



IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 125 OF 2012

CATHERINE KASITI NZUKI.....PLAINTIFF

VERSUS

LYDIA KASEKO PARSANKA.....1ST DEFENDANT

GLADYS NYOKABI MARAU2nd DEFENDANT

RULING

1. By notice of motion dated **18th April, 2012**, brought pursuant to the provisions of **Order 40** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**; and all enabling provisions of the law, the applicant seeks orders as follows:-
 - i. **That** a temporary injunction do issue against the respondent restraining them from interfering and/or dealing with **Kajiado/Kaputiei North 1539** (*hereinafter the suit premises*).
 - ii. **That** a permanent injunction do issue against the respondents from interfering and/or trespassing, dealing, wasting and/or demarcating land parcel number **Kajiado/Kaputiei North/47210** where the applicant resides in his capacity as the legal owner pending hearing and determination of the suit.
 - iii. **That** the respondents be summoned to appear before the court to produce the original certificate of title of an alleged subdivision of the **Kajiado/Kaputiei North 47210**.
2. The application is premised on grounds that the applicant is the legal owner of the suit premises which comprises of over 20 acres where she resides; the respondents obtained a certificate of title of a portion of the suit premises illegally and having disregarded a court order. They have adversely encroached on the applicant's land.
3. The application is supported by an affidavit deposed by the applicant who avers that she is the owner of **Kajiado/Kaputiei North/1539** which measures 20 acres but is part of 960 acre portion that was formerly owned by the late **Samson Parsanka Oloiko**. Her late husband, **Patrick Nzuki** purchased the suit premises from the late **Samson Parsanka**. She is the Administratrix of the estate of **Samson Parsanka**. The respondent obtained a title deed, trespassed onto the portion and surveyed it in total disregard of the court order. Having developed the suit premises which is her source of livelihood, she will suffer irreparable damage that cannot be compensated by way of damages.
4. In a reply thereto, the 1st respondent having been granted authority by the 2nd respondent deposed

- that the suit premises was originally owned by their late husband **Samson Parsanka**. It is within their knowledge that prior to his demise he sold 20 acres of land to the late **Patrick Nzuki**, the applicant's late husband. The 20 acre portion had not been actualized and no title deeds had been obtained. For the purposes of transmission and facilitating other transfers to other persons having claims, it was necessary to subdivide the large portion and clearly demarcate the portions. They invited the applicant to attend the survey and demarcation of the suit premises that was sold to her husband at the area where she resides. She attended in company of a representative of **Odek and Co. Advocates**. She did not raise any objection and/or concern, consequently there was no trespass.
5. Further, she stated that taking into consideration the fact that both the vender and purchaser had died and the temporary Grant of Letters of Administration Intestate granted to the applicant was not confirmed, the respondents obtained a transfer of the suit premises to their names in preparation to transfer it to the applicant. They denied having obtained the title to the suit premises illegally. They expressed their willingness to transfer the suit property to the applicant. They denied having any intention to sell or charge the suit premises.
 6. Rival submissions by both counsels for the applicant and respondents have been considered.
 7. The applicant has sought *inter alia* issuance of a permanent injunction. It is trite law that permanent injunctions cannot issue at an interlocutory stage. A permanent injunction is not a preliminary order that can be granted before trial. (see **Salim Lemuta Kanyoike & Another versus Erick Konchella & 2 Others [2006] eKLR**).
 8. Principles for issuance of interlocutory injunctions were set out in the case of **Giella versus Cassman Brown and Company Ltd[1973 E.A. 358]** where it was held that:-
 - i. An applicant must show a *prima facie* case with a probability of success.
 - ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
 - iii. When the court is in doubt, it will decide the application on the balance of convenience.
 9. A *prima facie* case was defined in the case of **Mrao Ltd versus First American Bank of Kenya Ltd & Others [2003] KLR 125** as follows:-

“... What is *prima facie* case? I would say that 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 later.”
 10. It is not in dispute that the suit premises were originally owned by the respondent's husband now deceased. Further, it is also not in dispute that prior to his demise he sold 20 acres of land out of the 60 acres that he owned to the applicant's husband **Patrick Nzuki**, now deceased.
 11. It has been averred and not denied that at the time of sale the actual portion was not identified. Consequently, no transfer was affected. It has been explained that the purposes of transfer effected was to effect transmission of the suit premises to the applicant. They have also stated that there are other purchasers of the land that belonged to the deceased (**Samson Parsanka**). It is therefore necessary to subdivide the large portion and clearly demarcate the portions. It would be in the interest of all parties involved to have the survey carried out in the premises. The action cannot be construed to be trespass. The respondents have acknowledged on oath that the suit premises belong to the applicant. Her right cannot be infringed in the circumstances. In the premises, no *prima facie* case has been established.
 12. The applicant is in possession of the suit premises. If the subdivision of the land is done expeditiously it will be to her advantage as the land will be transferred to her. In the premises there is absolutely nothing to suggest that she will suffer irreparable damages if orders sought are not granted.
 13. Coming to the balance of convenience, it tilts in favour of the respondents. Restraining them from dealing with the estate of the deceased would deter them from disturbing the estate and settling liabilities of their deceased husband's estate. They must be given an opportunity of transferring the suit premises to the applicant.

14. This is a case where the applicant has failed to establish a case warranting issuance of the temporary injunction sought. In the premises, it is dismissed with costs to the respondents.

DATED, SIGNED and DELIVERED at MACHAKOS this 24TH day of JUNE, 2014.

L.N. MUTENDE

JUDGE