



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 12 OF 2017**

**(Formerly Milimani ELC No. 206 of 2016)**

**WALTER OTISO OSORO.....PLAINTIFF**

**VERSUS**

**MWAURA KARUGA.....1<sup>ST</sup> DEFENDANT**

**EMBAKASI RANCHING COMPANY LIMITED....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's application dated the 4<sup>th</sup> March, 2016 brought pursuant to Order 51 rule 1, Order 40 rules 1, 2, 3 and 4 (1) & ( 2) of the Civil Procedure Rules and section 13(7) of the Environment and Land Court Act, Sections 1, 1A, 3 and 3A of the Civil Procedure Act and all the other enabling provisions of the law. The application, which seeks orders of temporary injunction, is premised on the summarized grounds that the Plaintiff is in possession of the suit property and all duly executed completion documents in respect to it. Having purchased it from the 2<sup>nd</sup> Defendant on 29<sup>th</sup> February, 2015. The completion documents have not been registered by the 3<sup>rd</sup> Defendant for no lawful cause or reason. By an unparticularized court order in suit No. 260 of 2010, the 3<sup>rd</sup> Defendant purported to register the 1<sup>st</sup> Defendant as proprietor of the suit property. The Court Order in suit No. 260 of 2010 relied upon, to make entries number 5 and 6 in the Lands Register for the suit property was obtained, if ever, through fraud, gross distortion and or by withholding material facts. That no party will suffer prejudice if the orders sought are granted as the suit property lawfully belongs to the Plaintiff who has established a prima facie case with a high probability of success.

The application is supported by the affidavit of Walter Otiso Osoro, the Plaintiff herein who deposes that in April 2005, Embakasi Ranching Company Limited through its duly authorized agent including the deceased Chairman Hon. Muhuri Muchiri offered to sell to him land parcel number Kajiado/ Kaputiei North/ 11275, which was registered in its name. He avers that he undertook an official search on 4<sup>th</sup> April, 2005 and confirmed the suit land belongs to Embakasi Ranching Company Limited. He claims he paid the purchase price of Kshs. 210, 000 in two instalments which payments were acknowledged and the Company delivered to him completion documents to wit: Original title deed; transfer of land instrument duly executed; letter of consent dated the 4<sup>th</sup> November, 2009; application for consent of land control board to transfer the suit property; Certificate of Incorporation; and Directors' KRA PIN. He contends that he presented the intended transfer for assessment of stamp duty, and lodged the documents for registration upon payment of Kshs. 2, 500 on 11<sup>th</sup> November, 2009, but his transfer was withheld. He insists that the Company even confirmed vide their letter dated the 9<sup>th</sup> September, 2010 to the CID Kitengela that he was the bona fide purchaser of the suit land. He discovered that a transfer was registered in favour of the 1<sup>st</sup> Defendant on 28<sup>th</sup> April, 2015. He reiterates that he is in possession of the original title deed from the 2<sup>nd</sup> Defendant as well as the Completion documents. Further, that no entry such as No. 6 dated the 28<sup>th</sup> April, 2015 can be made without surrender and or cancellation of the Land title deed. He reaffirms that he has been in possession of the suit land since 2005. He states that entry no. 5 and 6 should be expunged from record since he presented his first.

The Defendants did not file replying affidavits to the said application but the 1<sup>st</sup> Defendant later filed his submissions on 14<sup>th</sup> June, 2017 where he submitted that he purchased the suit land from the 2<sup>nd</sup> Defendant and paid the full purchase price. He referred to the Machakos ELC No. 260 of 2010 where he was awarded the suit land and pursuant to a Decree therein, he was registered as the proprietor of the suit land at the Kajiado Land Registry. He submitted that the Plaintiff failed to take any action after being denied registration by the 3<sup>rd</sup> Defendant and since he purchased the suit land in 2005, he failed to act until 2016, his rights under the contract were extinguished at the

expiry of six (6) years. He contends that he has always been in active possession of the suit land and relied on section 26 of the Land Registration Act to support his arguments.

The Plaintiff failed to file submissions despite being granted leave to do so.

### **Analysis and determination**

Upon perusal of the Notice of Motion dated the 4<sup>th</sup> March, 2016 including the supporting affidavit as well as the submission filed herein, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.

The fulcrum of the suit revolves around breach of contract by the 2<sup>nd</sup> Defendant and the Plaintiff's claim that he is the owner of the suit land, yet the 1<sup>st</sup> Defendant has been registered as a proprietor of the same by virtue of a Court Decree. The Plaintiff is seeking intervention of the Court to issue an order of temporary injunction prohibiting the 1st and 2nd Defendants from interfering with land parcel KAJIADO/KAPUTIEI – NORTH/ 11275 pending the hearing and determination of this suit.

In the case of **Giella Vs Casman Brown (1973) E.A 358** the Court established the principles for granting an injunction. As to whether the Plaintiff has established a prima facie case with a probability of success, I wish to refer to the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125** where the Court of Appeal described a prima facie case as follows:

***“.... 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”.***

From the title deed, it is evident that the 1<sup>st</sup> Defendant is the registered proprietor of the suit lands which he purchased from the 2<sup>nd</sup> Defendant but his registration was granted vide Court Decree in Machakos ELC No. 260 of 2010. The Plaintiff contends that he purchased the suit land from the 2<sup>nd</sup> Defendant and fully paid the purchase price but when he went to present the transfer documents to the 3<sup>rd</sup> Defendant, he failed to register him as the owner of the suit land. He has furnished the Court with all the completion documents the 2<sup>nd</sup> Defendant gave him. On perusal of the 1<sup>st</sup> Defendant's title deed including the documents presented by the Plaintiff, I find that the 2<sup>nd</sup> Defendant indeed breached the contract they had with the Plaintiff but at this juncture I note the 1<sup>st</sup> Defendant is already the registered proprietor of the suit land and hence protected by section 24 (a) of the Land Registration Act which provides:

***“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.***

Further, in being persuaded by the case of **Eldoret ELC NO. 65/2013, Christopher Kitur Kipwambok-vs- Vipulratilal Dodhia & 3 ORS;** where Justice Sila Munyao J held that Certificate of Lease just as a Certificate of Title was conclusive evidence of proprietorship, I find that since the suit land is already registered to the 1<sup>st</sup> defendant, by virtue of a Court Decree which was never appealed from, the Plaintiff has failed to establish a prima facie case to warrant the orders of an injunction sought.

On the second principle as to whether the plaintiff will suffer irreparable loss which cannot be compensated by way of damages. I note the Plaintiff is not the registered owner of the suit land. He has a claim of breach of contract against the 2<sup>nd</sup> Defendant which according to the submissions of the 2<sup>nd</sup> Defendant, is statute barred by the Law of the Limitation Act 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.’

I note since the suit land has already passed to the 1<sup>st</sup> Defendant by virtue of a Court Order, the Plaintiff can be compensated by way of damages.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that since the 1<sup>st</sup> Defendant is the registered proprietor of the suit land, the balance tilts in his favour.

It is against the foregoing that I find the application dated the 4<sup>th</sup> March, 2016 unmerited and dismiss it with costs.

**Dated signed and delivered in open court at Kajiado this 8<sup>th</sup> day of October, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**