



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 804 of 2012

CHELIMO MARTIM KIPSEREM.....PLAINTIFF

VS

RICHARD TIROP.....DEFENDANT

*(Application for injunction; principles upon which the court will consider an application for injunction; prima facie case; plaintiff alleging that defendant obtained the suit land by forging the signature of the plaintiff; defendant asserting that he obtained title through a gift inter vivos; no proof of the allegations of fraud; proof of fraud must go beyond mere allegation; prima facie case not established; application for injunction dismissed with costs)*

RULING

**A. INTRODUCTION**

The application before me is the Motion dated 31 January 2012 filed by the plaintiff. It is an application for injunction brought under the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010. The plaintiff in this application is seeking orders of injunction to restrain the defendant from interfering with, selling, charging, leasing, or dealing with the land parcel Tembelio/ Elgeyo Border Block 10 (Kaptuktuk) /213 which is a parcel of land measuring about 6.17 Hectares, pending the hearing and determination of this suit. The plaintiff in this application is also seeking orders to compel the defendant to deposit in court the original title deed of the suit land pending the hearing of this suit. The application is supported by the affidavit of the applicant and is opposed by the defendant who has filed a defence to the suit and a Replying affidavit to the subject application.

This being an application for injunction, I stand guided by the principles set out in the case of **Giella v Cassman Brown (1973) EA 358**. In the said suit, the court of appeal stated that before allowing an application for injunction, the court ought to be convinced that the applicant has laid out a prima facie case with a probability of success; secondly, be alive to the tenet that an application for injunction will not normally be granted unless damages cannot be an adequate remedy; and finally if in doubt, decide the matter on a balance of convenience.

The starting point therefore is to make a preliminary assessment of the plaintiff's case based on the material that the plaintiff has placed before court. In a situation where the defendant has filed defence and replied to the application, the assessment of the plaintiff's case has to be made in light of the defence and reply raised by the defendant.

What then is the plaintiff's case ?

**B. THE PLAINTIFF'S CASE**

The plaintiff has pleaded in her plaint that she is the biological mother of the defendant. She has deponed that she is now about 82 years of age. She has pleaded that she purchased the suit land sometimes in 1972 and had the same transferred into her name. I have seen the copy of the green card annexed to her affidavit which shows that the plaintiff became the registered owner of the suit land on 20.12.1994. It is further the plaintiff's case that the defendant took advantage of her trust and old age and fraudulently transferred the suit land to himself and obtained a title deed in his name without the knowledge or consent of the plaintiff. The plaintiff has set out the particulars of fraud on the part of the defendant as follows :-

- (a) *Fraudulently transferring the suit land to himself without the plaintiff's knowledge and/or consent.*
- (b) *Secretly and unlawfully forging transfer documents to appear as if the plaintiff was a signatory to the same.*
- (c) *Secretly and fraudulently charging the title deed to the suit parcel of land to financial institutions namely AFC for Kshs.250,000/=-, K-Rep Bank, Faulu Kenya and others and failing to repay the same.*
- (d) *Attempting to sell the aforesaid parcel of land without the plaintiff (sic) knowledge and/or consent.*

The plaintiff in her plaint has prayed for orders of permanent injunction to restrain the defendant from dealing with the suit land, and for an order to cancel the registration of the defendant as proprietor of the suit land and in place thereof have the plaintiff be registered as proprietor.

To her supporting affidavit, the plaintiff has deponed that the plaintiff took loans for which he never repaid and she had to repay the same. She annexed several payment receipts made to the Agricultural Finance Corporation which she averred she had to pay so that the land may be redeemed. She has also pleaded that on several occasions, the defendant has attempted to dispose of the suit land and is shopping for a potential buyer. She has further deponed that she lodged a caution which was fraudulently removed by the defendant. She has averred that on several occasions, she has sought to have the dispute between her and the defendant resolved by the chief of the area in vain. She annexed copies of minutes of a meeting held in 2011 in the presence of the area chief. She has sought this injunction because in her view if the same is not granted the suit land will be disposed of.

### **C. DEFENDANT'S CASE**

In his response to this suit and application, the defendant has denied that he obtained ownership of the suit land by fraud. He has pleaded that the same was transferred to him as a gift *inter vivos* and that he did acquire a good title. He has averred that as proprietor, he possesses all rights appurtenant thereto including the right to dispose the same to other parties. He has pleaded in his defence that he sold the suit land and purchased another parcel of land in Trans Mara District. In his affidavit, he annexed a sale agreement dated 9 January 2012 between himself and one Cyrus Kiplagat Katoron for the sale of the whole of the suit land. He has deponed that all transactions have been above board. He has further deponed that he has had a poor relationship with his relatives who interfered with his possession and that is why he opted to sell the suit land and move to another area.

