



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 799 OF 2012

HARON MWANGI MUNGE.....1ST PLAINTIFF

JAMES MWANGI NJOROGE.....2ND PLAINTIFF

VERSUS

THE COMMISSIONER OF LAND.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR (KAJIADO).2ND DEFENDANT

JANE NJERI LEINA(KAJIADO)..... 3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 29th October 2012 in which the Plaintiffs/Applicants seek for the orders of temporary injunction restraining the Defendants/Respondents from revoking, amending or dealing with the Titles or register for the parcels of land known as Loitokitok/Kimana–Tikondo/4454 and 4455 (hereinafter referred to as the “suit properties”) pending the hearing and determination of this Application and suit and that the costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1st Plaintiff, Haron Mwangi Munge, sworn on 29th October 2012 in which he averred that sometime in January 2007, one Alexander Leina Lembale (now deceased) approached him and requested him to find someone to buy his land known as Loitokitok/Kimana–Tikondo/295 for the reason that he had taken a loan from Agricultural Finance Corporation which he was unable to pay and his said land was to be auctioned. He further averred that they entered into a sale agreement with the deceased on 19th January 2007 to the effect that he and his co-plaintiff would jointly purchase the said land. He produced a copy of the said sale agreement. He further stated that the sale agreement was witnessed by the deceased Alexander Leina Lembale, the local area chief one John Laito and Jane Njeri Leina (the 3rd Defendant/Respondent) who is the widow of the deceased Alexander Leina Lembale. He further disclosed that according to the said sale agreement, he and his co-Plaintiff were to settle the outstanding loan due to Agriculture Finance Corporation and the remainder of the purchase price would be paid to the deceased and the said land would be transferred to him and his co-plaintiff. He confirmed that together with his co-plaintiff, they cleared the outstanding loan and a notification of discharge was issued by

Agricultural Finance Corporation which was registered at the District Land Register, Kajiado district on 6th March 2008. He further stated that a survey was carried out on Loitokitok/Kimana–Tikondo/295 sometime in February 2008 by which time Alexander Leina Lembale was still alive and signed the mutation form which was used to sub-divide the land into two portions being the suit properties for himself and the 2nd Plaintiff. He confirmed that one of the sub-divisions being Loitokitok/Kimana–Tikondo/4454 was registered in his name while the other sub-division Loitokitok/Kimana–Tikondo/4455 was registered in the name of the 2nd Plaintiff. He produced a copy of his title deed.

The Application is contested. The 3rd Defendant/Respondent, Jane Njeri Leina, filed her Replying Affidavit sworn on 11th December 2012 in which she averred that at no time did her late husband enter into the alleged sale agreement dated 19th January 2007 with the Plaintiffs/Applicants. She also denied having signed the alleged sale agreement and stated that the signature purported to be hers is a forgery. She further averred that the mutation form produced by the Plaintiffs/Applicants contains fundamental flaws such as the lack of a signature of the surveyor and the date when the subdivision was done. She further averred that she obtained copies of mutation form, green card and stamp duty payment form from the Kajiado Lands Office and stated that no consent to subdivide or transfer was ever sought or obtained. She further indicated that the alleged sale agreement had only one purchaser being the 1st Plaintiff and not the 2nd Plaintiff. She added that the Chief Land Registrar cancelled the two titles issued to the Plaintiffs after the failure of the Applicants to provide evidence of the transaction leading to the titles.

In response thereto, the 1st Plaintiff/Applicant filed his Further Affidavit sworn on 13th March 2013 in which he averred that contrary to the 3rd Defendant/Respondent's allegations, there was a sale agreement between her late husband and the Plaintiffs and that she was a witness to the same. He further stated that the mutation form is clearly dated 5th March 2008 and was signed on page 4 and 5 by the licenses surveyor from Messrs J.R.R. Aganyo & Associates who carried out the mutation work. He further stated that the documents attached by the 3rd Defendant/Respondent are genuine and reflect a lawful transfer of the suit properties to the two Plaintiffs. He further pointed out that the 3rd Defendant/Respondent did not dispute the payment of Kshs. 169,300/- to the Agricultural Finance Corporation in discharge of her late husband's loan. He further pointed out that their title deeds were never cancelled nor restored to the deceased.

Both the Plaintiffs and the 3rd Defendant/Respondent filed their written submissions which have been read and taken into consideration in this ruling.

The issue emerging for determination is whether or not to grant to the Plaintiffs/Applicants the orders of temporary injunction pending the hearing and determination of this Application and suit. In deciding whether to grant the temporary injunction sought after by the Plaintiffs/Applicants, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The question whether the Plaintiff/Applicant has demonstrated a genuine and arguable case no doubt leads us to an assessment of the documents of ownership produced by them in this Application. The Plaintiffs/Applicants rely on a sale agreement dated 19th January 2007 between one Alexander Leina ole Lembale (whom we are advised is now deceased) and James Mwangi Njoroje who is the 2nd Plaintiff in this matter. A copy of the said sale agreement was produced. A perusal of the same appears to corroborate the Plaintiffs/Applicants' assertions as to how they ended up as the proprietors of the suit properties which are subdivisions of the parcel of land known as Loitokitok/Kimana–Tikondo/295. Other documents produced by the Plaintiffs/Applicants upon which they rely are the mutation form used to effect the subdivision, a notification of discharge from the Agricultural Finance Corporation and copy of title deed to one of the subdivisions being Loitokitok/Kimana–Tikondo/4454. These documents go a long way in supporting the case of the Plaintiffs in their claim over the suit properties. Further documents produced by the 3rd Defendant/Respondent also support the Plaintiffs' case being green cards of the suit properties, stamp duty payment forms, receipt issued by the Agricultural Finance Corporation to the deceased and a letter dated 7th December 2011 from Agricultural Finance Corporation to the deceased. All these documents corroborate the Plaintiffs' claim over the suit property. The 3rd Defendant/Respondent's assertions that the Plaintiffs are guilty of fraud and forgery of these documents appears to be unsubstantiated at this juncture of these proceedings. The letter issued by the Chief Land Registrar to the effect that the titles to the suit properties in the names of the Plaintiffs have been cancelled is of no effect. The issue whether or not the title deeds produced before this court are genuine or not is one to be determined by this court. For now, I make a preliminary finding that the Plaintiffs/Applicants have demonstrated that they have a prima facie case with high chances of success at the full trial.

Does an award of damages suffice to the Plaintiffs/Applicants? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiffs' rights. Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

I therefore allow the Application. Costs shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 24TH

DAY OF APRIL 2015.

MARY M. GITUMBI

JUDGE