Tanui & 3 others (Suing as personal representative of the Estate of William Kiptonui Birir) v Misoi (Sued as an executor of the Estate of the Late Samwel Kipsang Arap Maseri & 3 others; Tulo General Cons Ltd (Intended Defendant) (Environment & Land Case E022 of 2021) [2022] KEELC 13678 (KLR) (13 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13678 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE E022 OF 2021

MC OUNDO, J

OCTOBER 13, 2022

BETWEEN

RONNY TANUI ..... 1ST PLAINTIFF

BETTY CHEPKEMOI BIRIR ..... 2ND PLAINTIFF

DAVID TONUI KIPKEMOI ..... 3RD PLAINTIFF

MARY CHEBET BIRIR ..... 4TH PLAINTIFF

SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM KIPTONUI BIRIR

AND

JASON KIBET MISOI (SUED AS AN EXECUTOR OF THE ESTATE OF THE LATE SAMWEL KIPSANG ARAP MASERI ..... 1ST DEFENDANT

JASON KIBET MISOI ..... 2ND DEFENDANT

LAND REGISTRAR BOMET COUNTY ..... 3RD DEFENDANT

ATTORNEY GENERAL ..... 4TH DEFENDANT

AND

TULO GENERAL CONS LTD ..... INTENDED DEFENDANT

RULING

1. Before me for determination are two Applications. The first application is a Notice of Motion dated August 10, 2021 brought under the provisions of Article 40(1) of the *Constitution*, Section 1A,

1B & 3A of the *Civil Procedure Act*, Order 40 Rule 1, 2, & 4 and Order 50 Rule 1 of the *Civil Procedure Rules*, Section 25, 28(j), 36 (2) of the *Land Registration Act*, Section 38(1) and 51 of the *Land Act*, where the Plaintiffs/Applicants seek temporary injunctive orders restraining the 1st and 2nd Defendants/Respondents jointly and severally by themselves, their agents and/or any other person claiming through them, from dealing, selling, leasing, charging and/or in any other way interfering with the land reference No Kericho/Cheptalal/359. It also seeks for the original copy of the title to be delivered to the Land Registrar for safe keeping, pending the hearing and determination of this suit. The Applicants also seek for costs of the Application.

2. The Application was supported on the grounds on the face of it as well as on an Affidavit sworn by Mary Chebet Birir, the 3rd Plaintiff herein, on an undated day in August 2021 as well as on her supplementary Affidavit sworn on the November 3, 2021 in which she had deponed that the suit land herein was registered to the deceased William Kiptonui Birir by virtue of a sale agreement of February 22, 1984 between him and Samwel Martin Kipsang arap Maseri and who had been in its occupation and possession for 35 years, before his demise on December 6, 2015. That the sale agreement had been entered into upon the expiry of the previous lease agreement which had been surrendered on May 3, 1985. That subsequently the 1st and 2nd Defendants/Respondents through non-disclosure of material facts and misrepresentation to the 3rd Respondent that the original title was lost, fraudulently obtained another title wherein they had transferred the title to the suit land into their names.

3. The said Application was opposed through the Replying Affidavit of Jason Kibet Misoi the 2nd Defendant herein dated the September 27, 2021 to the effect that, the Applicants' late father one William Kiptanui Birir had leased the suit land from his (2nd Defendant's) father the late Samwel Martin Kipsang arap Maseri for a period of 5 years from 1978 to 1983 wherein upon the expiry of the lease, the lease and documents had been surrendered to the lands registry where the Applicants' father had appended his signature and the same was subsequently entered into the records on June 14, 1978 and May 3, 1985 respectively. This was two months before the demise of his father, who died on the May 17, 1985.

4. Subsequently after the death of his mother and since the original title to the suit land being No Kericho/Cheptalal/359, measuring 20.5 hectares, could not be found, he had reported the loss to the police wherein he had obtained a police abstract pursuant to which he made an Application for replacements which was advertised in the Kenya Gazette of February 26, 2021. Upon the expiry of the notice, he had been issued with a title in his deceased father's name on April 30, 2021 pursuant to which he had been issued with a title deed in his name on May 4, 2021 wherein he had surrendered the previous title issued in his father's name.

5. There was no response from the 3rd and 4th Defendants herein to this Application dated the August 10, 2021.

6. Before this Application could be disposed of, the 5th intended Defendant filed an Application dated October 29, 2021 pursuant to the provisions of Order 1 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act* seeking to be joined to the suit o that they could file their Defence to the Plaint.

