



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 25 OF 2020

EZEKIEL SIMITO OLE SUPEYO, BRIAN MUTUNKEI

SUPEYO and MOSES NTIAMASAS SUPEYO

(Jointly as Administrators of the Estate

of RAHAB KAMASO SUPEYO – Deceased).....PLAINTIFFS

VERSUS

ROBERT MOSETI ONKWANI.....1ST DEFENDANT

ATTORNEY GENERAL (Sued on behalf of the Registrar of

Land Kajiado North Registry).....2ND DEFENDANT

RULING

The application before Court for determination is the Plaintiffs' Notice of Motion dated the 21st May, 2020 wherein the Plaintiffs are seeking the following orders:

1. Spent
2. Pending the hearing and determination of this application a temporary order of injunction be and is hereby issued prohibiting the 1st Defendant, his agents, employees or persons claiming on their behalf or their instructions, or any other party from entering, remaining in, charging, selling, transferring, leasing or otherwise disposing off or erecting any construction on the properties known as KAJIADO/ OLCHORO ONYORE/ 30804 and KAJIADO/ OLCHORO ONYORE/ 30805;
3. Pending the hearing and determination of this suit an order of injunction be and is hereby issued prohibiting the 1st Defendant, his agents, employees or persons claiming on their behalf or their instructions, from entering, remaining in, charging, selling, transferring, leasing or otherwise disposing off or erecting any construction on the properties known as KAJIADO/ OLCHORO ONYORE/ 30804 and KAJIADO/ OLCHORO ONYORE/ 30805;
4. The orders sought in prayers 2 and 3 above do bind Registrar of Land Kajiado North Registry;
5. Costs of this application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of MOSES NTIAMASAS SUPEYO. In the said affidavit, he provides the history of land parcel numbers KAJIADO/ OLCHORO ONYORE/ 30804 and KAJIADO/ OLCHORO ONYORE/ 30805 hereinafter referred to as the 'suit lands'. He contends that together with his brothers Ezekiel Simito Ole Supeyo and Brian Mutunkei Supeyo, they are administrators of the estate of their mother Rahab Kamaso Supeyo who died on 26th May, 2014. He explains that the estate of their mother was the owner of land parcel number Kajiado/ Ol Choro Onyore/ 39 which was subdivided into 14 parcels including Kajiado/ Ol Choro Onyore/ 9791 that was in turn subdivided into 16813, 16814, and 16815 respectively. Further, that when they sought to undertake a search on Kajiado/ Ol Choro Onyore/ 16813 they discovered that the same was registered in the name of the 1st Defendant as at 29th March, 2018. He claims there is an alleged Sale Agreement between the 1st Defendant and their deceased mother dated 16th November, 2013 in respect to the suit lands which bears a forged signature of their mother. He confirms Kajiado/ Ol Choro Onyore/ 16813 has since been subdivided into 30804 and 30805 which are the suit lands. He insists their deceased mother never entered into a Sale Agreement with the 1st Defendant, the title was fraudulently registered in the 1st Defendant's name and the same was irregularly acquired. He reiterates that they will lose their inheritance if the orders sought are not granted.

The 1st Defendant opposed the application and filed a replying affidavit where he explained how he acquired the suit lands from the deceased Rahab Kamaso Supeyo. He confirms entering into a Sale Agreement with the deceased and paying the full purchase price. Further, that the deceased furnished him with an undated Transfer Form as well as consent of the Land Control Board. He explains that he got registered as owner of the suit lands after the deceased demise. He insists he is the owner of the suit lands. He confirms having disposed of KAJIADO/ OLCHORO ONYORE/ 30805 to Maktraze Investments Limited to enable him develop KAJIADO/ OLCHORO ONYORE/ 30804.

The Plaintiffs filed further affidavits reiterating their claim, insisting the 1st Defendant obtained the lands fraudulently as their mother's signature was forged. They contend that the 1st Defendant has subdivided the land and is disposing of the same so as to defeat this suit.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 21st May, 2020 including the rivalling affidavits and parties submissions, the only issue for determination is whether an order of injunction should issue restraining the 1st Defendant, his agents or employees from interfering with land parcel numbers KAJIADO/ OLCHORO ONYORE/ 30804 and KAJIADO/ OLCHORO ONYORE/ 30805.

