



Case Number:	Civil Case 14 of 2011
Date Delivered:	28 Jul 2011
Case Class:	Civil
Court:	High Court at Machakos
Case Action:	Ruling
Judge:	Paul Kihara Kariuki
Citation:	ANNE WAIRIMU NDUNGU v DAVID RUTHIA KABOGO [2011] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

2011 HCL 10

ANNE WAIRIMU NDUNGU ..... PLAINTIFF

VERSUS

DAVID RUTHIA KABOGO ..... DEFENDANT

SUMMARY

(1) On the 25<sup>th</sup> January, 2011, Anne Wairimu Ndungu filed suit against David Ruthia Kabogo seeking declaration that Plot No. L.R. 214070 Mwasika Municipality (the suit property) lawfully belongs to her and an injunction against the Defendant restraining him from interfering, trespassing, remaining or entering the suit property or any sub-divisions thereof. The Plaintiff avers that she purchased the suit property from M/s Othmanji Ngũwa Farm (1966) Ltd on the 17<sup>th</sup> April, 2008 and is the beneficial owner thereof. She says that she took possession of the suit property upon payment of the purchase price and has sub-divided the same and sold some portions to third parties. She contends that upon visiting the suit property in January, 2011 she found that the first Defendant had responded to her suit alleging ownership thereof and has fraudulently sold some plots to third parties who have commenced developments thereon. In paragraph 9 of the Pleadings, the Plaintiff states that after carrying out her investigations, she has served notice on the first Defendant to carry out an L.R. No. 2019/4088 and with a fraudulent intent obtained a certificate of title to her land (the suit property) whose location is Machakos and to the Plaintiff's prejudice. The Plaintiff goes on to set out the particulars of the fraud alleged in paragraph 10 of the Pleadings contending that she has suffered inconveniences and stands to suffer irreparable loss and damage should the first Defendant obtain the suit property, the Plaintiff has sought the intervention of the court for redress.

(2) Simultaneously with the filing of the Pleadings, the Plaintiff also took out of Notice of Motion under Order 40 rules 1, 2, 3 and 5 of the Civil Procedure Rules, 2010, seeking temporary injunction in terms of the prayer in the Pleadings pending the hearing of the application and this suit respectively. The application is based on the grounds that the Plaintiff is the lawful bona fide purchaser for value of the suit property, that the first Defendant has invaded the suit property, alleging ownership and purporting to have title deeds and has already unlawfully started selling some of the parcels of the plaintiff that sub-divided without any colour of right, that upon investigations it has emerged that the purported sale to the first Defendant is a fraud, and that the Plaintiff stands to lose should the first Defendant continue selling the already sub-divided plots.

(3) The application is supported by the Plaintiff's own affidavit made on the 25<sup>th</sup> January, 2011 in which she repeats the grounds upon which the application is brought as well as the averments made in the Pleadings. In paragraphs 3, 4 and 7 of the affidavit, the Plaintiff deposes as follows:

"3. That upon completion of purchase price payment the vendors executed a transfer in my favour (copy of the transfer attached and marked 'A/N/2'.

4. That I subsequently took possession and occupation of the said premises and have already subdivided the same at a great cost and sold some of the parcels to 2<sup>nd</sup> parties (attached is copy of the subdivision map and marked 'A/N/2'

7. That the defendant's actions are not only unlawful but are malicious and unreasonable and are aimed at alienating my lawful property without any colour of right and should be stopped by the honourable court in good time to save the emergence of conflict between the opposing purchasers before further damage or alienation.

(6) When the application came up for mention before Wainuri J., on the 28<sup>th</sup> January 2011 the learned judge and on the basis of the evidence in paragraph 7 of the supporting affidavit ordered that:

"Writs of injunction be and is hereby granted in the terms that both parties are hereby restrained from selling, leasing, transferring or otherwise disposing of the said land pending disposal of the Notice of Motion dated 25.1.2011.

(5) The first Defendant filed his replying affidavit dated the 10<sup>th</sup> February, 2011 on the 16<sup>th</sup> February, 2011. He opposes the application on the basis of the following grounds and reasons set out in paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of his affidavit:-

"2. That I was lawfully allotted a parcel of Land Reference No.734875 from the Government of Kenya and was issued with a letter of allotment Ref. No.2071/10000 dated 12<sup>th</sup> October, 1998. (Attached hereto and marked 'D/K/1' is a copy of certificate of title dated the 12<sup>th</sup> October, 1998 and the Letter of Allotment)

3. That I paid the full stated premium and other related charges to the Government of Kenya totalling to Kenya Shillings One Hundred and Thirty Thousand (KShs.130,000). (Attached hereto and marked 'D/K/2' are copies of the rent clearance, rent payment receipt and rent payment receipts).

4. That the said parcel of land had been surrendered to the Government of Kenya and I was legally allotted the same and it has never been in the Plaintiff's possession as claimed in paragraph 4 of her affidavit.

