



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

ELC (OS) SUIT NO. 219 OF 2012

IN THE MATTER OF LAND REGISTRATION ACT 2012 SECTION 68 (II)

DANIEL NGANGA NJOROGE1ST PLAINTIFF/APPLICANT

JAMES GITEMA NJUGUNA2ND PLAINTIFF/APPLICANT

VERSUS

LEMUTAKA OLE NITALEI1ST DEFENDANT/RESPONDENT

NKASHEMA OLE SADURU..... 2ND DEFENDANT/RESPONDENT

GIDEON LAMUTAKA..... 3RD DEFENDANT/RESPONDENT

JACOB MALIT 4TH DEFENDANT/RESPONDENT

RULING

1. The Motion before the court is one dated 20th June 2012 brought under **Order 40 Rules 1 and 2 Civil Procedure Rules 2010** seeking to restrain the Defendants from dealing in any way with land portion **Kajiado/Kitengela/23950, 23951,23952 and 23953** pending hearing and determination of the suit herein.

2. **BACKGROUND:**

In the year 1986 the Plaintiff/Applicant bought **30 acres** from the 1st Defendant out of plot **No. Kajiado/Kitengela /61371**.

3. The Defendant No.1 failed to transfer and thus the dispute was lodged at Land Tribunal Kajiado for determination. The tribunal found for the Plaintiffs and the above parcel of land was subdivided with Plaintiff being assigned to get **Kajiado/Kitengela 637**.

4. The 1st Defendant got land subdivided and transferred to 2nd, 3rd and 4th Defendants (his sons) to defeat above tribunal award. This precipitated the filing of the suit (OS) herein to claim the same land which the Plaintiff bought and awarded by the tribunal. The Plaintiffs are seeking revocation of the title born out of the subdivision of parcel **No.6137 Kajiado/Kitengela** which ought to be in their names.

5. The Plaintiffs are also seeking an order of the declaration that the same subject matter herein belong to them by virtue of court orders of **Kajiado SRM Court Misc No. 4/2000** dated 8th November 2000 which adopted the award of the tribunal into the court judgment and decree spawned thereof.

6. The Applicants have sworn affidavits to support their application one dated 20th June 2012 and the second dated 6th August 2012.

7. The Respondents opposes the application herein and has filed a Replying Affidavit sworn by **Lemutaka Ole Ntilalei**, 1st Defendant sworn on the 26th July 2012.

8. The Respondent's case is that, the suit should be struck out as it is time barred by virtue of **Section 4(1) (a) and (d) of Limitation of Actions Act** in that the agreement sought to be enforced is dated 5th March 1985. That the Applicants sought to enforce the agreement aforesaid on 26th September 2000 via **Kajiado Tribunal case No. 4 of 2000** which was adopted as court judgment by the court.

9. Further the Respondents argue that the claim also contravenes the provisions of **Section 6(1) Cap 302** in that no consent to transact on the land subject herein was sought within 6 months of making the sale agreement.

10. The Respondents cites the authorities hereunder to support the above contention:

BTB Insurance Co. Ltd. Versus Nitin Shas & Others (2006) 2 EA 26 AND Kahia versus Nganga (2004) 1 EA P.75

which are to the effect that an agreement is void for all purposes in absence of Land Control Board consent being procured within 6 months of agreement.

11. Further the Respondent argues that the Tribunal lacked jurisdiction as the claim did not lie within the provision of **Section 3(1) of the LDT Act No. 18 of 1990** i.e. not a claim for determination of boundaries or division, to work or occupy land, or trespass to land.

12. Further the Respondent contends that the Plaintiffs never completed the agreement since they never paid the entire price. The Respondents blame the tribunal and the Resident Magistrate Court Kajiado for acting without jurisdiction or unlawfully.

13. The Respondents concludes thus the applicants have not proved a case against the Defendants with a high probability of success.

THE ISSUES:

i. Whether the Plaintiffs/Applicants have established a case for grant of temporary injunction?

ii. What are the orders as to costs?

14. **ANALYSIS:**

The Applicants have demonstrated that they bought the subject matter herein. The 1st Defendant refused to transfer the bought portion of land to the plaintiffs prompting the dispute being lodged at the Land Disputes Tribunal for adjudication.

15. The award arising from the above adjudication was adopted as a court judgment. The Defendant (1st) admits the sale of the subject matter but alleges that the agreement was not

complete as he never got fully paid the purchase price.

16. The Respondents are not challenging the award and judgment herein. In their submissions, they do not argue that they have ever appealed and/or sought review of the same verdicts of court and tribunal.

17. The Plaintiffs are seeking to enforce the award which was adopted as court judgment.

18. Pending the hearing and determination of the suit herein, the Plaintiffs seek interim orders to preserve the subject matters.

It is now trite law that for orders of interim injunction to issue, the applicant must establish the conditions of grant as set by

the authority of **Cassman Brown versus Giella Ltd.** These are:

- i. Applicant must establish prima facie case with probability of success;
- ii. The Applicant must prove that if orders are not granted, he is likely to suffer irreparable damages;
- iii. **AND** where court in doubt, the test of balance of convenience apply.

The question is, has the Applicants established a prima facie case?

19. The Plaintiffs are seeking to enforce un impeached judgment of court arising from an award. The Respondents have not taken any action to impugn the said award and judgment arising therefrom.

20. This court is prepared to and do hold that the Plaintiffs have established a prima facie case on the basis of the material before the court.

21. On the issue of the second limb of the principles of Giella, the 1st Defendant disposed subject matter while there was a tribunal award in favour of the Plaintiffs which he was aware of. There is no guarantee that him and his sons will not alienate the subject herein if orders sought are not granted. There is no evidence that the Respondents will be able to compensate the Plaintiffs in event they alienate the subject herein. The court thus holds that the 2nd limb of the principle has been proved.

22. Once the 1st and 2nd limb of the said principles have been demonstrated, there is no point of going to the 3rd limb of the conditions for grant of temporary injunctions.

23. The court thus makes the following order:

1. The Motion dated 20th June 2012 is granted in terms of prayer 4 until suit herein is heard and determined.

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

CHARLES KARIUKI

JUDGE