



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 138 OF 2018

(Consolidated with Kajiado ELC 146 OF 2018)

GEORGE NGURE KARIUKI.....PLAINTIFF

VERSUS

DAVID MAHUGU THONDU.....1ST DEFENDANT

DISTRICT LAND REGISTRAR, NGONG.....2ND DEFENDANT

DISTRICT LAND CONTROL BOARD3RD DEFENDANT

DISTRICT LAND SURVEYOR, KAJIADO.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

ELC 146 OF 2018

DAVID MAHUGU THONDU.....PLAINTIFF

GEORGE NGURE KARIUKI.....1ST DEFENDANT

DIRECTORATE OF CRIMINAL INVESTIGATIONS

KAJIADO NORTH DIVISION.....2ND DEFENDANT

DISTRICT LAND REGISTRAR, KAJIADO.....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 30th August, 2018 brought pursuant to Order 40 Rule 1 & 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Section 68 of the Land Registration Act. The Plaintiffs' seek for temporary injunction against the Defendants in respect to land parcel number Kajiado/ Kipeto/ 1452 hereinafter referred to as the 'suit land' and for an inhibition order to be registered against it. The application is premised on the summarized grounds that the Plaintiff is the registered owner of the suit land while the 1st Defendant has also been issued with another title to it. The 2nd Defendant has threatened to remove the restriction placed on the suit land. Further, the 1st Defendant has severally interfered with the Plaintiff's quiet ownership and enjoyment of the suit land by physically stopping his employees from accessing it. The 1st Defendant is trespassing upon as well as encroaching on the suit land without the Plaintiff's consent.

The application is supported by the affidavit of GEORGE NGURE KARIUKI where he deposes that the suit land was transferred to him by SAPENE OLE LESAPEYE after meeting all the requirements and a title was issued to him on 18th October, 1994. He claims to have taken possession of the suit land, fenced it and drilled a borehole thereon. He avers that on 22nd January, 2015, he discovered the 1st to 2nd Defendants' fraudulent acts culminating in the suit land being transferred to the 1st Defendant while he still had his title. He reported matter to the Directorate of Criminal Investigation at Ngong who then placed a restriction on the Green Card. Further, that they have been summoned twice to appear before the 2nd Defendant but the 1st Defendant failed to heed the said summons. He denies selling the suit land

nor appearing before the Land Control Board to transfer it. He confirms selling and transferring land parcel number Kajiado/ Kipeto/ 1816 to the 1st Defendant. He contends that the 1st Defendant has continued to interfere with the suit land and that the Defendants acts are illegal as well as unlawful.

The 1st Defendant opposed the application by filing a replying affidavit where he confirmed being the registered owner of the suit land which he purchased from the Applicant. He explained that he had initially entered into a Sale Agreement with the Applicant to purchase land parcel numbers Kajiado/ Kipeto/ 1573 and 1574 but before the completion of the said sale he replaced the said parcels with the suit land at an agreed purchase price of kshs. 110,000/= per acre and the Plaintiff gave him an equivalent of 15 acres to cater for the deposit of Kshs. 1,650,000/= that he had already collected. He insists the completion documents were duly executed but held in abeyance pending the resolution of the issue of the additional five acres but since the Applicant declined to make good his promise, he instructed his lawyer to transfer the 10 acres in his name and he was issued with a Certificate of Title on 22nd January, 2013. He contends that he took possession of the suit land, re established the beacons, erected a perimeter wall around it and is currently in occupation of the whole property. He avers that he enjoyed quiet possession of the suit land until February, 2015 when he was summoned to appear before the Land Registrar as the Applicant alleged he had transferred suit land without his knowledge. Further, that the Land Registrar based on the DCIO's letter dated the 26th November, 2014 registered a restriction against his title. He denies being summoned to record a statement. He states that on 18th November, 2018 a search was conducted to ascertain if the restriction had been removed but the said search only revealed that the Applicant was owner of the suit land. He reiterates that the Applicant is attempting to use the office of the DCIO Kajiado North to dispossess him of his land.

Both the Plaintiff and the 1st Defendant filed their respective submissions which I have considered.

Analysis and determination

Upon perusal of the application together with the respective affidavits and the parties' submissions, at this juncture the only issue for determination is whether the interim injunctions sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

The Plaintiff in his submissions reiterated his claim and contended that his title to the suit land precedes the 1st Defendant's. He relied on the case of **Wreck Motors Enterprises V Commissioner of Lands CA No. 71 of 1997** and **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** to support his averments. The 1st Defendant opposed the instant application and insisted the Plaintiff had not established a prima facie case. He relied on the cases of **Ngamate Wandongu V Esther Njoki Kibunja (2013) eKLR**; **Jan Bonde Nielsen V Hermans Philipus Steyn & 2 Others (2012) eKLR** to buttress his arguments.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In line with this principle, the Court will proceed to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, it is the Plaintiff's contention that he is the proprietor of the suit land and the 1st Defendant has colluded with the 2nd Defendant and obtained title to the said land while he still had his title. The 1st Defendant in his response stated that he bought the suit land from the Plaintiff.

Looking at the documents annexed to the respective affidavits' and the evidence presented, it is clear that the claim laid by the Plaintiff over the suit land is not baseless. Although several issues are not clear as to how the 1st Defendant obtained the transfer of the suit land to his name without the Plaintiff's knowledge and currently they each hold their respective titles. The 1st Defendant explained that they initially had a different transaction with the Plaintiff, in respect to different parcels of land but since the said transaction was not concluded, the Plaintiff compensated him with the suit land. He however did not explain how he managed to effect the transfer to his name while the Plaintiff still held the original title in his custody. Further, the 1st Defendant claims to have taken possession of the suit land while the Plaintiff also claims to have fenced and drilled a borehole thereon. I opine that the issues raised by the Plaintiff and 1st Defendant can only be best determined at a full trial and not at this interlocutory stage. Insofar as I find that the Plaintiff has established a prima facie case, it is my considered view that since there are two titles to the suit land, it would be proper if the substratum of the suit was preserved pending the outcome of the suit.

On the second principle as to whether the Applicant stands to suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and 1st Defendant claim ownership of the suit land and to be in possession of the same. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that **'...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.'**

Based on the facts as presented, and in relying on the decision cited above, since both parties have their respective titles and claim to be in possession of the suit land, I find it would be pertinent if they were both granted an opportunity of being heard to enable the court make a determination on the ownership of the suit land.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the property is not preserved, it may be wasted away.

Since both the Plaintiff and the 1st Defendant are staking claim over the suit land, with the sanctity of the title being in dispute, I will decline to grant the orders as sought but proceed to make the following order:

- 1) The Obtaining status quo be maintained where the party currently on the suit land to remain thereon until the hearing and determination of the suit.
- 2) The Land Registrar Kajiado North be and is hereby directed to register an inhibition order against land parcel number KAJIADO/KIPETO/1452 of any dealings, lease or charge pending the hearing and determination of the suit.
- 3) The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 24th day of February, 2020

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Kabene for the 1st defendants

No appearance for the plaintiff

Court assistant - Mpoye