



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 40 OF 2020

DANIEL KISHEU LETAARI

VICTOR RUMPAS LETAARI

JOSHUA SANCHA LETAARI (Suing as legal representatives of the estate of

NATAARI KILENYI SUPEYO).....PLAINTIFFS

VERSUS

GEORGE NGURE KARIUKI.....1ST DEFENDANT

SAMUEL KUNTAI TUNAI.....2ND DEFENDANT

THE REGISTRAR LANDS, NGONG.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

COUNTY GOVERNMENT OF KAJIADO.....INTERESTED PARTY

RULING

What is before court for determination is the Plaintiffs' Notice of Motion application dated the 7th July, 2020 where they seek for orders of temporary injunction prohibiting the Defendants, their servants, agents employees and or accomplices from selling, grazing, subdividing, charging, discharging, developing, accessing, grazing as well as dealing with land parcel number KJD/ KIPETO/ 2080 hereinafter referred to as the 'suit land', pending the hearing including determination of the suit. Further, that the officer commanding Kiserian Police Station to enforce the orders granted.

The application is premised on the grounds on the face of it and the supporting affidavit of DANIEL KISHEU LETAARI, VICTOR RUMPAS LETAARI and JOSHUA SANCHA LETAARI who confirm being the personal representatives of the estate of NATAARI KILENYI SUPEYO who passed away on 14th April, 1999. Further, that the deceased owned the suit land. They claim the 1st Defendant fraudulently caused the transfer of the suit land to his name on the 5th October, 2003, with a title Deed issued to that effect on 30th October, 2003. They contend that the illegal transfer was done four years after the demise of the deceased and before the commencement of the succession process in respect of his estate. They explain that the 1st Defendant further fraudulently transferred the suit land to the 2nd Defendant on 17th February, 2012 and a title deed was issued on the said date to that effect. They insist none of the deceased dependants are privy and or party to the illegal and fraudulent transfer of the suit land. Further, on 3rd June, 2020 the 2nd Defendant was spotted on the suit land in the company of people whom the Applicants firmly believe are unsuspecting potential buyers. They aver that currently the suit land is registered in the 2nd Defendant's name but there exists a restriction placed by the Chairman of the County Land Management Board that was registered on 22nd August, 2016.

The 1st Defendant opposed the application by filing a replying affidavit where he deposes that he met the deceased in 1997 at the time he was the managing director of United Insurance Company Limited. Further, at that time the deceased was the registered proprietor of land parcel number Kajiado/ Kipeto/ 574, and he offered to sell one hundred (100) acres to both United Insurance Company Limited and himself at a cost of Kshs. 35,000 per acre. He confirms that he was to take 50 acres while United Insurance Company Limited was to retain the other 50 acres. He contends that they proceeded to make payments to the deceased who obtained subdivision of the land. He explains that when the deceased collected the final instalment of the purchase price on 12th January, 1999, he executed all the transfer documents and the application for consent in his favour as well as that of the company. He states that following the demise of the deceased in 2012, he visited the area Chief in the company of a son to the deceased, who wanted to finalize the registration of the transfer in his favour and release the title in respect of the residual land to the family. Further, he advised his advocates accordingly. He confirms subsequently forwarding all

necessary documents for the subdivision and transfer of the portions purchased from the deceased to his advocate around April, 2003. He reiterates that the completion of the subdivision and transfer was done pursuant to documents signed by the deceased before his demise, having sold and collected the entire purchase price from him. He insists he acquired the suit land legally and states that in 2011 he entered into an agreement for sale of property to the 2nd Defendant and received the full purchase price from him after which he effected a transfer in his favour. Further, the sale and transfer to the 2nd Defendant was legal.

The 2nd Defendant opposed the application and filed a replying affidavit where he deposes that this suit is statute barred under section 7 of the Limitation of Actions Act. He insists the Plaintiffs have no cause of action as they have neither owned the suit land nor shown a legal interest that would enable them sue. He contends that he is the registered proprietor of the suit land having purchased the same in good faith and for value from the 1st Defendant sometime in November, 2011. He explains that at the time of purchase, he instructed his then advocate who conducted due diligence on the suit land and ascertained it indeed was registered in the 1st Defendant's name. Further, for the eight (8) years since he acquired the suit land, the Plaintiffs' alleged interest has never become apparent. He reiterates that he is a bona fide purchaser without notice. Further, the Plaintiffs have not furnished any evidence to prove the deceased owned the suit land. He contends that the Plaintiffs have not provided any evidence to prove allegations of fraud nor to link him in the fraud in regard to his acquisition of the suit land.

The Plaintiffs filed a supplementary affidavit where they reiterated their claim and explained that land parcel number Kajiado/ Kipeto/ 574 was subdivided into Kajiado/ Kipeto/ 1582; 1583; 1584; 1585 and 1586 respectively. They were aware that their father sold and transferred land parcel number Kajiado/ Kipeto/ 1586 to United Insurance Company Limited where the 1st Defendant was a director. They insist the 1st Defendant caused the subdivision of Kajiado/ Kipeto/ 1585 into Kajiado/ Kipeto/ 2080 and 2081 respectively. They contend that the purported application for consent of the Land Control Board for subdivision of Kajiado/ Kipeto/ 1585 and the Mutation were not executed by their late father. Further, that all payments made by the 1st Defendant to their deceased father were only in respect to purchase of Kajiado/ Kipeto/ 1586 and not Kajiado/ Kipeto/ 2080. They reiterate that the 2nd Defendant's title is not clean and that they discovered the fraud on 3rd June, 2020.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 7th July, 2020 including the respective affidavits and rivaling submissions, the only issue for determination is whether the Plaintiffs are entitled to orders of temporary injunction in respect to the suit land, pending the determination of this suit.

