



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 76 OF 2019

CANON MACRINE ADHIAMBO OWITI

(Suing in her capacity as the Executor of the Estate of the

late Martin Owiti Odero – Deceased).....PLAINTIFF

VERSUS

ERASMUS KIMATHI MURIUKI.....1ST DEFENDANT

REGISTRAR OF LANDS, KAJIADO NORTH.....2ND DEFENDANT

AND

KENYA COMMERCIAL BANK LIMITED.....INTERESTED PARTY

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 13th August, 2019 where she seeks an order of temporary injunction restraining the Defendants and Interested Party including their agents from interfering with land parcel number NGONG/ NGONG/ 27691 hereinafter referred to as the 'suit land', pending the hearing and determination of this suit. The application is premised on the grounds on the face of it and the supporting affidavit of the Plaintiff CANON MACRINE ADHIAMBO OWITI where she avers that she is the wife and executor to the estate of the late Martin Owiti Odero who owned the suit land. She confirms that the deceased died on 2nd June, 2015 and on 19th October, 2015 she undertook succession proceedings in respect to his estate vide Succession Cause No. 1775 of 2015 (In the matter of the estate of Martin Owiti Odero – Deceased). Further, that she was issued with a Certificate for Confirmation of Grant on 9th November, 2015. She explains that on 19th July, 2019 she discovered that the original title to the suit land was missing and she reported to the Loresho Police Station vide OB No. 19/2/8/2019. Further, on 22nd July, 2019, she conducted a search at the Land Registry in Kajiado North District and discovered that the suit land had been illegally transferred and registered in the name of the 1st Defendant on 24th May, 2018. She discovered that on 3rd March, 2019, the 1st Defendant charged the suit land to the Interested Party for a sum of Kshs. 3,500,000/=. She claims the purported illegal and unlawful title to the suit land is presently in possession of the Interested Party. She insists the 2nd Defendant has deliberately participated in the fraudulent transfer of the suit land to the 1st Defendant. Further, he has facilitated the illegal registration of the Charge. She reiterates that there is imminent danger that the 1st Defendant on the basis of the title deed acquired by means of fraud or misrepresentation shall draw further facilities against the suit land in view of the fact that the current market value stands at Kshs. 30,000,000/=. Further, that the suit land shall be sold in the Chargee's exercise of the statutory power of sale without consent or knowledge of the executor of the estate of the Late Martin Owiti Odero.

The 1st Defendant opposed the application and filed a replying affidavit sworn by ERASMUS KIMATHI MURIUKI where he deposes that he is the registered proprietor of the suit land which he purchased from Martin Owiti Odero on 17th May, 2014 for Kshs. 2,500,000 but undertook the transfer in his name on 24th May, 2018. He claims to have retained the original title in his custody. Further, that he has been in actual possession of the suit land from 2014 upto September, 2019. He denies the allegations of fraud and insists he is a purchaser for value without notice.

The Plaintiff filed a further affidavit where she reiterated her claim and insisted she was the one in actual possession of the suit land having constructed a structure for the caretaker and undertook green house farming thereon until 2017 when the said structures were destroyed by heavy rains. She further avers that she installed a water tank thereon which she used for drip irrigation.

The application was canvassed by written submissions but it is only the Plaintiff who filed hers.

Analysis and Determination

Upon consideration of the Notice of Motion application dated 13th August, 2019 including the rivaling affidavits and submissions, the only issue for determination is whether an interim injunction should issue restraining the Defendants and Interested Party from interfering with land parcel number NGONG/ NGONG/ 27691 pending the outcome of the suit.

The Plaintiff in her submissions reiterated her claim and insisted she had established a prima facie case and the balance of convenience tilted in her favour. Further, that she will suffer irreparable harm if the orders sought are not granted. To buttress her arguments, she relied on the following decisions: **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358; Mrao Vs First American Bank of Kenya Limited & 2 Others (2003) eKLR; Nguruman Limited V Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012 (2014) eKLR; Abdallah Kombo V Twalla Abdallah & 3 Others (2018) eKLR; Joseph Mbugua Gichanga V Cooperative Bank of Kenya Limited (2005) eKLR and Tachassis Wholesalers Company Limited V National Bank of Kenya Limited (2017) eKLR; Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4 Others (2014) eKLR.**

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358.**

In line with this principle, the Court will proceed to interrogate whether the Plaintiff has established a prima facie case with a probability of success at the trial.

In the first instance as to whether the Plaintiff has demonstrated a prima facie case with probability of success, the Court of Appeal while defining a prima facie case in **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** stated that it is a case in which on the materials presented to the court or tribunal, it will conclude there is an apparent infringement of the Applicant's rights.

It is not in dispute that the suit land was initially owned by Martin Owiti Odera (deceased) who was Plaintiff's husband. The 1st Defendant claims he purchased the land from the deceased in 2014 for kshs. 2.5 m but undertook a transfer in 2018. He has furnished court with a sale agreement to that effect. The Plaintiff who is the executor of the deceased estate confirmed the husband died in 2015 and they undertook succession of his estate. Further, she has been in possession of the suit land where she was carrying out greenhouse farming. She furnished court with the Certificate for Confirmation of Grant as well as pictures of the developments on the suit land. I note the 1st Defendant did not furnish court with transfer forms nor photos of the developments he had carried thereon.

Looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Plaintiff over the suit land is not baseless. Although, I note the alleged transactions were carried out in 2014 but the registration undertaken when the deceased died. The 1st Defendant has not indicated when he proceeded to the land control board nor furnished court with any documentation on how the transaction was completed. To my mind, I opine that the issues raised by the Plaintiff are very pertinent and in the circumstance, I find that she has established a prima facie case with a probability of success at the trial.

On the second principle as to whether the Plaintiff stands to suffer irreparable loss which cannot be compensated by way of damages. I note the 1st Defendant has not controverted the Plaintiff's averments of the developments on the suit land. 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. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.**'

Based on the facts as presented, since the Plaintiff has been on the suit land whose title is held by the 1st Defendant and charged to the interested party, I find that her injuries are not speculative injury but properly founded. She has indeed demonstrated the actual and substantial loss she stands to suffer if the orders sought are not granted.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the property is not preserved, it may be wasted away. Further, that the same tilts in favour of the Plaintiff. It is against the foregoing that I find the Notice of Motion dated 13th, August 2019 merited and will proceed to make the following final orders;

- 1) The Land Registrar Kajiado North be and is hereby directed to register an inhibition order against land parcel number NGONG/ NGONG/ 27691 of any dealings, lease or charge pending the hearing and determination of the suit.
- 2) The Defendants and Interested Party be and are hereby restrained from interfering with the land parcel number NGONG/ NGONG/ 27691 pending the hearing and determination of this suit.
- 3) The costs of the application are awarded to the Plaintiff to be borne by 1st Defendant

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 8TH DAY OF JUNE, 2021

CHRISTINE OCHIENG

JUDGE