on a balance of convenience. These were the principles laid out in the case of **Giella –v- Cassman Brown & Co Ltd [1973] E.A 368**. As an injunctive relief is basically a discretionary remedy in equity, all the circumstances including the conduct of the parties must however also be considered:see **Bonde v Steyn [2013] 2 EA 8**

11. The applications were prosecuted by way of oral submissions. The Plaintiff's counsel Mr. Njuguna was emphatic that there was a breach of trust by the 4th Defendant who held the suit property in trust for the Plaintiffs together with other beneficiaries. Counsel further submitted that the exact purchase price was not accounted for and neither was the same clear, adding that the property was purportedly sold at a gross undervalue. Further, it was submitted that the 1st Defendant who continues to collect rent from the suit property's tenants has shown the intention to demolish the property and that the likelihood of recovering any rent collected by the 1st Defendant is close to nothing. This, counsel submitted , would lead to irreparable loss. Counsel wound up his submissions by stating that the balance of convenience favoured the Plaintiffs.

12. The 1st Defendant's counsel, Mr. Ngugi, in opposition was clear that there was no fraud on the part of the 1st Defendant and further that the issue of fraud had been dealt with by a court of competent jurisdiction. Then counsel also submitted that the issue of rent had been dealt with by the court through an originating summons filed in Succession cause no. 172 of 1988 and the 1st Defendant allowed to continue collecting the rent. Counsel also took issue with the jurisdiction of the court, stating that the suit ought to be determined by the Family Division of the High Court rather than the Environment and Land Court, as the issues raised involved the distribution of the estate. As to the alleged want of consent or lack thereof by the Plaintiffs to the transaction between the 1st and 4th Defendants, counsel submitted that the Plaintiffs had not only received part of the purchase price but that the parties were all closely related effectively leading to the inference that the Plaintiffs were always aware of the what was happening.

13. Mr. Gathaara for the 2nd and 4th Defendants supported the applications. Mr. Gathaara submitted that the Plaintiffs had established a prima facie case. Counsel was of the view that the 1st Defendant had taken advantage of the literacy level of the 2nd and 3rd Defendants to acquire the property irregularly. Counsel also submitted that the acquittal of the 1st Defendant of criminal charges was not a vindication of the 1st Defendant's innocence as the acquittal was made under Section 210 of the Criminal Procedure

Code.

14. Advocating for the 3rd Defendant, Mr Muturi opposed the applications by submitting that the Plaintiffs were guilty of laches. Counsel also submitted that the 1st Defendant was a bona fide purchaser for value and that the full purchase price had been paid before the transfer and there was evidence of such payment.

Discussion and determinations

15. There is no controversy as to the origin of the suit property. It was originally owned by the late Gatuthu Njuguna who bequeathed the same to a limited liability company. The shareholders of the company were to be his widows. The executor indeed complied and incorporated the 4th Defendant. The suit property pursuant to the deceased's written Will was duly transferred to the 4th Defendant. There is also no controversy that the individual parties to this suit are related either by birth or through marriage.

16. Controversy however emerges when the 1st Defendant is accused of fraudulently transferring the suit property to himself after allegedly taking advantage of the 2nd and 3rd Defendant's literacy levels. The Plaintiffs also accuse the Defendants of not obtaining the consent of all the beneficiaries prior to transferring the suit property. The 1st Defendant with some support from the 3rd Defendant, of course denies all these accusations. The 1st Defendant further states that the parties have previously dealt peacefully and properties allegedly held in trust by the 4th Defendant transferred to the 1st Defendant and the purchase prices paid to the beneficiaries amongst them the Plaintiffs.

17. Before making a determination, it would be important in line with what was stated by the Court of Appeal in the case of **The Owners of motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] KLR 1**, to make a quick determination on whether or not this court has jurisdiction to determine the matters before it through the suit laid before it. If there is no jurisdiction the court will have to immediately lay down its tools. On this issue, I must point out that I have been unable to understand the basis of the 1st Defendant's objection. The Plaintiffs' are contesting ownership and title of the suit property by the 1st Defendant. The process leading to such ownership and title has been impugned. Nowhere in the claim is the issue of distribution of the estate raised and asking for an account of the purchase price does not, in my view, equate distribution of an estate.

18. The contest before the court, in my view, falls squarely within the jurisdiction of the court pursuant to the provisions of **Section 13** of the **Environment and Land Court Act (Cap 12A)** of the Laws of Kenya as read together with **Article 162 (2)** of the **Constitution**. The fact that the dispute involves members of the same family over a property bequeathed to a trustee does not take the same outside the ambit of this Court's jurisdiction as what has been challenged is ownership and title to the suit property. I consequently find and hold that this court has the requisite jurisdiction to entertain and determine the dispute herein.

