



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 720 OF 2017

(formerly Nairobi ELC Case No. 1232 of 2013)

CECILIA MUNYIVA MUIVA.....1ST PLAINTIFF

NDINDA KUSU.....2ND PLAINTIFF

VERSUS

SALAU OLE SOKON LIMURINKE.....1ST DEFENDANT

MIDARI PROPERTIES AGENCIES LTD.....2ND DEFENDANT

RULING

The application for determination is the Plaintiffs Notice of Motion dated the 14th October, 2013 brought pursuant to Order 40 Rule 1 and 2, Section 1A, 1B and 3A of the Civil Procedure Act and all the other enabling provisions of the law. It is based on the following grounds which in summary is that the Plaintiffs are the registered proprietors of land parcels numbers KAJIADO/KITENGELA/29622, 29623 and 21074 (hereinafter referred to as the 'suit lands') having purchase the same from the 1st Defendant through the 2nd Defendant. The 1st Defendant has without any lawful cause trespassed on the suit lands and denied the Plaintiffs access to them. The continued acts of trespass have and continue to cause harm to the Plaintiffs, and it is only fair, just as well as in the interest of justice that orders sought are granted.

The application is supported by the affidavit of CECILIA MUNYIVA MUIVA the 1st Plaintiff herein where she deposes that the 2nd Defendant was the agent of the 1st Defendant in the sale transaction of the suit lands which were excised from KAJIADO/KITENGELA/21077 and KAJIADO/KITENGELA/13907. She avers that on 5th July, 2004 she purchased 10 acres of land from the 1st Defendant acting through his agent viz the 2nd Defendant for the sum of Kshs. 1,040,000 which parcel of land was excised from KAJIADO/KITENGELA/13907; and paid the entire purchase price culminating in her being registered as the proprietor of land parcel number KAJIADO/KITENGELA/21074. She contends that the 2nd Plaintiff also bought 10 acres from the 1st Defendant acting through his agent viz the 2nd Defendant for the sum of Kshs. 1 million which parcel was excised from KAJIADO/KITENGELA/21077 and she paid the full purchase price culminating in her being registered as owner of land parcel number KAJIADO/KITENGELA/29622. She claims on 19th January, 2007 together with the 2nd Plaintiff they bought a further 10 acres of land for Kshs. 1 million which was fully paid for, with the said land being excised from KAJIADO/KITENGELA/21077 after which they were issued with a title deed for land parcel number KAJIADO/KITENGELA/29623. She avers that in the year 2007, together with the 2nd Plaintiff, they constructed a water dam at the centre of the suit lands that were

registered in their names, which cumulatively amounts to 30 acres, and allowed the 1st Defendant to graze his livestock as well as water his animals thereon. She states that sometime in March 2011 and September, 2013 together with the 2nd Plaintiff, they sent surveyors on the suit lands to subdivide it, but the 1st Defendant including his sons attacked the surveyor and his workmen, with crude weapons, chasing them away, warning them not to return and denying the 1st Defendant had ever sold the suit lands to anyone. She reiterates that the Defendants are in collusion to continue interfering with their quiet enjoyment of the suit lands, which acts amount to trespass, and they continue to suffer loss and damage. Further that the 1st Defendant's misuse of the suit lands including flora and the water dam has led to environmental degradation of the said properties. She insists official searches conducted on the parcels confirm the suit lands belong to them and it is only fair and just that the orders sought are granted.

The application is opposed by the 1st Defendant SALAU OLE SOKON LIMURINKE who filed a replying affidavit where he deposed that the Plaintiff's application is bad in law, an outright abuse of the due process of the law and the same should be struck out. He denied selling land parcels numbers KAJIADO/KITENGELA/29022, KAJIADO/KITENGELA/29023 and KAJIADO/KITENGELA/21077 nor entering into a sale agreement with them. He confirms he had an intention of selling 40 acres of land out of his land KAJIADO/KITENGELA/21077 to the 2nd Defendant's representative Mr. Michael Ngila who presented himself to him as a surveyor, and the sale did not materialize as no consideration was paid. He insists he only owed the alleged surveyor Kshs. 50,000 being costs of subdivision and never had any arrangement with the Plaintiffs. He reaffirms that the 2nd Defendant's aforementioned representative made him sign some documents making him believe they were facilitating the subdivision pending the sale transaction between himself and the 2nd Defendant, and only realized the 2nd Defendant had actually subdivided 60 acres out of his land, illegally and fraudulently and acquired the following titles: KAJIADO/KITENGELA/29022, KAJIADO/KITENGELA/29023 and KAJIADO/KITENGELA/21077 in favour of the Plaintiff and other two titles KAJIADO/KITENGELA/31514 and KAJIADO/KITENGELA/31523 respectively in its name. He denies executing the transfer documents before an advocate in Machakos and challenges the address on the application for consent and transfer to be different. Further that he lodged a complaint with the Chairman of the Land Disputes Tribunal Ngong who deliberated on the dispute and ordered that 20 acres of land to revert to him but was not happy with the said decision. He challenges the existence of a dam, states that the Plaintiffs have never been in possession of the suit lands and that this suit is tainted with fraud.

