REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE E017 OF 2021

ETHAN NJERU KITHUMBU..... 1ST PLAINTIFF/APPLICANT

PETER NGARI KITHUMBU.....2ND PLAINTIFF/APPLICANT

VERSUS

KITHUMBU BURACHI..... DEFENDANT/RESPONDENT

RULING

1. I am called upon to determine a notice of motion dated 23rd June, 2021 and filed by the applicants on 24th June,2021. The Application is expressed to be brought under **Order 40 rules 1 and 2 of the Civil Procedure Rules.**

APPLICATION

2. The Applicants are **ETHAN NJERU KITHUMBU and PETER NGARI KITHUMBU** who are the plaintiffs in the suit, and the Respondent is **KITHUMBU BURACHI** who is the defendant.

The motion came with four (4) prayers but prayers 1 and 2 are now moot. The prayers for consideration are therefore two (2) – prayers 3 and 4 – and they are as follows:

> *Prayer 3: That the Respondent either by himself, his agents and/or servants be restrained from subdividing, selling, charging, alienating, leasing or in any other way dealing with land parcel number NTHAWA/SIAKAGO/1567 pending the hearing and determination of this suit.*
>
> *Prayer 4: That a prohibitory order do issue and be registered against land parcel number NTHAWA/SIAKAGO/1567 pending the hearing and determination of the main suit herein.*

3. The application is supported by grounds interalia,that the respondent is a polygamous man with two wives and the applicants are children of the first wife; that he is the registered owner of land parcel Nthawa/Siakago/1567 where the applicants have been born and brought up; and that the land was allocated to him by the Kere clan to hold in trust and on behalf of his family.

4. It is stated that through a memorandum of understanding entered into in a family meeting in 2012, it was agreed that the land would be subdivided into two and children of each house were to get 30 acres jointly. The respondent is said to have then obtained consent for subdivision and mutation forms to effect the terms of the understanding. The respondent is however accused of causing further subdivisions to the 30 acre portion of land allocated to the 1st wife and is said to be in the process of selling it to third parties. The further subdivisions are said to be done without the knowledge and consent of the applicants and are therefore illegal as the respondent holds the land in trust and on behalf of the applicants.

5. The applicants have moved the court seeking to establish a trust and for orders of specific performance of the memorandum of understanding. They state that they are apprehensive that if the respondent is not restrained and prohibitory orders granted, then the respondent may sell off the land to the detriment of the family and further render the proceedings nugatory. It is further pleaded that the respondents will suffer loss of their rightful share of the land which they claim to have been occupying and cultivating. According to them, no prejudice will be occasioned to the respondent if the orders sought are granted.

6. The application came with a supporting affidavit filed on 4.6.2021 which reiterates the grounds in support of the application. To the supporting affidavit is annexed copy of search of land parcel Nthawa/Siakago/1567, Copy of Memorandum of Understanding, and a copy of Mutation form.

RESPONSE

7. The application is responded to by way of replying affidavit dated 8.07.2021 and filed on 15.07.2021. It is sworn by the respondent who is opposed to the orders sought by the applicants. He denies attending a meeting with his children for distribution of the suit parcel of land or signing the memorandum of understanding. He is of the view that the case should be put in abeyance until the signatures produced by the applicants are scrutinized by the police.

8. According to him, the application before the court is time barred as the cause of action arose in 2012. The respondent has further denied being allocated land by Kere clan or holding it in trust for his family. According to him, the applicants lack locus standi to file the suit as they were not the persons to benefit from the land as per the memorandum and neither have they been granted authority by the family members to plead on their behalf. It is the respondent's averment that the application lacks merit and should be dismissed with costs.

9. As a boost to the supporting affidavit, the applicants filed a further affidavit on 2.11.2021 and dated 28.10.2021. They averred that the issue of forgery of signature had been investigated by the DCI, Mbeere North, and determined that the respondent's action of appearing before the Mbeere Land Board Control were proof that he intended to carry out subdivision of the land. It is the applicants' averment that the application is properly on record and they have requisite locus to institute it, being that the application is based on trust and they are among persons to benefit from the suit land parcel. It is argued that the respondent has other parcels which he has not allocated to the applicants and he is accused of having subdivided his land to his sons from the 2nd house. Accordingly, it is averred that the applicants have obtained authority from the siblings of the 1st house to institute the present claim.

