



No.3004
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HIGH COURT CIVIL CASE NO.142 OF 2011

NICKSON MUCHERO MAISIODO..... PLAINTIFF
VERSUS

ROSE NASIEKU SELEI..... DEFENDANT

RULING

On 21st June, 2011, the plaintiff lodged this suit against the defendant seeking that the defendant be restrained from entering upon the plaintiff's parcel of land known as **Kajiado/Ewaso-Kedong/3379** hereinafter "**the suit premises**" and at remaining in possession of any portion thereof. The suit was informed by the fact that the plaintiff was the registered proprietor of the suit premises having been allocated or assigned the same in 2005 following Land Adjudication. His brother **George Ntagusa Kipau** – deceased and husband to the defendant had also applied to be allocated a parcel of land in **phase 2 Ewaso Kedong** but he died in 1994 before his dreams were met. The Plaintiff nonetheless allowed the remains of his late brother to be interred on the suit premises as he had initially allowed him to put up a mud house on the suit premises. The plaintiff too allowed the defendant to continue to reside on the suit premises following the passing on of her late husband. It would appear that the defendant subsequently married one, **Raphael Konana Ole Tanin** who has moved in with her. Sometimes in May, 2011 they started to construct a permanent residential house on the suit premises without the consent of the plaintiff. The plaintiff has since given them notice to vacate to no avail. He has even reported the matter to the area administration whereat, the defendant declared that she now belonged to a another family as she had married one, **Raphael Konana Ole Tanin**. Despite the foregoing, she had refused to vacate the suit premises, hence the suit.

Contemporaneously, with the filing of the suit, the plaintiff took out a Notice of Motion praying for an interim injunction to restrain the defendant from building, erecting, developing and constructing any structure or building whether permanent or otherwise whatsoever and howsoever on the suit premises pending the hearing and determination of the suit. He also asked for costs. The grounds advances and the affidavit in support of the application were along the same lines as outlined above.

Through a statement of defence filed by the defendant in person, she stated that though the plaintiff was solely registered as the proprietor of the suit premises, he did so through fraud as the suit premises resulted from a subdivision of **Kajiado/Ewaso Kedong/1423** which had been offered to her late husband by Ewaso Group Ranch. She had been in occupation of the suit premises even before it had been transferred and registered in the name of the plaintiff. It was thus not true that the plaintiff had allowed her to occupy a portion of the suit premises on humanitarian grounds. She had neither harassed the plaintiff nor had the plaintiff issued her with notice to vacate the suit premises. That her late husband having been buried on the suit premises serves to disapprove the plaintiff's assertion that the suit premises

belongs to him solely. The allegation by the Plaintiff that she was married to another man were lies intended to mislead the court. The plaintiff initiated the process of subdivision of the original parcel illegally through fake pretence and fraud. As a result, she had reported the matter to the police which was still under investigations with criminal department.

When the application came up for inter partes hearing on 10th November, 2011, the plaintiff's lawyer and the defendant agreed to canvass the application by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

The principles upon which a court grants a temporary injunction are settled. The plaintiff must demonstrate a prima facie with probability of success, that in the event that the injunction is denied, he will suffer irreparable damage, incapable of being compensated by an award of damages and in the event that the court is in doubt, it will consider the application on the basis of balance of convenience. Above all, it has to be appreciated that an injunction is both discretionary and equitable remedy and whoever comes seeking it must act above board and be beyond reproach.

In this case, the plaintiff has so far been able to demonstrate that he is the registered proprietor of the suit premises. The defendant admits that much but claims that the transfer and subsequent registration of the suit premises in the name of the plaintiff was fraudulent. For now that is mere allegation and will remain so until the plenary hearing of the suit if ever it comes to that. Much as the defendant claims that the suit premises belonged to her late husband, there is no documentary evidence to that effect. Much as she claims to have reported the alleged fraud perpetrated by the plaintiff to the police and which according to her is still pending investigation, again there is no evidence to that effect. Any evidence from the police such as O.B. report or progress made in the investigation would have sufficed. Again much as the defendant claims was fraudulently transferred to the plaintiff, I have looked at the defence filed, but I cannot see any counterclaim on the footing of the foregoing.

Prima facie therefore and as things stand, the plaintiff has demonstrated that he has a good case against his sister in law. Yes, the defendant's husband may have been buried on the suit premises. But that act perse in my judgment that the suit premises belonged to him. After all, the plaintiff was his brother.

The plaintiff has reported the incident of the defendant's incursions into the suit premises to the local administration. The defendant concedes this much as well. I do not think that the plaintiff will have taken such trouble if he did not believe that the suit premises were his solely. I do not think that he could take such draconian steps against his sister-in-law unless he seriously believed in what he has stated in the plaint, grounds in support of the application as well as the supporting affidavit thereof. If the defendant is allowed to carry on with the construction, the plaintiff will suffer and continue to suffer loss and damage. Even the balance of convenience tilts in favour of the plaintiff.

All said and done, I allow the application dated 20th June, 2011 in terms of prayer 2. The plaintiff too, shall have the costs of the application.

Dated and delivered at Machakos, this 16th day of January, 2012.

ASIKE-MAKHANDIA
JUDGE