5. That as the lawful owner of the said parcel of land I have since been in rightful possession of the same and it has never been in the Plaintiff's possession as claimed in paragraph 4 of her affidavit.

6. That I made an application for the sub-division of the parcel of land which consent was granted and on sub-division of the said parcel of land, I proceeded to sell the same to genuine purchasers. (Attached hereto and marked 'D/K/3' are copies of the application for consent and letters of consent dated 2<sup>nd</sup> September, 2010 respectively".

7. That the said sale was within the law and not illegal as stated by the Plaintiff in the 6<sup>th</sup> paragraph of her affidavit.

8. That the Plaintiff has purposed to sell the land to third parties, among them a number of Administration Police Officers, despite the fact that she is not the true owner of the said parcel of land.

9. That due to the persistent interference of the plaintiff and the police officers, the bona fide purchasers of my land have been unable to develop their individual parcels of land.

(8) In light of the interim order set out in paragraph (5) hereinabove with which the Plaintiff was dissatisfied, she brought another Notice of Motion on the 10<sup>th</sup> March, 2011 sending that the said interim order be amended to conform with the prayer sought in the Notice of Motion dated the 27<sup>th</sup> January, 2011 and further that the Officer-in-charge Uasinaiya Police Post and Ruoi Police Station be directed to effect observance of the orders of this court that application is supported by the Plaintiff's affidavit dated the 10<sup>th</sup> March, 2011 which she deposes as follows in paragraphs 2, 3, 4, 5 and 7 thereof:-

\*2. That on 10<sup>th</sup> day of February, 2011 we I was going about my usual business on the suit property, a roady crowd descended upon me and my encourage and they started hawking and shouting at me to immediately exit the suit premises as they claimed the same belonged to the defendant/respondent who had subsequently sub-divided and sold plots to them.

3. That I immediately made a report at Uasinaiya Police Post (OR No 819/02011) and Ruoi Police Station (OR No 2419/02011).

4. That further to my investigation I have come to realize that the defendant/respondent has been using his/her agents namely Jairo Oryengo, Geoffrey Oryengo, Charles Chumbe and Benjamin Wangi to frustrate the orders of this court by trespassing, altering, constructing and further sub-dividing the suit premises.

5. That I am reliably informed by my Advocates on record, advise which I verily believe to be true and correct that the defendant/respondent is bent on defying the spirit of the court order on account of its wording which is not wholly comprehensive and all inclusive hence our instant application for further orders. (Attached is a copy of the served order dated 28<sup>th</sup> January, 2011 and marked 'ANN E'

7. That one Caleb Ong'ati on the instructions and/or authority of the defendant/respondent is currently proceeding with construction work even after being supplied with copies of the court order. (Attached are photos of the ongoing construction works on the suit premises and the same are marked as a bunch 'ANN F'.

(9) On the 10<sup>th</sup> March, 2011, Caleb Jomo Ong'at (the second Defendant) referred to in the Plaintiff's said affidavit dated the 10<sup>th</sup> March, 2011 sought in a Chamber Summons application dated and filed on the said date to be enjoined in this suit as co-Defendant and leave was granted accordingly on the 10<sup>th</sup> March, 2011. In his supporting affidavit also dated the 10<sup>th</sup> March, 2011, the second Defendant states the following in paragraphs 2, 3, 4, 5, 6, 7 and 8

\*2. That I verily purchased plots of land known as Plot Nos. 25, 34/2, 46, 28, 43, 44 and 45 that were a subdivision of C.R.No.724673 ATM 80/02 from the Defendant herein (Attached hereto and marked 'C/D') are copies of the sale agreements entered into between myself and the Defendant herein, dated 27<sup>th</sup> June 2010 and 10<sup>th</sup> July, 2010 respectively and a copy of the map showing the proposed subdivision of the said property.

3. That I confirmed with the vendor, the Defendant herein, that he sought consent to subdivide the said parcel of land which consent was granted on or around 27<sup>th</sup> September, 2010. (Attached hereto and marked 'CJ02' is a copy of letter of consent dated 27<sup>th</sup> September, 2010)

4. That I bought each of the eight plots at Kenya Shillings Two Hundred Thousand (KSh.200,000.00) (Attached hereto and marked 'CJ03' are copies of receipts showing payment of the purchase price).

5. That upon payment of the Purchase Price, I was issued with Certificates of ownership (Attached hereto and marked 'CJ04' are copies of the Certificates of ownership to the said plots).

6. That I then embarked on developing the said plots.

7. That now the Plaintiff and/or her agents have trespassed onto my property and caused destruction claiming to be the rightful owners of the same.

8. That I was shocked by these actions because I had purchased the said plots lawfully and had the opportunity to peruse the certificate of title for L.R.No.734579 and the receipts for payment of land rent and rates which are in the name of the vendor, the defendant herein. (Attached hereto and marked 'CJ05' are copies of the certificate of Title for L.R.No.734579 and the receipts for payment of land rent and rates.)