10. The application was canvassed orally on 17.1.2022. Counsel for the applicants relied on the averments in the application, the further affidavit, and the annexures in support of the application. Counsel relied largely on the contents of the application. He further relied on the case of Giella Vs Cassman Brown & Co. Ltd [1973] EA 358 and submitted that the applicants have established a prima facie case based on the grounds in the application and accompanying affidavit. It is argued that applicants will lose their entitlements if a restraining order is not issued. Further it was said that the balance of convenience tilts in the applicants favor.

11. The respondent's submitted on his case and reiterated the averments in his replying affidavit. He submitted that he had educated the applicants, paid dowry for them, and given them land on which they reside. He denied that the land is clan land and questioned whether the applicants can state that the land they currently reside on is also clan land. He said that his sons had acquired jobs and were now using their money to sue him. It is his further submissions that he wishes to subdivide the land equally among his children and that the applicants were frustrating his efforts to do so. He pleaded with the court to allow him to subdivide his land while he is still alive.

12. The applicant's counsel, in reply to the submissions by the respondent, argued that the respondent had failed to show where he had allocated land to the applicants. She said that the applicants had not been allocated land elsewhere. It was submitted that the respondent had already subdivided the suit land and had started selling it to third parties.

ANALYSIS AND DETERMINATION

13. I have considered the application, the response made, and rival submissions by the parties together with the material on the court record. The applicants seek temporary injunctive orders against the respondent to restrain him from dealing in any way with the suit parcel of land pending determination of the suit. They are also seeking prohibitory orders in order to preserve the land.

14. The law governing grant of temporary injunction is Order 40 rule (1) (a) and (b) of the Civil Procedure Rules 2010. Further, there are principles set out for grant of a temporary injunction which were spelt out in the case of **Giella Versus Cassman Brown (1973) EA 358.** The principles were reiterated in the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014)eKLR where the Court of Appeal** held thus:

"*in an interlocutory injunction application the applicant has to satisfy the triple requirements to*

a) establishe his case only at a prima facie level,

b) demonstrate irreparable injury if a temporary injunction is not granted and

c) ally any doubts as to

(b), by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially"

15. On the first limb viz: what is a prima facie case. The case of ***Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others*** *[2003] KLR 125* is instructive. A prima facie case was defined as follows:

"*In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is*

higher than an arguable case."

16. The applicants have sought orders for temporary injunction. It is their case that their father is the registered owner of land parcel Nthawa/Siakago/1567 which was allocated to him by the Kere clan to hold on his own behalf and in trust for his family. According to them, in a family meeting, their father agreed to subdivide his 60 acre parcel of land Nthawa/Siakago/1567 equally between his two houses and they subsequently executed a memorandum of understanding to that effect. They allege that their father proceeded to obtain a consent and mutation forms for purposes of effecting the terms of the understanding. It is now contended that the respondent has reneged on terms of the understanding and has proceeded to further subdivide the land and is in the process of selling it to third parties.

17. The respondent has denied all the averments in the application. He also denies holding the land in trust or ever signing the memorandum of understanding. He has argued that the applicants have no right to demand for his land as he has already allocated them land elsewhere. He stated that he only wishes to subdivide the land to his children and he should be allowed to do so. According to him, the application before the court lacks merit and should be dismissed.

18. I have considered the issues and arguments made by both parties. It is my view that most of the issues raised therein can only be fully adjudicated upon and determined after the matter has proceeded for full trial and not at this interlocutory stage. My duty at this juncture is to only consider whether the parties have met the conditions set for grant of a temporary injunction and no more.