The Plaintiffs in their submissions aver that they have established a prima facie case with high probability of success as they have demonstrated that the 1st Defendant acquired the suit lands fraudulently. Further, that the deceased alleged fingerprints are forged as demonstrated by the Fingerprint expert who they hired to examine the various documents used in the transactions. They reiterate that they will suffer irreparable loss as they inherited the suit land from their mother and no amount of money can compensate for loss of inheritance. Further, that the balance of convenience tilts in their favour. To buttress their averments, they have relied on the following decisions: **Juja Coffee Exporters Limited & Another V NIC Bank Limited & Another (2020) eKLR; Veronica Wairimu Njuguna V Jim Njuguna Muthama & Another (2017) eKLR; Susan Njeri Karo V Catherine Njeri Njoroge t/a Licat Enterprises & 2 Others (2016) eKLR; William Kiprotich Cherus V Stanley Kiplangat Rono & Another (2014) eKLR; Board of Governors, Moi High School, Kabarak & Another V Malcolm Bell (2013) eKLR and Naftali Ruthi Kinyua V Patrick Thuita Gachure & Another (2015) eKLR.**

The 1st Defendant in his submissions insist the Plaintiffs have not established a prima facie case to warrant the orders sought since he legally purchased the suit land from the deceased and has since subdivided it. Further, that he has annexed documents to prove this position. He insists the Plaintiffs will not suffer any irreparable harm as in the annexed Certificate for Confirmation of Grant, the suit land is actually bequeathed to Stephen Njuguna. Further, he is the one who will suffer irreparable harm since he has fenced the suit land and grazes his livestock thereon. He insists the Applicants have not explained the reason for their delay in seeking these orders. To support his arguments, he has relied on the following decisions: **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358; Kibutiri Vs Kenya Shell, Nairobi High Court Civil Case No. 3398 of 1980 (1981) KLR; Wairimu Mureithi Vs City Council of Nairobi Civil Appeal No. 5 of 1979 (1981) KLR 322; Nguruman Ltd. Vs. Jan Bonde Nielsen & 2 Others (2014) eKLR; Civil Application 139/2018 Njeri Njoroge Vs Maina Giuchuhi & Another (2018) eKLR and Election Petition 1/ 2013 Raila Amollo Odinga & Another V IEBC & Others.**

In line with the principles on injunction as enshrined in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** this Court will proceed to interrogate whether the Plaintiffs have made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicants have demonstrated a prima facie case with probability of success, I will refer to the definition of a prima facie case as stated in the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125**. From a perusal of the respective documents annexed to the rivalling affidavits including the Complaint, Defence, Documents and Witnesses Statements, I note the Plaintiffs are the administrators of the estate of Rahab Supeyo who owned the suit land which was later subdivided. The Plaintiffs have furnished Court with the Expert Report indicating the signatures on the documents are disfigured and they allege the 1st Defendant fraudulently acquired the land which he has since subdivided. They however have not indicated whether they engaged the 1st Defendant when they sent the documents to the Document Examiner. The 1st Defendant insists he purchased the suit land prior to the deceased demise, paid the full purchase price and it is the deceased who furnished him with all the requisite documents including the Consent of the Land Control Board and the undated Transfer Form but he later got registered as its owner after her demise. The Plaintiffs have however not controverted the 1st Defendants averments that he is on the suit land which he has since subdivided. Further, that he is in the process of disposing of a portion of the land to a third party. From the Certificate for Confirmation of Grant, I note the suit land has actually been bequeathed to one Stephen Ndungu and not to any of the Plaintiffs. The Plaintiffs have not offered any explanation on why this is so but insist the land was fraudulently transferred to the 1st Defendant and they will suffer irreparable harm if the orders sought are not granted. From the respective averments, and my analysis above, I opine that the allegations of fraud can only be determined once the dispute is set down for hearing and expert witness (document examiner) cross examined. However, at this juncture, I find that the Plaintiffs have not established a prima facie case to restrain the 1st Defendant or his agents from occupying the suit lands. Further, since the Plaintiffs have not established a prima facie case and in line with the case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, I will not handle the two other limbs on injunction. Be that as it may, since there are allegations of fraud while associating myself with the case of **UCB Vs Mukoome Agencies (1982) HCB22 where the Court held that, 'where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit;'** I opine that it is pertinent to preserve the substratum of the suit.

Since both the Plaintiff and the 1st Defendant are staking claim over the suit land and its resultant subdivisions, with the sanctity of the title being in dispute and the 1st Defendant claiming to have fenced it and is grazing livestock thereon, the Court finds that these are issues best determined at a full trial. Insofar as I find the Plaintiffs have not established a prima facie case, I will proceed to make the following order:

- The Land Registrar Kajiado North be and is hereby directed to register an inhibition against land parcel numbers KAJIADO/ OLCHORO ONYORE/ 30804 and KAJIADO/ OLCHORO ONYORE/ 30805 respectively of any dealings pending the hearing and determination of the suit.

- The costs of the application dated 21st May, 2020 will be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 29TH DAY OF JULY, 2021.

CHRISTINE OCHIENG

JUDGE