



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 228 OF 2018**

**SAMWEL ODHIAMBO OLUDHE.....1 ST PLAINTIFF**

**DAVID ODUOR OLUDHE.....2 ND PLAINTIFF**

**DAVID OWUOR OLUDHE.....3 RD PLAINTIFF**

**(All suing as the Administrators of the Estate of Jackson Oludhe Aloo - Deceased)**

**=VERSUS=**

**BENKEN ENTERPRISES LIMITED.....1 ST DEFENDANT**

**THE GOVERNMENT LAND REGISTRAR..... 2 ND DEFENDANT**

**RULING**

1. This ruling relates to two applications: (i) the plaintiffs' notice of motion dated 11/5/2018 in which the plaintiffs seek an interlocutory injunctive order restraining the 1st defendant against dealing with or interfering with the plaintiffs' quiet possession of Land Reference Number 1870/X/72; and (ii) the 1st defendant's notice of motion dated 21/6/2018 in which the 1st defendant seeks a similar injunctive order against the plaintiffs. In addition, the 1st defendant seeks an order setting aside the subsisting interim injunctive order. The suit property measures approximately 0.661 of an acre and is situated in Westlands Area of Nairobi City County. It is developed. Through an indenture dated 1/11/1965, the suit property was conveyed to and registered in the name of Jackson Oludhe Aloo (hereinafter referred to as "**the deceased**"). The plaintiffs are administrators of the estate of the deceased.

2. The plaintiffs' application is supported by an affidavit sworn on 11/5/2018 by Samuel Odhiambo Oludhe. The case of the plaintiffs is that the suit property belongs to and forms part of the estate of the deceased. They contend that the deceased never sold the suit property to the 1st defendant. They add that they have had quiet possession of the suit property from the time the deceased acquired it till recently when the 1st defendant emerged with what they call fraudulent documents, claiming ownership of the property. They further state that, in the immediate past, they rented the suit property to various tenants in succession, among them: (i) Prof Margaret Kamar (Senator of Uasin Gishu County); Mr Patel of Spencon (K) Limited; and Mr Anjali Mediratta of Polyphase Systems Limited. They contend that the 1st defendant fraudulently procured a purported title document (indenture), caused the plaintiffs' guard to be kidnapped, and illegally attempted to seize the suit property. Their position is that the documents which the 1st defendant are waving and calling title documents are fraudulent documents. They seek interim restraining orders, pending the hearing and determination of this suit.

3. The 1st defendant's application is supported by an affidavit sworn on 20/6/2018 by Isaiah Kandie. It is opposed by the plaintiffs through a replying affidavit sworn by Samuel Odhiambo Oludhe on 2/10/2018. The case of the 1st defendant is that it purchased the suit property from the deceased in 1996 at a consideration of Kshs 50,000,0000 and the deceased conveyed the suit property to the 1st defendant through an indenture dated 14/8/2003. Consequently, the 1st defendant asserts that it is the registered proprietor of the suit property. The 1st defendant further contends that through a power of attorney dated 2/7/1996 and registered on 11/7/1996, the deceased appointed one Eric Kiptanui Naibei as his attorney in relation to the suit property. The position of the 1st defendant is that, as the registered proprietor of the suit property, its ownership cannot be defeated.

4. The case of the 2nd defendant is contained in an affidavit sworn on 17/6/2019 by Edwin Munoko Wafula and filed in court on 19/6/2019. At the time of swearing the affidavit, Wafula worked in the Office of the Chief Land Registrar in the Ministry of Lands and Physical Planning as a Senior Land Registration Officer based at Ardhi House, Nairobi. The case of the Land Registrar is that, from the records held by the Lands Registry, the suit property was acquired by the deceased from the Standard Bank Limited through an indenture registered on 23/11/1965 as Presentation No 612. The indenture was registered as N41 Folio 134/5 File 12752. The Lands Registry does not have any records of conveyance of the suit property to any other person or entity, and the suit property remains registered in the name of Jackson Oludhe Aloo. Further, the Land Registrar's case is that the purported indenture dated 14/8/2003 between Jackson Oludhe Aloo and Benken Enterprises Limited is not part of the records held by the Lands Registry. Similarly, the certificate of postal search purportedly issued by the

Ministry of Lands and Physical Planning reflecting the registered proprietor of the suit property as Benken Enterprises Limited is not reflected in the records held by the Lands Registry. The Land Registrar further states that the purported power of attorney by Jackson Oludhe Aloo appointing Eric Kiptanui Naibei as an attorney in respect of the suit property and purportedly registered as I.P/A246998/1 on 11/7/1996 does not appear in the records held by the Lands Registry. The Registrar's position is that the said power of attorney is a fraud. Lastly, the 2nd defendant urges the court to issue an appropriate conservatory order in favour of the plaintiffs but not to grant prayer 5 of the plaintiffs' application requiring the 2nd defendant to file a report regarding the circumstances under which the suit property was transferred to the 1st defendant.