(i) The second Defendant also filed his defence on the 10<sup>th</sup> March, 2011 in which he denies each and every allegation of fact contained in the Plaint and rebuts the averments made in paragraph 2, 3, and 7 of his said supporting affidavit.

(ii) The first and second Defendants in an replying affidavit dated the 4<sup>th</sup> April, 2011 responded to and denied the averments made in the Plaintiff's said affidavit dated the 10<sup>th</sup> March, 2011 in addition to repeating the substance of his earlier affidavit dated 10<sup>th</sup> February, 2011.

(iii) The second Defendant in opposition to the plaintiff's second application dated the 10<sup>th</sup> March, 2011 filed his affidavit made on the 4<sup>th</sup> April, 2011 in which he repeats the averments made in his earlier affidavit dated the 10<sup>th</sup> March, 2011. He admits knowledge of the order of court made on the 20<sup>th</sup> January, 2011 but says it did not bar him from proceedings with constitution on the said property.

(iv) Finally, the Plaintiff in her further affidavit's sworn on the 12<sup>th</sup> April, 2011 reiterated the contents of her earlier affidavit's of her earlier affidavits of the 20<sup>th</sup> January, 2011 and the 10<sup>th</sup> March, 2011. She denies as having been fabricated the contents of the first and second Defendant's affidavits dated the 4<sup>th</sup> April, 2011. She also states as follows in paragraph 5 and 6 of her affidavit:

5. That I am reliably informed by my Advocates on record, advice which I verily believed to be true and correct that without a title document, no building plans can be approved for the erection of a permanent structure such as the ones being constructed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents and their spouses and/or alleged purchasers.

6. That I am also reliably informed that the authorities cannot dispense legally acquired title such as the one in my possession in determining ownership of land and it is therefore my conviction and contention that the acts of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are actuated by malice and fraudulent intent.

(12) I have considered both applications (which were heard together) and all the affidavits as well as the respective submissions filed on behalf of the Plaintiff and the first and second Defendants on the 13<sup>th</sup> April, 2011 and the 13<sup>th</sup> May, 2011 respectively.

(13) The Plaintiff has demonstrated that an agreement for sale dated the 10<sup>th</sup> April, 2008 with Githunguri Ngu Farm (1986) Ltd to purchase a property described in Agreement as L.R. 7940/79 at the price or sum of KShs 1.5 million. She has produced a copy of the Bankers Cheque (KXMM 1/7) as well as an instrument of transfer dated the 10<sup>th</sup> April, 2008 duly executed. The said transfer document states that the said company being registered as the proprietor from the government of Kenya ALL THAT "second parts or parcel of land comprising measurements two decimal one (2/100) hectares and known as L.R. 7940/79 transfer to right title and interest thereto to the Plaintiff. On the face of it, the transfer appears to have been intended for stamp duty but there is no evidence that it was duly stamped. There is also no evidence for the transfer to be recorded as a transfer. The document does not disclose whether the interest in the property described therein was being transferred to the Plaintiff as husband or himself. The document refers to a grant registered as Number 24, 11568/11 in which Case File Number 11568/11 is said to be assigned yet the Plaintiff has not produced the grant as evidence of the vendor's (Githunguri Ngu Farm (1986) Ltd) proprietorship under and by virtue of which she claimed a beneficial interest in the suit property. Looking at the said transfer document and in addition to the serious anomalies which I have pointed out... it does not contain the memorandum of encumbrances referred to therein and does not therefore conform with statutory form prescribed under the Registration of Titles Act (Cap 281). The Plaintiff has also not explained why the transfer would have remained uncompleted since the 10<sup>th</sup> April, 2008 when it was executed.

(14) The Plaintiff has challenged the first Defendant's title as fraudulent and has given particulars thereof in paragraph 10 of the Plead as I have already said. However, she has not produced any evidence at all to support the averments made in paragraph 4 and 7 of her supporting affidavit to the application dated the 25<sup>th</sup> January, 2011. The sub-division map (MSB 2) is not signed and the client is named to be "Shangeni Married Women Group" which has not been explained. The Plaintiff has also failed to disclose the nature and extent of the investigation she says she carried out and to produce documents to show that the first Defendant's title is a fraud.

(15) The first Defendant, on the other hand, has explained how he acquired the suit property and I have reproduced the relevant portion of his replying affidavit in paragraph 5 of this ruling. Similarly, the relevant paragraphs in the second Defendant's affidavit are set out in paragraph 7 hereinafter.

(16) For these reasons, both the Plaintiff's application cannot succeed as she has failed to make out a prima facie case with a probability of success. The Plaintiff's applications in the Notice of Motion respectively dated the 25<sup>th</sup> January, 2011 and the 10<sup>th</sup> March, 2011 both fail and each of them respectively be and is hereby dismissed with costs. It follows that the interim orders granted on the 25<sup>th</sup> January, 2011 be and are hereby discharged and vacated.

Orders accordingly.

Dated and delivered at Mombasa this 28<sup>th</sup> day of July, 2011.

P. Khare Karuki

Judith



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)