



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 253 OF 2017

KISAREI SIRINGET.....1ST PLAINTIFF

RAPHAEL KISAREI.....2ND PLAINTIFF

VERSUS

NELSON NGWILI & 22 OTHERS.....DEFENDANTS

RULING

What is before Court for determination is the 3rd, 4th, 11th and 13th Defendants' Notice of Motion application dated the 2nd October, 2020 where they are seeking interim orders against the 2nd Plaintiff restraining him, his servants, employees, agents, workers, purchasers or person claiming under them from selling, constructing, trespassing on the subdivisions from land parcel number Kajiado/ Kaputiei Central/ 461 until the determination of this suit. The application is premised on the grounds on the face of it and the supporting affidavit of PAUL NGOMA where he deposes that they purchased various acreages of land from LR No. Kajiado/ Kaputiei Central/ 461. He explains that vide agreements entered by each of them and the 1st Plaintiff on various dates between 15th February, 1987 and 7th March, 1993, the 1st Plaintiff sold to them a portion of LR. No. Kajiado/ Kaputiei Central/ 461 for a consideration. Further, that the 1st Plaintiff was fully paid as per the said agreements between himself and them and that no outstanding sum remains unpaid. He insists that the 2nd Plaintiff was never privy to any contract between them and the 1st Plaintiff nor did he witness any of the agreements which were reduced in writing. Further, that the present suit is a conspiracy to deprive them of their lawfully acquired parcels of land. He contends that they have been in occupation of their portions of land under the aforementioned land parcel and the 2nd Plaintiff is a trespasser since his rights or claims to the above parcel of land were extinguished when the 1st Plaintiff sold the said portions to them. Further, ever since they purchased their respective parcels, the Plaintiffs have failed to subdivide to them their portions. He explains that the 1st Plaintiff is deceased while the 2nd Plaintiff who is the area chief has begun showing prospective clients the land with the main intention of selling it to them. Further, this will be to their detriment as the 2nd Plaintiff continues to use his power as the area chief to harass them. He reiterates that they will suffer prejudice if the orders sought are not granted and the application has been brought without undue delay.

The 2nd Plaintiff RAPHAEL KISAREI opposed the application by filing a replying affidavit where he deposes that the instant application is a non-starter, based on mere rumours and baseless allegations. He denies being the registered owner of the suit land and avers that the orders sought cannot be issued against him. He confirms that the 1st Plaintiff is the registered owner of the suit property. Further, he denies being the administrator to the 1st Plaintiff's estate. He contends that he is not privy to the purported agreements and payments made by the Applicants. He explains that the suit property has never been subdivided and the Applicants have not provided evidence to prove the same. He avers that the Applicants' allegations that he has been advertising and/or bringing potential buyers to the suit property for sale is misleading and false since he has no authority whatsoever to do so. He reiterates that there has never been plans to subdivide the suit property for the benefit of the Applicants. He further denies harassing the Applicants. He states that the application is inordinately late as this matter was filed in the year 2000 and the Applicants have never bothered to move the court since then for any interim orders. He reaffirms that the application is full of malice and merely aimed at tarnishing his name. Further, that the Applicants have not met the threshold set for injunction.

The Application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the instant Notice of Motion application including the rivaling affidavits and submissions, the only issue for determination is whether an interim injunction should issue restraining the 1st Plaintiff from interfering with land parcel number Kajiado/ Kaputiei Central/ 461 pending the outcome of the suit.

The Applicants in their submissions reiterated their claim and insisted they had established a prima facie case and the balance of convenience tilted in their favour. Further, that the Plaintiff will not suffer any irreparable harm. To buttress their arguments, they relied on the following decisions: **Joseph Ndirangu Waheho t/a Zeeco Auto & 2 Others V Cooperative Bank of Kenya Ltd (2019) eKLR; Nguruman Limited**

V Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012 (2014) eKLR; Mrao Vs First American Bank of Kenya Limited & 2 Others (2003) eKLR; American Cynamid Co. Vs Ethicon Limited (1975) UKHL 1; Kipkoech Lagat t/a Kaptarakwa Enterprises & 23 others v William Bayas & 3 Others (2013) eKLR and Francis Jumba Enziano & Others Vs Bishop Philip Okeyo & Others Nairobi High Court Civil Case No. 1128 of 2001 (unreported).