19. On what is to be considered in establishing whether a party has a prima facie case or not, a good example is the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** where it was stated that:

> *"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion……. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.*

20. In the instant case, the applicants have pleaded that the land in question, parcel number Nthawa/Siakago/1567, though registered in the name of his father(the respondent) is trust land which was allocated to the respondent to hold on his behalf and on behalf of his family. It is further stated that by virtue of the memorandum of understanding, the respondent agreed to transfer the land between himself and his family but later reneged on this understanding. During the oral submissions by the applicants, they submitted that the respondent had subdivided specific portion that is meant for the first house in which the applicants belong and was in the process of selling it off to third parties.

21. It is not always easy to establish a prima facie case if the applicant is not a title holder. In the case of Jamin Kiombe Lidodo Vs Emily Jerono Kiombe & Another: ELC No. 218 of 2012 [2020] eKLR, a ruling by Gacheche J (as she then was) when the matter was HCC No. 81 of 2005, Eldoret, observed that where an applicant has not shown title to the suit land, it is unsafe to hold that a prima facie case is made.

22. This position is understandable given that the law vests in a registered owner of land rights and privileges that are not easy to defeat. Our courts of law are never enthusiastic about interfering or tampering with these rights. Intervention is only made where a party shows clear justification for interference.

23. In the matter at hand, the respondent is the registered owner of the land. The applicants are his children. They believe that the respondent holds the land in trust for the family but the respondent does not see it that way. When the suit was filed, it did not come with witness statements which would help the court to make an early opinion whether a trust is possibly inferable. I say this because while the law would easily presume a trust in favour of a spouse, it is not axiomatic that such a trust exists in favour of children.

24. It has to be borne in mind that in law, a registered owner of land is said to own the land absolutely. Demonstration of a trust is one way in which the absoluteness in ownership can be successfully challenged. Where a trust is noted on the land register, the matter becomes more or less straightforward. But where, as in this case, such trust is not noted on the land register, cogent evidence is required to establish it. The applicant's case is premised on the kind of trust that is not noted on the land register. To make out a prima facie case, the court should have been allowed to have a glimpse of the evidence that the applicants intend to adduce. In this regard, witness statements would have been helpful. As I write this ruling, such statements are not available.

25. In light of this, I make a finding that a prima facie case has not been established. **Nguruman Limited case (supra)** is clear that the principles spelt out in **Gielas case (supra)** have to be sequentially demonstrated. Where an applicant fails in demonstration of one, there is no need for consideration of the others. The applicants have failed to establish a prima facie case. I need not consider the other requirements. The fact of the matter is that they are not entitled to a restraining order.

26. But the applicants in my view also made another blunder. They know that the respondent is the registered owner of the suit land. Faced with such a scenario, it is always good to given an undertaking to pay damages if it ultimately turns out that a restraining order given was not merited. In **Gati Vs Barclays Bank (K) Ltd [2001] KLR 525,** the court held, inter alia, that an undertaking to pay damages is one criteria for granting an injunction and where none has been given, an injunction can not issue.

27. The applicants are also seeking a prohibitory order. This kind of order is never given where a case is not concluded. It is always a post-judgement order. It is provided for under Order 22 rule 48 of Civil Procedure Rules, 2010. The rule provides as follows:-

> **48(1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgement-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a coy of prohibitory order or inhibition against the title to the property.**

28. Order 22 is about execution of decrees and orders. It is clear that rule 48, sub-rule (1) thereof, is the one that provides for issuance of either a prohibitory order or an order of inhibition. The aim is to preserve the property to be attached from being disposed of to third parties or from being charged to a bank or other financial institution.

29. It can therefore be seen that the applicants misapprehended the law by thinking that they can get a prohibitory order in a case that has not even been heard. In my view, what the applicants should have applied for is an order of inhibition under Section 68 of the Land Registration Act, 2012. They failed to do so and instead applied for an order that is not grantable at this stage.

30. It is now clear that the orders sought by the applicants can not be granted. The court therefore hold, without equivocating, that this application is for dismissal. The application is hereby dismissed with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 8TH DAY OF MARCH, 2022.

In the presence of Kiongo for Mukami for plaintiff/Applicant and the Defendant/Respondent present in person.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

08.03.2022