



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC. CASE NO. 987 OF 2015**

**MARY TELELAN LEMITA &**

**SAITEYIA LIMITA KIMULUA.....PLAINTIFFS/APPLICANTS**

**(Suing for and on behalf of the Estate of Lemita Ole Kimoruo Lelgan)**

**VERSUS**

**OLIVE WAIRIMU KINYANJUI...1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LAND REGISTRAR, KAJIADO...2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 7<sup>th</sup> October 2015 and filed on 8<sup>th</sup> October 2015 in which the Plaintiffs/Applicants seek for an order of temporary injunction restraining the Defendants/Respondents either by themselves, their officers, servants, agents, or otherwise howsoever from selling, disposing of, transferring, charging, pledging, leasing, wasting, developing or in any manner whatsoever or howsoever from interfering with the parcel of land known as Kajiado/Kaputiei North/548 (hereinafter referred to as the "suit property") pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1<sup>st</sup> Plaintiff, Mary Telelan Lemita, sworn on 7<sup>th</sup> October 2015 in which she averred that her co-plaintiff in this suit is her biological mother and both of them are the legally appointed administrators *ad litem* of the estate of her deceased father Lemita Ole Kimorua Lelgan (hereinafter referred to as the "deceased"). She further averred that the deceased died intestate on 13<sup>th</sup> October 2010. She then averred that she and her late father and her mother resided on the suit property and they continued to remain in occupation even after the deceased passed on. She then stated that in November 2014, the first Defendant came to the suit property seeking to be given her mother's national identity card without disclosing the reasons for doing so. She then averred that her mother refused to avail her national identity card and they chased away the first Defendant. She then averred that they then conducted a search at the lands office in Kajiado and discovered to their utter shock and dismay that the suit property is registered in the name of the first Defendant. It was her averment that the deceased was the legal owner of the suit property but that the first Defendant had fraudulently caused to be subdivided and transferred to her name a portion thereof. She then stated that her co-plaintiff and she have been in possession and occupation of the suit property throughout and that, though her mother has now moved to reside in a different location, she herself has remained in occupation of the suit property. She then added that the deceased had indicated to her that he intended to sell 5 acres of the suit property but she did not know to whom he desired to sell specifically. She also added that in December 2015, she came across a purported land sale agreement signed by the deceased and her co-plaintiff purportedly disposing 5 acres to the first Defendant and one Lawrence Muchiri. She believed the sale agreement to be a fraud. It was her averment that the deceased never signed any sale agreement. She added that she believed that the first Defendant took advantage of the illiteracy of the deceased and fraudulently caused to be subdivided the original parcel of land into inter alia the suit property and in fact, the first Defendant converted the entire suit property to herself in her name and now holds the title deed which title she maintained was obtained fraudulently.

The Application is contested. The 1<sup>st</sup> Defendant, Olive Wairimu Kinyanjui, filed her Replying Affidavit sworn on 1<sup>st</sup> February 2016 in which she averred that the deceased was the registered proprietor of the suit property measuring approximately 28 ha. She added that the deceased caused the suit property to be subdivided into two parcels of land namely Kajiado/Kaputiei North/1060 and Kajiado/Kaputiei North/1061 on 6<sup>th</sup> July 1987. She then added that the subdivided parcel of land known as Kajiado/Kaputiei North/1061 was further subdivided to yield *inter alia* the parcel of land known as Kajiado/Kaputiei North/1177 measuring 5 acres to which she lays a claim over.

