



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. CASE NO. 66 OF 2020

JMM.....PLAINTIFF

VERSUS

JNM.....1ST DEFENDANT

SMM.....2ND DEFENDANT

LAND REGISTRAR, KAJIADO.....3RD DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 10th September, 2020 where he seeks orders of a temporary injunction restraining the Defendants by themselves, their servants, agents or anyone acting on their behalf from mortgaging, trespassing, constructing, advertising or disposing of land parcel number NOONKOPIR TOWNSHIP/xxx hereinafter referred to as the 'suit land', pending the outcome of the suit. Further, the Court to order assistance of the Police in enforcement thereof.

The application is based on the grounds on the face of it and the supporting affidavit of JMM where he deposes that he purchased the suit land on 3rd March, 2003 from one Stanley Muiruri Muniu. He confirms having been married to the 1st Defendant, and they were registered as joint proprietors of the suit land. He explains that they jointly charged the suit land to Equity Building Society to secure a loan of Kshs. 3,000,000, which was serviced and at the time of processing the Discharge of Charge, the 1st Defendant including 2nd Defendant who is his son, lodged forged documents of transfer for registration indicating he has relinquished his interest on the said suit land. Further, the 3rd Defendant issued a Certificate of Lease dated 5th November, 2012, transferring ownership to the 1st and 2nd Defendants. He states that in February, 2017, the 1st Defendant commenced construction on the suit land without his consent, which was briefly stopped but resumed in August, 2019. He avers that he was arrested by Kitengela Police Officers claiming he had trespassed on the suit land and also threatened to kill the 1st and 2nd Defendants. Further, he was charged but the same was later cancelled. He reiterates that he undertook a search and noted there were illegal entries in the records in respect to suit land.

The 1st and 2nd Defendants opposed the application by filing a replying affidavit sworn by 1st Defendant JNM where she deposes that the Plaintiff is her husband while the 2nd Defendant is her son. She confirms being a joint owner of the suit land. She contends that the Plaintiff relinquished his interest in the suit land and transferred the same to the 2nd Defendant in accordance with the law. She avers that together with the 2nd Defendant, they have been paying land rates. She insists the Plaintiff left the family 12 years ago and the dispute herein is over division of matrimonial property and not land. She reiterates that the Plaintiff's prayers in the instant application are malicious and he has not offered any evidence to prove the allegation of fraud. Further, there is no injustice that the Plaintiff will suffer if the orders sought are not granted.

The 3rd Defendant did not file a response to the instant application which was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Plaintiff's Notice of Motion application dated the 10th September, 2020 including the parties' affidavits and rivalling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.

The Plaintiff in his submissions avers that he has established a prima facie case as against the Defendants as he is in imminent danger of losing his interest over the suit land owing to the fraudulent transfer by the Defendants. He contends that there will be no prejudice suffered by the Defendants if the orders sought in the instant application are granted to preserve the suit land. He relied on the following decisions: **Giella V Cassman Brown & Co. Ltd (1973) EA 358 and Nguruman Limited V Jan Bonde Nielsen & 2 Others (2014) eKLR** to support his averments.

The 1st and 2nd Defendants in their submissions reiterated their averments as per their replying affidavit and insisted that the Plaintiff had not established a prima facie case with a probability of success at the trial. Further, the suit land is one of the matrimonial properties jointly owned by the Plaintiff and 1st Defendant. The 1st Defendant submits that she is the one who stands to suffer as a result of this application. Further, that her share of the suit land is not disputed and she should be peacefully left to enjoy her possessions. She reaffirms that costs follow the event. She contends that the Applicant is undeserving of such equitable relief. To support their arguments, they have relied on the following decisions: **Giella V Cassman Brown & Co. Ltd (1973) EA 358**; **Nguruman Limited V Jan Bonde Nielsen & 2 Others (2014) eKLR**; **Devani Bhadresra & Another (Civil Appeal No. 21 of 1971) EACA 27; (10 NOVEMBER 1971)**; **Kyangaro V Kenya Commercial Bank Ltd & Another (2004) 1KLR 126 as cited in Patrick Waweru Mwangi & Another V Housing Finance Co. of Kenya Ltd (2013) eKLR**; and **Independent Candidate of Kenya V Mutula Kilonzo & 2 Others**.

The Plaintiff has sought for orders of temporary injunction against the Defendants and contend that they should be restrained from dealing with the suit land. As to whether the Plaintiff has established a prima facie case with a probability of success at the trial, I will rely on the principles established in the case of **Giella Vs Cassman Brown & Company (1973) EA 358** as well as the definition of a prima facie case as stated in the case of **Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125**. The Plaintiff claims the 1st and 2nd Defendants fraudulently registered the suit land in their names at the point of undertaking a discharge of charge. I note the Plaintiff and the 1st Defendant have admitted that they were married and the suit land was initially jointly registered in their name. I have had a chance to peruse the documents presented by both parties and I note vide a letter dated the 10th September, 2012, the Clerk to Council wrote to the Plaintiff and 1st Defendant granting consent to transfer suit land to the 1st and 2nd Defendants. I have highlighted an excerpt from the said letter herebelow: **‘We refer to your undated letter through which you sought our consent, which we duly grant to transfer the above referred property to JNM of ID No. xxxxxxxx and SMM of ID No. xxxxxxxx. The consent is granted vide Min. No. 11/12 of Town Planning Sub Committee meeting of 11th July 2012.’**

I note this culminated in the issuance of a Certificate of Lease in the name of 1st and 2nd Defendants dated 5th November, 2012. From the various annexures, I note the 1st and 2nd Defendant even obtained certain approvals of developing suit land. What is not clear is why the Plaintiff took eight (8) years before lodging the instant claim. The Plaintiff did not controvert the 1st Defendant’s averments that he had disposed of some of the matrimonial property. It is trite that injunctive reliefs suffice so as to protect the substratum of the suit. However, a party seeking an injunctive relief, which is an equitable relief must come to court with clean hands. In this instance, I note the Plaintiff has not explained why he took eight (8) years to lodge a claim over suit land which he jointly owned with the 1st Defendant. Further, the 1st and 2nd Defendants are in the process of developing the same. The Plaintiff claims fraud but has failed to join the County Government of Kajiado in this matter, that issued the consent to transfer his share to the 2nd Defendant, culminating in the issuance of the new title. To my mind, at this juncture, I do not find the Plaintiff candid in some of his averments. In the circumstance, I find that the Plaintiff has not demonstrated a prima facie case as against the Defendants to warrant the orders sought. In relying on the principles established in the case of **Nguruman Limited V Jan Bonde Nielsen & 2 Others (2014) eKLR**, I will not proceed to deal with the other two limbs on injunctions. However, I opine that since this suit touches on matrimonial property, it is pertinent if the substratum of the suit is protected so as not to render the suit an academic exercise and will proceed to direct that the 3rd Defendant do enter an inhibition order to protect the suit land.

It is against the foregoing that I find the Plaintiff’s Notice of Motion application dated the 10th September, 2020 unmerited and will disallow it. I will however direct that the Land Registrar, Kajiado do register an inhibition order against land parcel number Noonkopir Town/xxx pending the outcome of the suit.

Costs will abide the outcome of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8TH DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE