



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 210 OF 2017**

**LOCAL AUTHORITIES PROVIDENT FUND (LAPFUND).....PLAINTIFF**

**VERSUS**

**EMILY KATITO KASIRIMO.....1<sup>ST</sup> DEFENDANT**

**JOSEPHAT MUYAA KASIRIMO.....2<sup>ND</sup> DEFENDANT**

**DAVID KIMITI KASIRIMO.....3<sup>RD</sup> DEFENDANT**

**(Being sued as the Legal Administrators of the estate of**

**DANIEL KASIRIMO OLE MUYAA – Deceased vide the Limited Grant of Letters Ad Litem**

**TERRY CHEBET MAINA.....4<sup>TH</sup>DEFENDANT**

**ABRAHAM KIPSANG KIPTANUI.....5<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Notice of Motion Application dated the 30<sup>th</sup> July, 2020 where they seek for the Court to discharge, vary or set aside its Ruling delivered on 18<sup>th</sup> July, 2017 and or any consequent orders made thereof in respect to land parcel number Kajiado/ Kaputiei North/ 1020 and the resultant five (5) subdivisions being 36933, 36934, 51838, 52489 and 52490 respectively; and in its place issue a temporary injunction against the Plaintiff, its agents or servants from accessing, taking possession, encroaching, fencing or constructing illegal structures on suit land. Further, that status quo to be maintained until determination of the suit. The application is premised on the grounds on the face of it and the supporting affidavit of EMILY KATITO KASIRIMO where she deposes that she is the widow and one of the personal representatives to the deceased estate. She claims on 18<sup>th</sup> July, 2017 and 19<sup>th</sup> June, 2018, the Court granted the Plaintiff temporary injunction which was crafted in such final terms, that they have been misusing and if the said orders are not varied or set aside, it will render the suit nugatory. She contends that on 27<sup>th</sup> and 28<sup>th</sup> July, 2020 the Plaintiff’s agents, servants or workers under close supervision of OCS Isinya Police Station trespassed upon their land title number Kajiado/ Kaputiei North/ 1020 and embarked on fencing the disputed land whereas the dispute is ongoing and insists status quo ought to be maintained to preserve the subject matter. Further, upon confronting the OCS, he confirmed he was acting under instructions of the Plaintiff and he would proceed to do so if he did not receive a court order from them. She further contends that she has established a prima facie case as the substratum of this suit stands to be alienated and or extinguished unless the orders sought are granted. She insists the Plaintiff shall suffer no prejudice if the remedies sought are granted and the balance of probability is in granting it.

The Respondents did not file any replying affidavit to oppose the instant application.

The 1<sup>st</sup> to 3<sup>rd</sup> Defendants filed their submissions to canvass the instant application.

**Analysis and Determination**

Upon consideration of the instant notice of motion including the supporting affidavit and submissions, the following are the issues for determination:

- Whether the orders issued on 18<sup>th</sup> July, 2017 should be discharged, varied and or set aside.
- Whether the court should issue an interlocutory injunction restraining the Plaintiff from interfering with land parcel number

Kajiado/ Kaputiei North/ 1020 and the five resultant subdivisions being 36933, 36934, 51838, 52489 and 52490 respectively.

As to whether the orders issued on 18<sup>th</sup> July, 2017 should be discharged, varied and or set aside. This Court issued orders of injunction restraining the deceased DANIEL KASIRIMO OLE MUYAA now represented by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from interfering with land parcel number Kajiado/ Kaputiei North/ 52489 pending the outcome of the suit. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants now seek to have the said orders discharged, varied and or set aside claiming the deceased estate is the owner of land parcel number Kajiado/ Kaputiei North/ 1020 and its five aforementioned resultant subdivisions. I note Kajiado/ Kaputiei North/ 52489 is a resultant subdivision of Kajiado/ Kaputiei North/ 1020 which is registered in the Plaintiff's name. I note the application dated the 24<sup>th</sup> November, 2016 which culminated in the issuance of orders dated the 18<sup>th</sup> July, 2017 was opposed by the deceased DANIEL KASIRIMO OLE MUYAA who actually admitted that he already sold a portion of Kajiado/ Kaputiei North/1020 to the 5<sup>th</sup> Defendant. His main contention was that the 5<sup>th</sup> Defendant paid him a portion of the purchase price but failed to pay the balance. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants in their submissions enumerated how the sale of Kajiado / Kaputiei North /1020 was effected and insist the balance of the purchase price was not paid. Further, they allege fraud and insist the deceased signature was forged. They referred to the Award issued by the Land Disputes Tribunal which directed that twenty-five (25) acres of land should be excised from Kajiado / Kaputiei North / 1020. They relied on various decisions including **Civil Appeal No. 211 of 1996 National Bank of Kenya Vs Ndungu Njau and Narok ELC Case No. 19 of 2019 Mary Nkolia & 2 Others Vs Allan Musanka Togom** to buttress their averments. They reiterate that a status quo order should be issued.