5. The two rival applications were canvassed through written submissions. The plaintiffs submitted that they had established a *prima facie* case because they had demonstrated that their late father was the registered proprietor of the suit property through an indenture dated 1/11/1965. Reliance was placed on the decision in **Evanson Wambugu Gachugi v Simon Wainaina Gatwiki & 2 others (2014) eKLR**. They challenged the purported power of attorney donated to Eric Kiptanui Naibei and argued that a power of attorney ceases to be valid upon the death of the donor. Reliance was placed on the decision in **Loice Wanjiru Meru & 3 others v John Migui Meru (2017) eKLR**. The plaintiffs further submitted that a title obtained fraudulently is not protected under Article 40 of the Constitution. They relied on, *inter alia*, the decision in **Elijah Nyangwara v Stephen Njuguna & Another (2013) eKLR**. Lastly, they submitted that unless an injunction is granted, the 1st defendant would pass the fraudulent title to a third party.

6. The 1st defendant filed its submissions on 21/2/2019. It was its submission that the orders issued by this court on 16/5/2018 should be set aside because the said orders were not served upon them within 3 days and the default was a contravention of Order 40 Rule 4(3) of the Civil Procedure Rules. It was contended that the said orders automatically lapsed. The 1st defendant further submitted that it had established a *prima facie* case and it stood to suffer irreparable damage. It added that it was necessary that the *status quo* be maintained because the main dispute is who between the plaintiffs and the 1st defendant is the true owner of the suit property. It was further argued that allegations of fraud ought to be specifically pleaded and strictly proved. Lastly, it was argued that the plaintiffs only have a claim as the beneficiaries of the Estate of the Late Jackson Oludhe Aloo and are not the owners of the suit property.

7. The 2nd defendant filed its submissions on 19/6/2019. It was its submission that the 1st defendant had not satisfied the criteria for setting aside court orders as spelt out in the decision in **St Patrick Hill School Limited v Bank of Africa Limited (2018) eKLR**. He further submitted that the plaintiffs had established that they were beneficiaries of the Estate of the deceased and stood to suffer irreparable injury. Counsel for the 2nd defendant added that the court's duty was to protect the plaintiffs as beneficiaries of the deceased's estate. Reliance was placed on the decision in **American Cyanamid Co v Ethicon Ltd (1975) AC 396**. Lastly, the 2nd defendant submitted that the purpose of interlocutory injunctions is to preserve the suit property.

8. I have considered the rival applications, the relevant affidavits and the parties' respective submissions. I have also considered the applicable legal framework and jurisprudential principles. Two issues fall for determination in the two rival applications. The first issue is who between the two applicants has satisfied the criteria for grant of an interlocutory injunction. The second issue is whether the subsisting interim order should be set aside.

9. The principles upon which this court exercises jurisdiction to grant an interlocutory injunctive order were spelt out in the case of **Giella v Cassman Brown (1973) EA 358** and are well known. First, the applicant is required to demonstrate a *prima facie* case with a probability of success. Second, the applicant is required to demonstrate that unless the injunctive relief is granted, he would stand to suffer irreparable damage which may not be adequately indemnified through an award of damages. Third, should the court have doubts on either or both of the above, its decision should be based on the balance of convenience. Lastly, at the interlocutory stage, the court does not make definitive or conclusive findings.

10. In the two rival applications, the plaintiffs and the 1st defendant are waving what they call title documents relating to the suit property. The plaintiffs' title document is an indenture executed by the Standard Bank Limited and the late Jackson Oludhe Aloo on 1/11/1965. The indenture was registered in the Crown Lands Registry on 23/11/1965 as Presentation No 612 Volume No 41 Folio 134/5 File 12752. The 1st defendant's claim of ownership is based on what the 1st defendant considers to be valid documents conferring rights of ownership, namely: (i) sale agreement dated 10/9/1996 which the 1st defendant contends was executed by them and the deceased; (ii) an indenture dated 14/8/2003 which the 1st defendant contends was executed by Jackson Oludhe Aloo and registered in the Government Lands Registry in 2003; (iii) certificate of postal search which the 1st defendant contends was issued by the Registrar of Government Lands on 13/3/2018; (iv) power of attorney which the 1st defendant contends was executed by the deceased on 2/7/1996 and registered against the title as IP/A 24698/1 on 11/7/1996. It is common ground that the suit property was registered under the Government Lands Act (now repealed)

11. The 2nd defendant who is the Registrar of Government Lands and custodian of all registration records relating to land registered under the now repealed Government Lands Act has at this stage of interlocutory applications come out and categorically stated that the indenture and the power of attorney which the 1st defendant is waving as title documents were not registered by the Government Lands Registry and do not exist among the records held by the Lands Registry. He has further categorically stated that the certificate of postal search which the 1st defendant is waving did not emanate from the Lands Registry.