7. The Application was supported by the grounds therein as well as by an Affidavit sworn by one Mr Charles K Maiyo the director of the intended 5th Defendant, to the effect that on August 5, 2021 they had entered into a land sale agreement with the 2nd Defendant for the purchase of the suit land and that it would be fair and just that the 5th intended Defendant be allowed to join the proceedings as a purchaser for value so as to present their case.

8. In response to the said Application, whereas the 1st and 2nd Defendants through their Replying Affidavit sworn on March 10, 2022 by Jason Kibet Misoi, had no objection to the Application for reason that the 5th intended Defendant had paid a deposit of Ksh 5,000,000/= towards the purchase of the suit land and as such could not be stopped from participating in the proceedings. That in the interest of justice they ought to be enjoined so as to protect their interest in the land.

9. The Plaintiffs on the other had opposed the Application through a Replying Affidavit sworn by Mary Chebet Birir who deponed that the dispute in suit herein was in relation to ownership of the suit property to which the 5th intended Defendant was not a necessary party as they could not assist the court to determine the issue on ownership. That secondly, the Plaintiff had no claim against the 5th intended Defendant and their statement of Defence to the Plaint would only be mere denials of the facts as pleaded. That further the Plaintiffs were not privy to the sale agreement dated August 5, 2021 between the 2nd Defendant and the 5th intended Defendant. That the 5th intended Defendant, had entered into the said sale agreement with the 2nd Defendant with full knowledge that he had no title to pass on the suit property and therefore the said sale agreement was null and void there having been no capacity to sell. That the reliefs sought in the Plaint would not cause any prejudice to the 5th intended Defendant, but that the Plaintiffs would suffer prejudice should the 5th intended Defendant be joined to the suit as they are likely to be dragged into a dispute arising out of a sale agreement that they were not privy to.

10. In rejoinder, the 5th intended Defendant through their further affidavit deponed that at the time of the sale agreement, the seller had a valid title that had no encumbrances and therefore if any orders would be issued by the court without enjoining them to the suit, the same would be prejudicial to them as buyers without notice. That their right ought to be protected.

11. Again there was no response to the Application by the 3rd and 4th Defendants. By consent therein, on January 25, 2022 directions were taken to the effect that both the Applications dated the October 29, 2021 and August 10, 2021 be disposed of by way of written submissions.

Plaintiffs' submissions.

12. In support of the 1st Application, the Plaintiff's submission was to the effect that the court should base its issue for determination on to whether to grant an order of injunction or not based on the principles laid down in the decided case of *Giella vs Cassman Brown & Company Ltd [1973] EA 358*.

13. That they had established a prima facie case with the possibility of success in the trial from the material placed before the court which had demonstrated that the estate of William Kiptonui Birir had a genuine and valid proprietorship interest/right in the suit property. That the 1st and 2nd Defendants/ Respondents through non-disclosure of material facts and misrepresentation to the 3rd Defendant that the original title was lost, fraudulently obtained another title wherein the 2nd Defendant had then transferred the title to the suit land into his name and subsequently sold it to the 5th Intended Defendant. That the 1st and/or 2nd Defendant's conduct was clear that he intended to move with speed to defeat the Plaintiffs' interest to the suit property and which property was still open to violation.

14. On the second issue for determination as to whether they would suffer irreparable injury which could not be compensated by an award for damages, the Plaintiffs submitted that there was intrinsic and enormous value in the suit property having been their late father's matrimonial home and which still remains their home to date. As such they sought to keep their father's legacy in continuity so as to practice the large scale Tea farming, legal logging and animal husbandry. That the estate of would thus

suffer sentimental injury that could not be compensated and was impossible to value, were the 1st and 2nd Defendants allowed to continue with the violation.

15. On the issue of balance of convenience, the Plaintiffs submitted that since they had demonstrated that the estate of William Kiptonui Birir was a bonafide proprietor to the land where they had been in occupation of the same for four decades, that they stood to lose their proprietary interest should the 1st and 2nd Defendants continue dealing with the suit property. That the balance of convenience therefore lay in their favour. That the 2nd Defendant had not demonstrated what prejudice he would suffer were the injunction not granted.