19. The Plaintiffs have alleged fraud and breach of trust in the transfer of the suit property. I am aware that allegations of fraud must not only be specifically pleaded but must also be strictly proved: see **Okere v Kinyukia [2007] 1 E.A 304** and also **Ratilal v Lalji [1954] E.A 314**. The Plaintiffs have also gathered support from the 2nd and the 4th Defendants with both stating that the 1st Defendant misled the 2nd and 3rd Defendants into signing a Sale agreement as well as a Transfer when all they intended to sign was an acknowledgment of a debt.

20. The alleged fraud is basically two-fold. That the 1st Defendant took advantage of the 2nd and 3rd Defendants levels of literacy and that without the beneficiaries consent the 1st Defendant transferred the suit property to himself. On the issue of fraud, as already pointed out, the Plaintiffs have a huge task in front of them. Fraud is not a run of the mill civil cause of action. It is quasi-criminal in nature. For that reason alone the standard of proof is always higher, though not equivalent to prove beyond reasonable doubt.

21. The 1st Defendant with the support of the 3rd Defendant has stated that he is being put through trial a second time. He pleads double jeopardy. It would appear so but one must recollect quickly that the standard of proof in criminal matters does not equate the standard of proof in civil claims. A cursory glance at the proceedings before the criminal jurisdiction will also reveal that the court found that the facts and evidence tendered did not support the charges of conspiracy to defraud, obtaining registration by false pretence and forgery of signatures with which the 1st Defendant and his co-accused had been indicted. The Defendants are not faced with the same allegations herein.

22. The allegations in the instant suit by the Plaintiffs as well as the 2nd and 4th Defendants are relatively serious. However until proven to the required standard they remain just that: serious allegations. They are however not without merit. Whilst the 1st Defendant states that the purchase price was agreed upon following a valuation report initiated by the 2nd and 3rd Defendants and the beneficiaries of the suit property, a fact also reflected in the third recital of the Sale Agreement, the Plaintiffs who are some of the beneficiaries deny ever being a party to the sale agreement let alone the valuation. It is also to be noted that as early as April 2010, the 1st Defendant had already made payment towards the purchase price yet the valuation was only undertaken in 2011.

23. There is also the issue of payment of the purchase price. The 1st and 3rd Defendants state that the transfer was only effected after the purchase price had been paid in full, yet it is apparent from the 1st Defendants own evidence that part of the purchase price was paid long after the transfer had been registered in March 2012. Indeed, part of the purchase price was paid in 2014, if the affidavit evidence of the 1st Defendant is to be taken on its face value.

24. The 1st Defendant is currently the registered proprietor of the suit property. The same was transferred to the 1st Defendant by a trustee. Ordinarily, because of a trustee's general powers, in the absence of deprecatory conditions in the Sale Agreement which render the consideration inadequate or in the absence of evidence of collusion between the purchaser and the trustee, a sale and subsequent transfer by the trustee may not be impeached: see **Sections 13 and 14 of the Trustee Act (Cap 167)**.

25. The Plaintiffs have however attacked both the Sale Agreement as well as the Transfer as having been fraudulently obtained. The Plaintiffs have also attacked the transaction on the basis of irregularity. **Section 26 of the Land Registration Act** allows a Certificate of Title to be challenged on the basis of the same having been obtained illegally, fraudulently, unprocedurally or through a corrupt scheme.

26. In the instant case the 1st Defendant has deponed that he bought the property for a consideration of Kshs. 32,250,000/= yet the instrument of transfer has a declaration of Kshs. 10,000,000/= as the consideration. The instrument of transfer was also assessed for purposes of stamp duty at the amount of Kshs. 10,000,000/=. The 1st Defendant's explanation was that the amount of Kshs. 10,000,000/= is the value the Government Valuer returned as the true value. I have my doubts on this sort of explanation. Section 10 of the Stamp Duty Act (Cap 480) is relatively clear. The 1st Defendant under the said section was under a duty to fully and truly set out in the instrument of transfer circumstances and facts related to the transfer. One such crucial fact must have been the fact that the agreed consideration was Kshs. 32,250,000/=. Failure to comply with the requirements of Section 10 of the Stamp Duty Act means that

the there is a transgression of the law, positive law. It would appear from the facts currently before the court that there was a transgression of the law by the 1st Defendant. Whether this was intentional or not, the court will have to determine at trial. In these respects, the Plaintiffs stand in better stead when they state that there was fraud in the process of obtaining the title and I do find that they have a prima facie case.