The Plaintiffs in their submissions reiterated their claim, contended that they had established a prima facie case and will suffer irreparable harm if the orders sought are not granted. Further, that the balance of convenience tilted in their favour. To buttress their averments, they relied on the following decisions: **Robert Mugo Wa Karanja V Ecobank (Kenya) Limited & Another (2019) eKLR; Giella Vs Cassman Brown & Company (1973) EA 358; Mrao Ltd Vs First American Bank Of Kenya & 2 Others (2003) KLR 125; and Zingo Investment Limited V National Bank of Kenya Limited (2020) eKLR.**

The 1st Defendant in his submissions stated that the Plaintiffs had not established a prima facie case to warrant the orders sought. Further, that no order of inhibition should be granted. To support his arguments he relied on the following decisions: **Robert Mugo Wa Karanja V Ecobank (Kenya) Limited & Another (2019) eKLR; Giella Vs Cassman Brown & Company (1973) EA 358; John Njuguna Kikumba V Hussein Hassan & Another (2021) eKLR; Mrao Ltd Vs First American Bank Of Kenya & 2 Others (2003) KLR 125; and Joseph Mumita Kipees (Suing as Legal Representative of the estate of Moses Kisento) V Nteri Merik Obo Kipaika & 2 Others (2014) eKLR.**

As to whether the Plaintiffs' have established a prima facie case with probability of success at the trial. I will anchor my analysis on the principles established in the case of **Giella Vs Cassman Brown & Company (1973) EA 358** as well as the definition of a prima facie case as stated in the case of **Mrao Ltd Vs First American Bank Of Kenya & 2 Others (2003) KLR 125**. It is not in dispute that the suit land is currently registered in the name of the 2nd Defendant. The Plaintiffs contend that the transfer of the suit land to the 1st Defendant and thereafter to the 2nd Defendant was fraudulent since the same was done after the deceased demise. The 1st Defendant in his replying affidavit annexed copies of the payment receipts signed by the Deceased. Further, he explained that it is the deceased who subdivided the initial parcel of land. The Plaintiffs dispute that the Application for Land Control Board and the Mutation Form were signed by the deceased. They however confirm that their father sold fifty (50) acres of land to the United Insurance Company Limited where the 1st Defendant was the Managing Director. On perusal of the documents presented by the respective parties, I note the deceased signed for several payments between 1997 upto 1999 over sale of land which parcel number is not indicated therein. Further, various cheques have also been annexed in the deceased name. The Application for Consent of the Land Control Board for subdivision of Kajiado/ Kipeto/ 1585 into 2080 and 2081 respectively is signed off by the Deceased Nataari Supeyo Kilenyi. Further, the Consent of the Land Control Board for subdivision of Kajiado/ Kipeto/ 1585 was granted on 17th March, 1998 when the deceased was still alive. The Plaintiffs dispute that the Deceased never obtained consent and the mutations but have not annexed any evidence to the contrary. From a perusal of the Complaint, the Plaintiffs have not indicated which parcel of land was sold to the United Insurance Company Limited as claimed in their supplementary affidavit. Further, they have not provided any documents to that effect. I note the deceased died in 1999 and the Plaintiffs only obtained the Letters of Administration Ad Litem in 2019 which was 20 years later. Further, the 1st Defendant was registered as proprietor of suit land in 2003 after which he sold the same to the 2nd Defendant in 2011. The Plaintiffs contend they have been on the suit land but the 1st and 2nd Defendants insist it is the 2nd Defendant who is in occupation thereon.

From my analysis above, I note the Plaintiffs claim they only realized the issue of fraud in 2020 and dispute the aforementioned subdivision including the consent of the Land Control Board. They have even referred to a restriction which had been entered on the suit land in 2016 by the Chairman of the Kajiado County Land Management Board but do not inform court on who instigated the said Chairman to enter the restriction. They have not furnished court with a copy of the title before subdivision. To my mind, I opine that they are not being candid over

the said transaction as the 1st Defendant explained that it is the deceased who undertook the subdivision and signed transfer forms before his demise. Further, none of them controverted the 1st Defendant's averments that following the demise of the deceased in 2012, he visited the area Chief in the company of a son to the deceased, who wanted to finalize the registration of the transfer in his favour and release the title in respect of the residual land to the family. They insist the 1st Defendant caused the subdivision of Kajiado/ Kipeto/ 1585 into Kajiado/ Kipeto/ 2080 and 2081 respectively but have not informed court on who owns Kajiado/ Kipeto/ 2081. It is my considered view that there are various gaps in the averments by the Plaintiffs and since injunctive reliefs are equitable remedies, it is pertinent for the party seeking the same to be candid.

In the circumstances while associating myself with the decisions cited above, I find that the Plaintiffs have not established a prima facie case to warrant the orders of injunction sought. Further, in relying on the Case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where it was held that in instances when a party has fails to establish the first limb on injunctions, the court need not proceed to make a determination of the other two limbs and I will hence decline to do so.

It is against the foregoing that I find the Notice of Motion application dated the 7th July, 2020 unmerited and will proceed to dismiss it.

Costs will be in the cause

Dated signed and delivered in Virtually at Kajiado this 26th day of July, 2021

CHRISTINE OCHIENG

JUDGE