She then said that sometime in the year 1988, she purchased the parcel of land known as Kajiado/Kaputiei North/1177 from the deceased at a price of Kshs. 4,700/- per hectare. She averred that they entered into a written sale agreement a copy of which the plaintiff exhibited. It was her averment that she paid the first instalment of Kenyan shillings 11,750/- to the deceased in the presence of his wife the co-plaintiff and their son known as Joseph. She said that she paid the second and final instalment two weeks later again witnessed by the deceased's wife and son Joseph. She then averred that the deceased agreed to sell her a further 5 acres and they entered into another written sale agreement which was left with the deceased. She then said that she cleared paying for the second 5 acre parcel in front of another son of the deceased known to her as John. It was her averment that they proceeded to the land control board for authorisation and consent to transfer was given. She added that the deceased personally appeared before the lands registrar on 20<sup>th</sup> December 1988 with his wife and son where he signed the transfer documents which were witnessed by the land registrar. She added that the deceased did not dispose off the entire suit property leaving his family with nothing but merely sold to her a portion thereof being the parcel known as Kajiado/Kaputiei North/1177. She added that the deceased had capacity to enter into a legally binding agreement during the entire length of the negotiation and the transaction for the sale of the said parcel of land. She then stated that she was issued with a title deed on 6<sup>th</sup> August 1997, a copy of which she annexed to this Replying Affidavit marked as "OWK 3". She averred further that in the year 2005, when she visited her said parcel of land being Kajiado/Kaputiei North/1177, it came to her attention that the beacons had been removed and she pursued the issue with the Kajiado lands office. She stated that the issue was fully investigated and deliberated on by the land registrar on 14<sup>th</sup> January 2013 and it was resolved that the problem of overlapping of the land parcel would only be solved by resurveying through a court order or having the present boundaries redrawn. She stated that she had never had any dispute with the deceased concerning the said parcel of land that she had purchased from him during his entire lifetime from 1986 until he passed on in the year 2010. Further to the above, she stated that she has known the deceased's family for a period of over 30 years and they never related to her as a trespasser. She stated that she only realised that something was amiss when she was served this Application. She stated that her claim is only in respect of the parcel of land known as Kajiado/Kaputiei North/1177 and not the entire suit property occupied by the plaintiffs. She said that she procedurally and lawfully purchased the portion known as Kajiado/Kaputiei North/1177 and obtained the title deed. On those grounds, she sought that this Application be dismissed with costs.

The issue arising for determination is whether or not to grant the prayer of a temporary injunction. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

***"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

***"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case 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 as to call for an explanation or rebuttal from the latter."***

Do the Plaintiffs/Applicants have a 'genuine and arguable case' and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must mention to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

***"In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law."***

The 1<sup>st</sup> Plaintiff/Applicant admits having come across a written sale agreement entered into by the deceased with the 1<sup>st</sup> Defendant selling to her a portion of 5 acres of the suit property. She asserted that this agreement was fraudulent on the basis that the 1<sup>st</sup> Defendant took advantage of the illiteracy of the deceased. She even annexed a copy of that sale agreement to this Application. On her part, the 1<sup>st</sup> Defendant asserted that the deceased was fully able to negotiate the sale transaction and understood the full import of selling to the 1<sup>st</sup> Defendant the parcel of land known as Kajiado/Kaputiei North/1177. To the Plaintiffs/Applicant's assertion of fraud, I will be guided by **Section 107 of the Evidence Act Cap 80** which provides that:

***"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

I am further guided by the finding of the former Court of Appeal for Eastern Africa in **R.G. Patel versus Lalji Makanji (1957) EA 314** which stated as follows:

***"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."***

In this particular suit, the Plaintiffs/Applicants have themselves admitted the sale transaction that took place between their deceased father and the 1<sup>st</sup> Defendant/Respondent. Nothing has been shown to this court to support their claim that their late father was illiterate and taken advantage of by the 1<sup>st</sup> Defendant. Nothing has been put before this court to demonstrate the fraud claimed by the Plaintiffs/Applicants. In short, the Plaintiffs/Applicants have not strictly proved the fraud that they allege. The 1<sup>st</sup> Defendant on her part has produced evidence to demonstrate how she became the proprietor of the parcel of land known as Kajiado/Kaputiei North/1177 which was a part of the suit

property. She even annexed a copy of her title deed thereto. The law is very clear as regards the position of a title holder of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-***

***(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

Overall, the 1<sup>st</sup> Defendant’s claim over the parcel of land known as Kajiado/Kaputiei North/1177 remains unchallenged. This means that the Plaintiffs/Applicants have not succeeded to demonstrate to this court that they have a prima facie case with a probability of success at the trial.

Since the Plaintiffs/Applicants have failed to prove the first ground in the grounds set down in the celebrated case of Giella versus Cassman Brown, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

***“The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”***

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

***“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”***

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants/Respondents.

**DATED AND SIGNED AT NAIROBI BY LADY JUSTICE MARY M. GITUMBI THIS 24<sup>TH</sup> DAY OF APRIL 2018.**

**MARY M. GITUMBI**

**JUDGE**

**DELIVERED BY HON. JUSTICE SAMSON OKONGO ON THIS 3RD DAY OF MAY 2018.**

**SAMSON O. OKONG’O**

**PRESIDING JUDGE**