16. That on their prayer seeking for an order of mandatory injunction compelling the 1st and 2nd Defendants jointly and severally to deposit the original duplicate copy of the title issued on the May 4, 2021 with the Deputy Registrar, they submitted that in addition to having established the requirements for grant of prohibitory injunction, they had established the existence of special circumstance to the effect that the suit property remained at the risk of being wasted while the 1st and 2nd Defendants continued to hold the duplicates title, having regard on how they had obtained it in the first instance. Their conduct presented fertile ground for the court to grant the order of mandatory injunction as sought.

17. In relation to the second Application, the Plaintiffs relied on the decided case in *Pravin Bowry vs John Ward & Another [2015] eKLR* cited with approval the case in *Departed Asians Property Custodian Board vs Jaffer Brothers Limited [1999] 1 EA55 (SCU)* to submit that a party who seeks to be joined in the proceedings was one whose presence was necessary for the effectual and complete settlement of all questions in the suit. That in the absence of proof of payment for the purchase of the suit land, the 5th intended Defendant had failed to prove its interest as a purchaser of the suit land and therefor the orders of the court would not affect it as its presence in the proceedings would not help the court determine the issues before it the effectually and completely keeping in mind that the suit was in regard to an issue relating to proprietorship of the suit property. Neither the Plaintiff nor the 1st and 2nd Defendants had sought any relief against the 5th intended Defendant. The Plaintiffs thus opposed joinder of the 5th intended Defendant to the suit.

18. The 1st and 2nd Defendants did not file any submissions to the Application seeking injunctive orders but filed two sets of submissions in support of the Application seeking the joinder of the 5th intended Defendant. They submitted that they were not opposed to the joinder of the 5th intended Defendant to the proceedings for reasons that he had an interest in the suit property and the outcome of the case would affect the said interest.

19. The 5th intended Defendant, in support of its Application to be joined to the suit submitted that it had purchased the subject suit land from the 2nd Defendant at a time when there are no encumbrances on the same. That its participation in the proceedings was crucial to avoid a multiplicity of proceedings on the same subject matter which could end up with conflicting decisions. That adjoining it to the proceedings would effectually settle all questions involved as a bonafide purchaser for value. That the judgment or the order of the court would affect it in one way or another and not only parties to the suit. That it had a legitimate claim which was not inferior to the Plaintiffs' claim.

Determination.

20. I have considered the first Application herein dated August 10, 2021, the arguments for and against it and Counsel's submissions, as well as the authorities cited. The often cited case of Giella –vs- Cassman Brown & Company Ltd (1973) EA 358 is the leading authority on the conditions that an Applicant

needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

21. In the present matter, there is no dispute that indeed the suit land herein being LR No Kericho/ Cheptalal/359 was initially registered to the deceased one Samwel Martin Kipsang arap Maseri the 2nd Defendant's father who had subsequently leased it to the deceased one William Kiptanui Birir the Plaintiffs' father.

22. It is also not in contention that having had registered the loss of the original title, the 2nd Defendant was issued with a duplicate title in his deceased father's name on April 30, 2021, pursuant to which he had been issued with yet another title deed in his name on May 4, 2021 upon the surrender of the previous title (that had been issued in his father's name.)

23. The bone of contention herein, according to the Plaintiffs, is that upon expiry of the lease agreement between the parties fathers, the lease had been surrendered on May 3, 1985, whereby the two deceased persons had entered into a sale agreement instead and the land had been registered to the deceased William Kiptonui Birir by virtue of that sale agreement of February 22, 1984. That subsequently the 2nd Defendant/Respondent fraudulently obtained another title and transferred the title to the suit land into his name.

24. While determining whether or not to issue injunctive orders and while relying on the notorious case in Giella –vs- Cassman Brown (supra), on the first issue as to whether the Plaintiffs had made out a prima facie case with a probability of success, I am guided by the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, where the Court of Appeal explained what constituted a prima facie case in the following terms:

> ' 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.'

25. Looking at the facts of this case as submitted, the Court has been moved under a Certificate of Urgency, by the Plaintiffs, to issue temporary injunction against the Defendants/Respondents. At this stage, the Court is only required to determine whether the Plaintiffs/Applicants are deserving of the orders sought. The Court is not required to determine the merit of the case.

26. Applying the above principles to the present Application and whilst relying on the documents annexed in support of the Application where the Plaintiffs have argued and asserted that their late father Mr Wiliam Kiptanui Birir be declared as the rightful and absolute proprietor of the suit property known as LR No Kericho/Cheptalal/359 because the 2nd Respondent had acquired its title illegally and unlawfully and therefore cannot be deserving of protection under the law, I note however that there was no title deed nor any registerable documents within the law presented to court as prima facie evidence that the Plaintiffs' deceased father had proprietary ownership and/or interest of LR No Kericho/Cheptalal/359.