27. Then there is also the allegation that the suit property was transferred without the beneficiaries consent. The instrument of trust was not availed to me to enable me make a preliminary view on the powers and limitations of the trustee thereunder. In these respects, the instrument of trust would be the Memorandum and Articles of Association of the 4th Defendant as read together with the instrument that settled the trust, being the Will of the late Gatuthu Njuguna. I do not hold the view that the beneficiaries have done enough for the moment to challenge the transaction on the basis of want of consent. This though is a question which will have to be interrogated by the trial court, especially in view of earlier testimony by a forensic document examiner in the criminal case proceedings that some of the signatures on the Sale Agreement were not actually by the persons stated to have signed the same.

28. The totality of the circumstances and the evidence before me lead me to the conclusion that the Plaintiffs have established a prima facie case with chances of success.

29. The question as to whether there is need to injunct the 1st Defendant can be easily disposed of by reviewing the intended actions of the 1st Defendant. The 1st Defendant has actually issued notices to the sitting tenants of the suit property. The notices which have been annexed to the 1st Plaintiff's affidavit of 23rd February 2015 are to the effect that the 1st Defendant requires vacant possession of the premises to enable the 1st Defendant undertake "major renovations" to the premises. "Major renovations" is a relative appellation. It could lead to a complete overhaul and change of the face of the property. It could mean a demolition of part of the property. That may mean that the likelihood of the Plaintiff's suffering irreparably and beyond ordinary monetary compensation is actual and practical.

30. With regard to prayers for orders that the rent now being collected by the 1st Defendant be deposited in an escrow account, I see no reason to make such orders now.

31. Firstly, there is no dispute that the property is currently registered in the 1st Defendant's name. Secondly, there is also no dispute that the 1st Defendant has paid a substantial portion of, if not the whole, purchase price to various persons including the beneficiaries. The 1st Defendant's money is out there somewhere. The 2nd and 3rd Defendants were some of the beneficiaries of the payments and through them some of the Plaintiffs. The amount being collected as rent is known. If the Plaintiffs succeed it could be easily calculated and, at the very least, deducted from any purchase price to be restituted to the 1st Defendant. If on the other hand the Plaintiffs are not successful, then the 1st Defendant would in any event be still entitled to the amount. I state so because I have no doubt in my mind that whenever interlocutory orders are sought, a court should as a matter of good practice make an observant interest in the substantive relief sought in the suit and ensure that any interlocutory relief which is simply in aid of the substantive relief is not an unnecessary burden to the respondent. Thirdly, I am ready to accept the 1st Defendant's version that the issue of his collecting rent has previously also been adjudicated by a court of concurrent jurisdiction. That statement on oath was not particularly resisted by the Plaintiffs save for a retort by counsel from the bar that the originating summons which invited the issue of rent was struck out without any determination on merit.

Conclusion

32. By way of conclusion, I find that on the totality of the affidavit evidence before me and the circumstances of this case, the Plaintiffs have established a prima facie case with a probability of success and further that the property is in danger of being wasted in the sense of the imminent major repairs which may actually mean demolition. Damages in such circumstances may not be an adequate remedy.

33. In my view, this is one case in which there is much greater risk of causing injustice by withholding an injunction (if the plaintiffs ultimately turn out to be right at trial) than by granting it (if the Plaintiffs ultimately turn out to be wrong at trial). As was stated in the case of **American Cyanamid Co v Ethicon Ltd [1975] 1 All.E.R 504** it is always counsel of prudence to preserve the status quo when factors are evenly balanced. It would be appropriate to preserve the status quo herein by way of a formal injunctive order as the substantive reliefs await determination by the trial court.

Disposal

34. In disposal, I allow the application dated 7 July 2014 in terms of prayer 3 thereof and also the application dated 23 February 2015 in terms of prayer 5 thereof. The 1st Defendant shall be restrained by an order of injunction pending hearing and determination of this suit from selling transferring, leasing, charging or otherwise alienating the suit property being Land Reference Number 4953/478 (IR 13765) and further the 1st Defendant shall be restrained from demolishing or otherwise altering the buildings and or structures erected on Land Reference Number 4953/478 and or terminating or otherwise interfering with the various tenants' tenancies therein pending the hearing and determination of this suit.

35. The Plaintiffs have substantially succeeded and will have costs of both applications to be paid by the 1st and the 3rd Defendants.

36. Orders accordingly.

Dated, Delivered and Signed at Nairobi this 5th day of May 2015

J.L. ONGUTO

JUDGE

Mr. Njuguna instructed by the firm of Njuguna & Partners Advocates for the Plaintiffs

Mr. Gathaara instructed by the firm of Gichure & Associates Advocates for the 2nd and 4th Defendants

Mr. Ngugi instructed by the firm of C.M. Ngugi Rebiro & Co. Advocates for the 1st Defendant

Mr. Muturi instructed by the firm of Muturi Kamande & Co. Advocates for the 3rd Defendant



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