



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 779 OF 2013

PANARI ENTERPRISES LIMITEDPLAINTIFF/APPLICANT

VERSUS

MRS LIJODI.....1ST DEFENDANT/RESPONDENT

PAUL SEER.....2ND DEFENDANT/RESPONDENT

RAPHAEL PARSITAU.....3RD DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 27th June 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from charging, leasing, transferring or in any way interfering with the Plaintiff's possession, occupation and use of the parcel of land known as Kajiado/Dalalekutuk/3193 (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and suit. The Plaintiff also seeks for the costs of this Application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Patrick Marekia, the Managing Director of the Plaintiff, sworn on 27th June 2013 in which he averred that the suit property belongs to the Plaintiff. He produced a copy of the title deed in the Plaintiff's name. He further averred that on or about 11th June 2013, he discovered that the 1st Defendant had constructed a permanent house on the suit property. He further averred that he also discovered that the 2nd Defendant had constructed a temporary house on the suit property and that the 3rd Defendant was claiming interest in the suit property. He further averred that he reported the trespass to the local police station. He further stated that he is unable to take over possession of the suit property as the Defendants are now violent hence this suit.

The Application is contested. The Defendants filed the Replying Affidavit of Paul Seer, the 2nd Defendant, sworn on 29th October 2013 in which he averred that it is not true that the Plaintiff/Applicant is the absolute owner of the suit property and that the copy of title exhibited was obtained fraudulently. He further averred that the suit property was part of a greater parcel of land which was subdivided by the

Sajiloni Group Ranch which was purposely established under the Land (Group Representatives) Act Cap 287 to identify the lawful beneficiaries of communal land within the then Kajiado District by virtue of its members being occupiers and users of the land who ordinarily were all from the maasai tribe. He then stated further that the property which the Respondents occupy is known as Kajiado/Dalalekutuk/2926 where they have lived for several years, built houses and buried their loved ones. He further stated that the land they occupy was initially owned by Kamakei Ole Maika who was a registered member of Sajiloni Group Ranch who passed away in or around the year 2004. He further explained that the 3rd Respondent was a beneficiary of the estate of the late Kamakei Ole Maika which included Kajiado/Dalalekutuk/2926. He confirmed that the location of the suit property is further away from Kajiado/Dalalekutuk/2926. He further stated that the suit property belonged to the late Ole Kongu Lankoi before the mischievous group ranch officials changed the name to Ole Bhagwanji M. Ratna Kongu to facilitate a fraudulent transfer to the Plaintiff/Applicant. He further stated that the late Ole Kongu Lankoi lived, occupied and cultivated the suit property for more than 7 decades before his death that occurred on 22nd March 2012. He further stated that letters of administration were obtained by his brother Letela Ole Kongo Posengwe which was confirmed on 6th June 2012 by the Principal Magistrate's Court at Kajiado and an order was made that Letela Ole Kongo Posengwe be registered as the owner of the suit property. He further intimated that the parcel of land known as Kajiado/Dalalekutuk/2926 was subdivided to give rise to land parcels number Kajiado/Dalalekutuk/3856-3860 in respect of which they acquired interest and title deeds. He produced a copy of a title deed for Kajiado/Dalalekutuk/2926 in the name of the 3rd Defendant and Lekiriamu Ole Oromoi Maika and further produced a copy of a title deed in the same names in respect of Kajiado/Dalalekutuk/3857.

In response thereto, the Plaintiff filed the Further Affidavit of Patrick Marekia sworn on 11th November 2012 in which he averred that the suit property is a distance away from Kajiado/Dalalekutuk/2926 which belongs to the 3rd Defendant and Lekiriamu Ole Oromoi Maika and stated that the 2nd Defendant is a busybody.

Both the Plaintiff and the Respondents filed their written submissions which have been read and taken into account in this ruling.

In deciding whether to grant the temporary injunction sought after by the Plaintiff, 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.”

Has the Plaintiff 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.”

Looking at the facts of this case, the Plaintiff has demonstrated its ownership of the suit property by producing to this court its title deed. The Respondents have intimated that the title deed produced by the Plaintiff is fraudulent. However, there was no supporting evidence put forward by the Respondents. The Respondents have also argued that the land they are in occupation of is not the suit property but a neighbouring parcel of land known as Kajiado/Dalalekutuk/2926. So far as I can tell, the title deed produced by the Plaintiff holds sway at this interlocutory stage of these proceedings. The law prescribes

how a court may approach such a scenario. Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”**

There is no doubt that the Plaintiff/Applicant has produced its title deed. The above legal provision binds this court to take that as prima facie evidence of ownership unless it can be challenged on the grounds of fraud or misrepresentation or where the title deed has been acquired illegally, unprocedurally or through a corrupt scheme. From what I can see, the Respondents have not been able to demonstrate to this court, albeit at this interlocutory stage, that the title deed produced by the Plaintiff can be challenged on any of those grounds. That being my finding, I further find that the Plaintiff/Applicant has succeeded to establish a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR .**

The third and final condition laid out in the **Giella versus Cassman** case for grant of an interlocutory injunction is that if the court is in doubt, it is to determine in whose favour the balance of convenience tilts. The question as to the exact location of the Respondents is yet to be determined. Further, the Plaintiff informed this court that the Respondents have constructed a permanent house on the suit property. The Respondents on their part have alluded to the fact that a relative is buried on the suit property. The Plaintiff has also stated that there is a temporary structure erected by one of the Respondents on the suit property. There is no doubt that the Respondents have been on the disputed land for a while for such developments to have occurred thereon. To grant the Plaintiff an interlocutory injunction at this stage would amount to an eviction order of the Respondents at an interlocutory stage of these proceedings. It is noteworthy that the only prayer the Plaintiff has made in its Plaint dated 25th June 2013 is a permanent injunction against the Respondents. I am of the view that granting an interlocutory injunction at this stage will be granting a final order which is inappropriate at this stage. Such an order will amount to an eviction order even before this suit has been tried and concluded finally. Accordingly, my finding is that the balance of convenience tilts in favour of the Respondents rather than the Plaintiff.

Arising from all of the above reasons, I find that the Plaintiff has not reached the threshold for grant of an interlocutory injunction. I therefore dismiss this Application. Costs shall be in the cause.

It is so ordered.

SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF SEPTEMBER 2014.

MARY M. GITUMBI

JUDGE