12. Equally important, the 1st defendant contended that it purchased the suit property at Kshs 50,000,000 and paid Kshs 30,000,000 at the time of signing the agreement in 1996 while the balance was to be paid in instalments between 1996 and 2003. The 1st defendant has not told the court the source of the sum of Kshs 50,000,000 and the mode of payment. Secondly, there is *prima facie* evidence that the deceased died in 1998, yet the indenture which the 1st defendant is relying on indicates that the same deceased who died in 1998 executed the indenture in 2003; it does not in any way suggest that the indenture was executed by an agent of the deceased. Thirdly, it is still in doubt that a holder of a purported power of attorney would have mandate to exercise that power after the death of the donor. Fourthly, there is *prima facie* evidence that the deceased's personal representatives have had uninterrupted possession of the suit property all along. It was only in April 2018 when unknown people kidnapped the plaintiffs' guards and the 1st defendant purported to enter the property on account of the documents which the Land Registrar has described as fraudulent and not emanating from the Lands Registry.

13. The totality of the foregoing is that the plaintiffs have at this stage presented *prima facie* evidence demonstrating that the suit property still belongs to the late Jackson Oludhe Aloo and forms part of his estate. Secondly, there is *prima facie* evidence by the Land Registrar who

is the custodian of lands records that the documents which the 1st defendant is waving did not originate from the Lands Registry. Consequently, the court is satisfied that the plaintiffs have demonstrated a *prima facie* case with a probability of success.

14. Whether or not damages would be an adequate remedy is a question which ought to be answered within the context of the unique facts of each case. In the present case, serious allegations of fraud have been made and there is *prima facie* evidence in support of the allegations. Secondly, the probability of monetary indemnification should not be a basis upon which the court allows the holder of documents which have *prima facie* been impugned by the Land Registrar to throw a *prima facie* legitimate proprietor out of a suit property. In the present case, the plaintiffs have demonstrated a *prima facie* clear legal right which deserves protection by the court. The court would be failing in its duty if it lent a blind eye to the *prima facie* facts of a case and told the party who has demonstrated a *prima facie* case, “**don’t worry, even if you are evicted, you will be compensated through an award of damages**”. It is therefore my finding that indemnification through an award of damages will not be an adequate remedy in the circumstances of this case.

15. The estate of the deceased has been in possession of the suit property all along. It is only recently that the 1st defendant emerged with the impugned documents and laid claim to the property. The inconvenience to be occasioned to the 1st defendant seems minimal compared to the inconvenience to be occasioned to the plaintiffs who have been in possession of the suit property all along. The balance of convenience therefore tilts in favour of the plaintiffs.

16. The last issue is whether the subsisting interim order should be set aside. Firstly, having come to the above findings, this issue is moot. It is moot because the above findings entitle the plaintiffs to the interim relief sought under prayers 4 and 6 of the plaintiffs’ application.

17. Lastly, besides the interim restraining orders, the plaintiffs sought an order requiring the 2nd defendant to prepare and file a report before the court outlining the circumstances under which the suit property was conveyed to the 1st defendant. That order will not be granted. I take this view because the 2nd defendant has categorically stated that the suit property has never been conveyed to the 1st defendant. It is the position of the 2nd defendant that the suit property remains registered in the name of the deceased. Without saying much, it would be illogical to require the 2nd defendant to explain a purported convey which the 2nd defendant maintains has not happened.

18. In conclusion, it is the finding of this court that the plaintiffs have satisfied the criteria for grant of an interlocutory injunctive order. It is also the finding of this court that the 1st defendant has failed to satisfy the criteria for grant of an interlocutory injunctive order. Consequently, the plaintiffs’ notice of motion dated 11/5/2018 and the 1st defendant’s notice of motion dated 21/6/2018 are disposed as follows:

**a) The plaintiffs’ notice of motion dated 11/5/2018 is allowed in terms of prayers 4 and 6.**

**b) The 1st defendant’s notice of motion dated 21/6/2018 is dismissed for lack of merit.**

**c) The 1st defendant shall bear costs of the two applications.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF OCTOBER 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Kamotho Advocate for the plaintiff

Mr Osundwa and Masomi Advocates for the 1st defendant

Court Clerk - June Nafula