### **D. ARGUMENTS OF COUNSEL**

This application was argued before me on the 19 February 2013. Only Miss. J.J. Kiplimo, learned counsel for the plaintiff appeared. The defendant had been represented by the law firm of M/s Angu Kitigin & Co Advocates who later filed an application to withdraw that was allowed. The defendant is at the moment unrepresented. He did not appear at the hearing of the subject application and after satisfying myself that he was duly served, I allowed Miss. Kiplimo to proceed to argue her application. Miss. Kiplimo took me through the pleadings and the affidavit in support. She reiterated that the defendant obtained the suit land by forging the signature of the plaintiff. She stated that the plaintiff has a *prima facie* case with a probability of success and that there is danger of the defendant disposing of the suit land to other persons. For these reasons she urged me to allow the application for injunction.

## **E. DECISION OF COURT**

I have considered the application herein. Although the defendant did not make any oral submissions, I will still take into consideration his pleadings and replying affidavit.

It is not disputed that the defendant is currently the registered owner of the suit land. It is the averment of the plaintiff that the defendant acquired title to the suit land by forging the signature of the plaintiff. On the other hand the defendant has pleaded that the plaintiff transferred the suit land to him as a gift. I think it was incumbent upon the plaintiff to put forth material indicating the exact signatures that she alleges the defendant forged. No documentation whatsoever of the documents of transfer were displayed by the plaintiff. It is not enough in my view to simply allege that a person has forged a signature without putting forth the very document in which the signature is disputed. To prove fraud, one has to go beyond a mere allegation. There needs to be some material or evidence that will indicate or point at the exact fraud that is being alleged. I am afraid that in this case, no such evidence has been placed before me.

I have also taken note of the supporting documents that the plaintiff annexed to her application. I have seen that the defendant became registered as proprietor of the suit land on 2 February 2005. The payment receipts to the Agriculture Finance Corporation annexed by the plaintiff are of 8 January 2010 and 12 January 2011. It means therefore that by the year 2010 the plaintiff was aware that the defendant had title to the suit land. No action was taken by the plaintiff to recover the land immediately. This is not the natural reaction of a person who has just discovered that his/her land has fraudulently changed hands. Neither is there any correspondence or report to the police on any allegation of fraud.

I have also read the minutes of the meeting that was held by the Chief of Koitoror Location which was an attempt at a mediation between the plaintiff and defendant. I have seen in the said minutes a statement by one Mr. Maiyo, a brother to the plaintiff, who seemingly recounted how the plaintiff allowed a change of name in the title deed to have the defendant procure a loan which he was unable to pay. No allegation of fraud was raised during the mediation by the Chief. Indeed, there is absolutely no evidence of any allegation of fraud raised by the plaintiff prior to the filing of this suit in any forum.

With the material placed before me, I am less inclined to believe the allegation that the defendant obtained the suit land by forging the signature of the plaintiff. I am more inclined to believe the averment of the defendant that the plaintiff transferred the suit land to him by way of gift. I could of course come to a different view after I hear the suit on merits if the plaintiff places before me evidence of fraud on the part of the defendant. I am however afraid that at this stage of the proceedings, the plaintiff has not placed before me evidence that points at forgery or any other sort of fraud committed by the defendant.

The suit by the plaintiff is one of fraud. She is tied to her pleadings and she must prove the same to succeed in this case. At the moment I must be alive to the fact that the defendant is the registered owner of the suit land. By virtue of being proprietor, he is entitled to enjoy all proprietary rights vested upon him. I have no reason to curtail him from enjoying his rights as proprietor of the suit land.

In short I am not convinced based on the evidence before me that the plaintiff has demonstrated a prima facie case. The plaintiff will still have opportunity to prove her case on merits but for the moment I have little option but to dismiss this application with costs.

It is so ordered.

**DATED AND DELIVERED THIS 12<sup>TH</sup> DAY OF MARCH 2013.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

*In the presence of:*

Miss J.J. Kiplimo of M/s Kigen & Co Advocates for the plaintiff.

N/A for the defendant in person.