The Plaintiffs and the 1st Defendant filed their respective submissions which I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion application dated the 14th October, 2013 together with the supporting affidavit, the replying affidavits and the parties' submissions, at this juncture the only issue for determination is whether the interim injunction sought by the Plaintiffs ought to be granted pending the outcome of the main suit.

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** as follows:

"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."

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

In the first instance as to whether the Plaintiffs/Applicants have demonstrated a prima facie case with probability of success, it is their contention that they are proprietors of the suit lands namely

KAJIADO/KITENGELA/29622, 29623 and 21074 which they purchased through the 2nd Defendant who was an agent for the 1st Defendant. The Plaintiffs' were even issued with respective title deeds to the suit lands and constructed a dam in the middle of the three parcels of land. The Plaintiffs aver that the 1st Defendant with his sons have denied them access to and quiet enjoyment of the suit lands and even chased away the surveyor they had sent to subdivide the land. 1st Defendant denies ever selling any land to the Plaintiffs and insists this was fraudulently done. He however admits that he had sought to sell land to the 2nd Defendant who was supposed to assist him with subdivision. Further, that he even signed some documents. I note the 1st Defendant alleges fraud and claims the representatives of the 2nd Defendant in collusion with the Plaintiffs', had them registered as owners of the suit lands. He even denies knowing the Plaintiffs. However, these are issues best heard and determined at a full trial. I note the 1st Defendant has not furnished court with evidence that he commenced legal proceedings against the Plaintiffs to recover the 30 acres from them.

Section 24 of the Land Registration Act provides that: **'Subject to this Act—**

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;'

Section 26 of the Land Registration Act stipulates that: **'(1) 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 proprietor shall not be 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.

The 1st Defendant alleges fraud on the part of the 2nd Defendant who sold the suit lands to the Plaintiffs. I note however that the 1st Defendant admits there was a contractual relationship between him and the 2nd Defendant for the sale of part of the land. 1st Defendant however alleges fraud and denies transferring land to the Plaintiffs. In the case of **UCB Vs Mukoome Agencies (1982) HCB22** it was held as follows: **'that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'.**

In the instant case I find that it would be pertinent if both the Plaintiff and the 1st Defendant is granted an opportunity to be heard to enable the court make a determination on the ownership of the suit lands. Looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Plaintiffs over the suit lands is not baseless. In relying on the above sections of the law and the facts presented, I find that the Plaintiffs have indeed established a prima facie case with a probability of success.

On the second limb as to whether the Plaintiffs/Applicants will suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiffs and 1st Defendant claim ownership of the suit lands. I note the Plaintiffs already have their respective titles to the suit lands. The 1st Defendant had denied them access to the suit lands and threatened the surveyor they sent to subdivide it. I find that since the Plaintiffs were purchasers for value without notice, and they already hold their respective titles to land, they will indeed suffer irreparable loss which cannot be compensated by way of damages.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt

that this tilts in favour of the Plaintiff; and if the title to the property is not preserved, it may be wasted away.

Further there is a need to bar the Defendants from denying the Plaintiffs the right to enjoy the suit land.

Since both the Plaintiffs and the 1st Defendant are staking claim over the suit lands, with the sanctity of the title being in dispute the Court finds that these are issues best determined at a full trial, I will allow the Plaintiffs Notice of Motion application dated the 14th October, 2013 in the following terms:

a) An order of injunction be and is hereby issued restraining the Defendants, either by themselves, their servants, agents, workmen and/or anyone acting through them from trespassing upon, occupying, grazing animals and/or any portion of the land forming part of LR Number KAJIADO/KITENGELA/29622, KAJIADO/KITENGELA/ 29623 and KAJIADO/KITENGELA/ 21074 pending the hearing and determination of the suit herein.

b) An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel number KAJIADO/KITENGELA/29622, KAJIADO/KITENGELA/ 29623 and KAJIADO/KITENGELA/ 21074, of any dealings, lease or charge pending the hearing and determination of the suit.

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 30th day of January, 2018

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Busaidy holding brief for Kabue for Plaintiff

N/A for Defendant