The Plaintiffs in their submissions insist the Applicants have not established a prima facie case to warrant the orders sought. They contend that the Applicants have not proved that the 2nd Plaintiff became the registered proprietor of the suit property after the 1st Plaintiff's demise. They insist the Applicants will not suffer irreparable harm if the orders sought are not granted as the 2nd Plaintiff has no capacity to deal with the suit property. Further, that the balance of convenience does not tilt in their favour. They relied on the case of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358 and Pius Kipchirchir Kogo V Frank Kimeli Tenai (2018) eKLR** to support their arguments.

It is not in dispute that the suit property is owned by the 1st Plaintiff who is deceased. The 2nd Plaintiff has further not disputed the Applicants' presence in the suit property. What is in dispute is the Applicants' claim that the 2nd Plaintiff is showing the suit property to third parties with the intention of disposing of it, which fact he denies. The Applicants have hence sought for injunctive reliefs against the 2nd Plaintiff.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In line with this principle, the Court will proceed to interrogate whether the applicants have made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicants have demonstrated a prima facie case with probability of success, the Court of Appeal while defining a prima facie case in the decision of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** stated that it is a case in which on the materials presented to the court or tribunal, it will conclude there is an apparent infringement of the Applicant's rights.

It is the Applicants' contention that they entered into various agreements with the 1st Plaintiff on diverse dates between 15th February, 1987 and 7th March, 1993, wherein the 1st Plaintiff sold to them a portion of LR. No. Kajiado/ Kaputiei Central/ 461, and they paid the whole consideration. They claim to have been in occupation of their respective portions of land and the 2nd Plaintiff is a trespasser since his rights or claims to the above parcels of land were extinguished when the 1st Plaintiff sold the said portions to them. Further, ever since they purchased their respective parcels, the Plaintiffs have failed to subdivide to them the said portions.

Looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Applicants over the suit land is not baseless. Although, I note the transactions were carried out between 1993 and 1997 and it is not clear why the 1st Plaintiff failed to effect transfer to them. The 2nd Plaintiff denied that he was showing off the land to third parties. He confirmed that he was not the registered proprietor of the suit property and hence the orders sought could not be sustained against him. To my mind, I opine that the issues raised by the Applicants and 2nd Plaintiff can only be best determined at a full trial and not at this interlocutory stage. Insofar as I find that the Applicants' have established a prima facie case, it is my considered view that since the 2nd Plaintiff is not the registered proprietor of the suit land while the 1st Plaintiff is deceased, it would be proper if the substratum of the suit was preserved pending the outcome of the suit.

On the second principle as to whether the Applicants stand to suffer irreparable loss which cannot be compensated by way of damages. I note it is not disputed that the Applicants are on the suit land. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that **'...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. '**

Based on the facts as presented, since the Applicants have agreements they claim to have entered into with the 1st Plaintiff. Further, they have been in occupation of their respective portions in the suit land, I find that, it would be pertinent if they were both granted an opportunity of being heard to enable the court make a determination on its ownership. Further that the injury they stand to suffer is not speculative.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the property is not preserved, it may be wasted away.

Since both the Plaintiffs in their plaint sought injunctive reliefs against the Defendants, while the Applicants claim to have purchased their various portions of land from the 1st Plaintiff (now deceased) wherein, they reside, I will decline to grant the orders as sought but proceed to make the following order:

- 1) The Obtaining status quo be maintained where the Applicants are to remain in their respective portions of the suit land until the hearing and determination of the suit.
- 2) The Land Registrar Kajiado be and is hereby directed to register an inhibition order against land parcel number Kajiado/ Kaputiei

Central/ 461 of any dealings, lease or charge pending the hearing and determination of the suit.

3) The costs will be in the cause.

The parties are urged to urgently comply with Order 11 of the Civil Procedure Rules and set the suit down for hearing as soon as possible.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 8TH DAY OF APRIL, 2021.

CHRISTINE OCHIENG

JUDGE