



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CASE NO. E021 OF 2021

TANYAAG SHINANAI JACKSON (Suing on behalf of the estate of

SOMET OLE TANYAAG).....PLAINTIFF/APPLICANT

VERSUS

JULIUS SIGEL.....RESPONDENT/DEFENDANT

RULING

1. What is before me for determination is a Notice of Motion Application dated 4th November, 2021 brought pursuant to **Order 40 rule 1** and **Order 51** of the **Civil Procedure Rules** and **Sections 1A, 1B** and **3A** of the **Civil Procedure Act** seeking the following orders: -

1. Spent.

2. Spent.

3. That pending hearing and determination of this suit, a temporary order of injunction do issue restraining the Defendant/Respondent whether by himself or representatives, servants, agents and/ or assigns from howsoever further cultivation, planting, selling, leasing, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as Parcel Number Narok/Cis-Mara/Ololulunga/1143 measuring 1 65.00 Ha, the suit property herein.

4. That the costs of this application be provided for.

2. The application is premised on the grounds on the face of it and more particularly the affidavit of the applicant herein sworn on 4th November, 2021 in which he deposed that his late father is the registered proprietor of land parcel known as Narok/Cis-Mara/Ololulunga/1143 the suit land having been issued with a title deed dated 16th April, 1993.

3. That through the office of the chief, Nkorkorri location, the applicant's family wrote a letter forwarding their grievances dated 7th September, 2020. Thereafter, the chief wrote a letter to the Deputy County Commissioner dated 26th May, 2021 concerning the same dispute. On 27th September, 2021, the Assistant County Commissioner also wrote a letter to the Deputy County Commissioner Narok West Sub County concerning the same dispute in which a meeting was held and agenda set for the same in which several people were in attendance including the parties herein. In the said meeting, it was resolved that documents claimed to be agreements for land could not be relied upon as the meeting could not determine whether the documents were genuine and no cultivation, leasing or any other dealing would take place until the dispute was solved. That notwithstanding the same, the respondent defied and disobeyed the resolutions of the meeting without any justifiable cause and is on riot cultivating the disputed land.

4. The applicant further deposed that the continuous trespass cannot be compensated by way of damages. The applicant further stated that **section 26** of the **Land Registration Act** not only provides for indefeasibility of title but also provides for impeachment of titles that have been procured fraudulently, by mistake or by misrepresentation.

5. The respondent filed a replying affidavit sworn on 29th November, 2021. He deposed that the application is frivolous, misleading and devoid of merit for the reason that he is the rightful owner of the suit land having purchased the same from the applicant's deceased father for value and in good faith through agreements that were executed by both parties on various dates between the years 1996 and 1998.

6. The respondent further deposed that the deceased granted him vacant possession after every purchase except for the last phase of 14 acres which he was granted only 4 acres and the applicant's deceased father never refunded the payment of the ten acres. That in total the respondent purchased 94 acres and since then, he began occupying and he has fenced it and built structures on the same. He has also grown crops which are due for harvest. The respondent deposed that at the time of purchase, he was living in Ngongori which is 20 kilometres away

and was not in occupation of the same but only leasing it out. That in the year 1999, the deceased applied for consent to subdivide the portions respectively and a mutation form was presented for booking and the requisite fees paid. It followed that the mutation form could not be registered as there existed a restriction by Ole Leperes due to boundary disputes then.

7. The respondent further deposed that there have never been any disputes since then until recently when the applicant's family began questioning his occupation of the suit land. Despite the same, there are other occupants residing on the remaining portion of the land and it appears to him that the applicant is malicious, discriminative and full of spite. That the allegations of trespass are an afterthought and untrue since he has been in occupation since the year 1996 without any interruption and for these reasons the applicant has not met the conditions for grant of a temporary injunction.

8. The applicant filed written submissions dated 28th January, 2022. The applicant raised three issues for determination as follows: -

1. **Whether the suit property belongs to the Plaintiff/Applicant's deceased father.**
2. **Whether the Plaintiff/Applicant's should be granted orders as prayed in the application.**
3. **Whether the claimant is entitled costs.**

9. The applicant submits that he has produced title documents showing the true and bonafide proprietorship of the suit land being the applicant's deceased father. On the other hand, the respondent produced series of sale agreements as instruments that he purchased the suit land from the applicant's deceased father. The applicant submits that the sale agreements are not prima facie evidence of ownership to land or conclusive evidence of proprietorship and this court is therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated. That in this case the applicant has shown that the land belongs to his late father which position was not challenged by the respondent and neither has the respondent filed any pleadings in opposition to the registered ownership of the suit land. It is his submission that among the rights enjoyed by a registered owner any land is the right for peaceful and quiet enjoyment of the land he owns including the right to possession, occupation and use of the suit land.

10. The applicant further submits that in determining a grant of injunction, this court should be guided by the well decided case of **Giella versus Cassman Brown** whose conditions are well settled. He submits that it is conceded by both parties that the suit property was and is still registered in the name of Somet Ole Tanyaag and at no time was the suit land registered in the name of the respondent. The effect of this is that the alleged sale agreements are of no legal effect. In fact, the sale agreements were impeached during the meeting held on 23th June, 2021 at the office of the Assistant County Commissioner Mulot division. For these reasons the applicant submits that he has established a prima facie case and this court should grant the same.

11. The applicants also submit that costs are the discretion of the court and he invites this court to exercise discretion in his favour.

12. The respondent did not file written submissions.

13. I have carefully analysed the application, replying affidavits, annexures and the written submissions filed and the issue for determination is whether this court should grant the orders of temporary injunction.

14. The principles the court applies when asked to consider an application for grant of interlocutory injunctions are now well settled by the leading and often cited case of **Giella vs Cassman Brown & Co. Ltd.** For an application seeking the grant of interlocutory injunctions to succeed, the Applicant is required to prove the following:

- a. **Existence of a prima facie case with a probability of success** – an applicant must present before the court sufficient evidence to persuade the court that they have a prima facie case with a probability of success. In the Court of Appeal case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**, a prima facie case was defined by the court as follows: **“In civil cases it is a case in 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.”**

Further, in the Mrao case above, the Court of Appeal further opined that: **“...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant's case upon trial...”**

15. In this case, the applicant has produced a copy of certificate of title showing the applicant's deceased father as the registered owner of the suit land. In my view and having perused the documents annexed to the application, there appears to be a dispute as to ownership of certain portions of the suit land as per the resolutions of the minutes dated 23rd June, 2021. It would be in the interest of justice to allow for preservation of the suit land and as such, this court allows prayer 3 of the notice of motion application dated 4th November, 2021. Costs will be in the cause. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 24TH MARCH, 2022.

MBOGO C.G

JUDGE

In the presence of: -

CA: Timothy Chuma