The grounds upon which an order of the Court may be reviewed is set out in Section 80 of the Civil Procedure Act and **Order 45** of the **Civil Procedure Rules**.

Section 80 of the Civil Procedure Act provides that: - **“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

While Order 45, rule 1 (1) of the Civil Procedure Rules stipulates thus: **‘ Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.’**

In the case of **Muyodi v Industrial and Commercial Development Corporation and Another EALR (2006) EA 243**, the Court of Appeal while dealing with issues of review held as follows:-

***“For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”***

I note the Orders sought to be reviewed were issued on 18<sup>th</sup> July 2017. When the said orders were issued the deceased never appealed nor sought for review of the same. At the point the impugned order was issued, the deceased was well aware and pleaded that land parcel Kajiado/ Kaputiei North/ 1020 had already been subdivided and the Plaintiff owned one of the resultant subdivisions. On perusal of the Court Record I note the deceased was ably represented by an advocate and in his replying affidavit had admitted that indeed the 5<sup>th</sup> Defendant had paid him some monies towards purchase of Kajiado/ Kaputiei North/ 1020. The Applicants have now sought for review of the said Order after almost three years, but not explained the reason for the delay. Further, they have not explained if there was discovery of new and important facts after the Ruling was delivered, which the deceased was not privy to. Except for seeking an order of status quo, they have not demonstrated if there was an error apparent on the face of record. A reading of Order 45 of the Civil Procedure Rules is very clear on instances where a Court can discharge, vary or set aside its orders. Based on the facts as presented and since the delay is not explained, there is no indication that there was discovery of new and important evidence nor that there is an error apparent on the face of record while associating myself with the decisions I have cited above, I find that the Applicants have not met the threshold set for discharge, variation and or setting aside of the orders granted on 18<sup>th</sup> July, 2017.

As to whether the court should issue an interlocutory injunction restraining the Plaintiff from interfering with land parcel number Kajiado/ Kaputiei North/ 1020 and the five resultant subdivisions being 36933, 36934, 51838, 52489 and 52490 respectively

It is not in dispute that the deceased had initially been the registered proprietor of land parcel number Kajiado/ Kaputiei North/ 1020 which has since been subdivided into five portions. It is further not in dispute that the Plaintiff is now the registered proprietor of land parcel number Kajiado/ Kaputiei North/ 52489 which is one of the resultant subdivision of Kajiado/ Kaputiei North/ 1020. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants seek injunctive reliefs against the Plaintiff from interfering with land parcel number Kajiado/ Kaputiei North/ 1020 including the resultant subdivisions therefrom. In their submissions they have relied on the cases of **Giella Vs Cassman Brown (1973) EA 358 and Mugah Vs Kunga (1988) KLR 748** to buttress their averments.

I note the Plaintiff is the registered proprietor of its parcel of land which was sold to it by the 4<sup>th</sup> Defendant. The Plaintiff in the Application culminating in the order which was issued on 18<sup>th</sup> July, 2017 actually annexed a copy of its title. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants have not indicated whether the resultant subdivisions are still part of the deceased estate. Further, I note that land parcel number Kajiado/ Kaputiei North/ 1020 is no longer in existence. In line with the principles enshrined in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** and based on the facts before me, at this juncture, I find that the 1<sup>st</sup> to 3<sup>rd</sup> Defendant have not established a prima facie case as against the

Plaintiff to warrant the injunctive orders sought. Further, in relying on the decision of Nguruman Ltd v Jan Bonde Nelson & 2 others, Civil Appeal No.21 of 2014 (UR) where the Court held that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration, I will not consider the remaining two conditions as the Plaintiff has failed to meet the first condition in the threshold set to warrant the grant of an injunction.

It is against the foregoing that I find the Notice of Motion application dated the 30<sup>th</sup> July, 2020 unmerited and will dismiss it.

Costs will be in the cause.

**Dated signed and delivered virtually at Kajiado this 24<sup>th</sup> day of February, 2021.**

**CHRISTINE OCHIENG**

**JUDGE**