27. The burden was upon the Plaintiffs to show or demonstrate that the said ownership of the suit land was challengeable within the provisions of the law, by providing the impugned registerable document

as evidence of the contested proprietorship. It is not enough for the Plaintiffs to allege that the title of the suit land was obtained through fraud. The Plaintiffs had the onus to demonstrate and prove their allegation as it would be very difficult for the court to determine the same at this stage. I thus find that the Plaintiffs have failed to establish a prima facie case herein to warrant interlocutory orders.

28. The Court of Appeal in the case of *Kenya Commercial Finance Co Ltd –vs- Afraha Education Society (2001) IEA 86* cited by Gitumbi, J with approval in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR* observed as follows:-

> ' The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the 2nd condition can only be addressed if the 1st one is satisfied'.

29. I also find that the Plaintiff/Applicants' Application seeking mandatory injunction to have the original copy of the title to be delivered to the land registrar for safe keeping, pending the hearing and determination of this suit fails.

30. However if I am wrong, then I could also look at the second condition as stated in the Giella case (supra.) The Plaintiffs have contended that by the 2nd, Defendant/Respondent's conduct it was clear that he intended to move with speed to defeat their interest to the suit property which property was still open to violation. That the estate would thus suffer sentimental injury that could not be compensated as it was impossible to value the sentimental attachment to the property it being their late father's matrimonial home.

31. Indeed the Plaintiffs/Applicants fear was not far from the truth having seen some evidence to the effect that the 2nd Defendant was in the process of dispossessing the suit land to a third party who had sought to be joined to the suit as a 5th Defendant to protect its interest. I do therefore find that in this instance, balance of convenience tilted in the Applicants' favour.

32. I have thus balanced all the factors and circumstances in the instant Application and having found that a prima facie case was not established, I believe that there being an existing state of affair in situ which the Court must keep an eye on, I do hereby, pursuant to Court's practice directions vide Gazette Notice No 5178/2014 Practice direction No 28(k), See also *Mugah vs Kunga [1988] KLR 748*, make an order for parties to maintain the status quo pertaining, until determination of the case. The Application dated August 10, 2021 is therefore disallowed with costs in the cause.

33. As pertaining the second Application dated the October 29, 2021 wherein the 5th intended Defendant seeks to be joined to the suit and thereafter file their Defence to the Plaint I have again considered the arguments herein.

34. The provisions of Order 1 rule 10(2) of the *Civil Procedure Code* provide as follows:

> 'The court may at any stage of the proceedings, either upon or without the Application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.'

35. From the above procedural rule, the court has unfretted discretion to admit or strike out of proceedings a party with or without there being an Application to that effect. It is trite law that the court, upon

satisfying itself that that a person whose presence before it may be necessary to assist it effectually and completely to determine all questions involved in a dispute, may join such person to the suit.

36. Article 50 (1) of the *Constitution* of Kenya, states that:

> 'Every person has the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body'.

37. The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In the case of *Onyango vs Attorney General* (1986-1989) EA 456, Nyarangi, JA asserted at page 459:

> 'I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.'

38. At page 460 the learned judge added:

> ' A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.'

39. And in the case of *Mbaki & Others vs Macharia & Another (2005) 2 EA 206*, at page 210, the Court of Appeal held as follows:

> ' The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.'

40. From the affidavit and the submission by the 5th intended Defendant, the decided authorities herein, and further, based on the fact that this court hesitates to place unnecessary hurdles on the access to justice and by extent access to the court. In the absence of any sign of bad faith on the part of the 5th intended Defendant, I find that they have persuaded me to exercise the court's discretion under the provisions of Order 1 Rule10 (2) of the Civil Procedure Rules to join Tulo General Construction Limited to these proceedings as the 5th Defendant so that they may be afforded an opportunity to be heard.

41. I do hereby direct the Plaintiffs herein to file and serve their amended Plaint within the next 21 days from the delivery of this ruling. That upon such service the Defendants shall file and serve their amended and/or responses within 14 days. On this 2nd Application, I make no orders as to costs.

42. Parties shall comply with the provisions of Order 11 of the Civil Procedure Rules within the next 21 days for the hearing of the main suit herein.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 13TH DAY OF OCTOBER 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE