



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC CASE NO. 17 OF 2020**

**SIPHORA CHEBET TOWETT (suing as the administrator of the Estate of**

**KIPCHUMBA ARAP TOWETT).....PLAINTIFF**

**VERSUS**

**MWANGI CHARLES MAHINDA.....1<sup>ST</sup> DEFENDANT**

**PETER MUBONGI MAHINDA.....2<sup>ND</sup> DEFENDANT**

**RULING**

**THE APPLICATION**

1. By an Amended Notice of Motion dated **24/09/2020** and filed in court on **1/10/2020** brought under **Section 1A, 1B and 3A** of the **Civil Procedure Act, Order 1 Rule 3, Order 8 Rule 3 and Rule 5, Order 40 Rule 1 and Order 51 Rule 1** of the **Civil Procedure Rules 2010, Section 100** of the **Civil Procedure Act**, the applicant who is the plaintiff sought the following orders:

a. ...spent

b. ...spent

c. **That pending the hearing and determination of this suit this honorable court be pleased to issue temporary injunction restraining the 1<sup>st</sup> defendant and the 2<sup>nd</sup> intended defendant either by themselves, their agents, servants or personal representatives from alienating, disposing, selling, wasting or in any way dealing with parcel of land in the supporting affidavit and known as **NAIVASHA /OLJORAI PH 11/875****

d. ...Spent

e. **That costs of this application be provided for.**

2. In the application at hand the plaintiff who describes herself as the administrator of the estate of the late Kipchumba Arap Towett, deceased, who was the owner of all that land known as **Naivasha Oljorai Phase 11/875**.

3. The application is supported by the sworn affidavit of the applicant sworn on **24/09/2020**. The facts forming the genesis of the application are that there is an order of this court issued on **4<sup>th</sup> March 2020** restraining the 1<sup>st</sup> defendant and his agents from entering alienating or disposing of or in any manner interfering with the land known as **Naivasha Oljorai Phase 11/875**; that despite the order the 1<sup>st</sup> defendant has entered into a sale of land agreement dated **4/09/2020** with one **Moses Kamau Mwangi** in respect of **1 acre** out of **Naivasha Oljorai Phase 11/875**. It is stated that the 1<sup>st</sup> defendant is aware that **Naivasha Oljorai Phase 11/875** is the subject matter of this suit and that his acts are in total disregard of a court order.

**THE RESPONSE**

4. There is a sworn replying affidavit and a further replying affidavit both filed by the 1<sup>st</sup> defendant on **24/11/2020** and **4/6/2021** respectively in opposition to the amended Notice of Motion dated **24/09/2020**. The 1<sup>st</sup> defendant's response is that in **2011** the 1<sup>st</sup> defendant and the plaintiff entered into a sale agreement with Kipchumba Arap Towett whereby the latter sold to the former all that parcel of land known as

**Naivasha Oljorai Phase 11/875** measuring approximately **2.2 ha** for **Ksh 300,000/=** with further conditions that the 1<sup>st</sup> defendant would repay the Settlement Fund Trustee (SFT) loan encumbering the property and process the discharge of charge from Nairobi which conditions he fulfilled; that the vendor surrendered to him all the original receipts and introduced him to the SFT officials and informed them that he had sold the land to the 1<sup>st</sup> defendant; that the vendor expressed his wish that the buyer would hold the purchase price till the vendor found land to buy; that the vendor subsequently found land in Kuresoi being **LR Molo South/ Ikumbi Block 6 /478** and asked the buyer to pay the purchase price directly to the seller of the latter land on his behalf which he did; that the vendor moved into the latter land and has been in occupation thereof with his family; that the balance of **Ksh 50,000/=** was paid to the vendor which he used to move his family to the new land; that the vendor executed a transfer at the execution of the agreement; that the 1<sup>st</sup> defendant took possession of the suit land immediately on purchase and installed a caretaker thereon; that the transfer of the title to the 1<sup>st</sup> defendant's name was done in a transparent manner; that in **2015** while abroad he learned of an encroachment of one acre of the suit land; that he returned and reported to the police; that the encroacher claimed that she was sold the land by Kipchumba, the deceased; that the 1<sup>st</sup> defendant filed a citation and transferred the suit land to himself and later sold the suit land to a third party who has since obtained title deed; that the purported buyer and an advocate called Penninah were charged in court over the claims over the land; that the plaintiff has also filed a similar application for injunction in Naivasha; that the plaintiff's delay in acting on the grant that the plaintiff obtained in **2017** at the High court in Nakuru is suspect; that the plaintiff has filed parallel succession proceedings in different courts; that the original title deed has mutated into other titles which have been resold to other parties.

5. The 2<sup>nd</sup> respondent did not file any response to the application.

#### **SUBMISSIONS**

6. The applicant filed her submissions on **22/06/2021**. I have perused the court file and I have not found any submissions filed on behalf of the respondents.

#### **DETERMINATION.**

7. I have perused the proceedings of **4/3/2020** and found that this court granted **prayer no 2** of the application dated **3/3/2020**. That prayer had sought orders as follows:

**“That pending the hearing and determination of this application interpartes this honorable court be pleased to restrain the defendant/respondents by themselves, agents, servants and/or employees from entering alienating, selling, transferring, leasing, disposing and/or interfering in any manner whatsoever with the property known as NAIVASHA /OLJORAI PH 11/875.”**

8. The application dated **3/3/2020** was not heard; instead, on **1/10/2020** the instant amended notice of motion was filed and placed before Hon Mutungi J who ordered that the same be served for *inter partes* hearing before Hon Ohungo J on **22/10/2020**.

9. On **22/10/2020** the amended notice of motion came up before court and prayers **nos (b)** and **(d)** were granted in the presence of only the applicant's counsel. **Prayer no (b)** was only granted till the following date. The interim orders were extended on **5/11/2020** and on **30/11/2020** and on **3/12/2020**. They were also extended on **1/2/2021** and on **11/3/2021**, **6/5/2021**, and **26/5/2021**. On **22/9/2021** when the ruling date was issued no application for extension of the orders was issued and the court did not extend them *suo motu*.

10. From the foregoing, it is clear that the application before me is therefore fit for consideration of interim injunction orders since it is not a fresh application but an amended version of the older application dated **3/3/2020**.

11. After considering the application, the only issues for determination are whether the defendants acted in contravention of a court order and whether the court should grant a temporary injunction restraining the defendants from dealing in any way with land **Parcel No. Naivasha/Oljorai PH 11/875** pending the hearing and determination of this suit.

12. For an interim order to be granted, the applicant must establish a *prima facie* case with a probability of success. Even in instances where a *prima facie* case is established, an injunction will not issue if damages will be an adequate compensation. Further, when a court is in doubt then it will give a determination on a balance of probability. See the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**.

13. The Court Of Appeal in the case of in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** defined a *prima facie* case to be:

**“... a case in 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... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”**

14. The applicant claims in her plaint that the deceased was allotted **plot No. 875 at Ol Jorai Phase 11 Settlement Scheme**. The defendants have not been heard to controvert this but in his defence the 1<sup>st</sup> defendant states that the deceased subsequently sold him the land and he that he has evidence that the transfer to him of the suit land was above board.

15. What is of concern to the court is that the mutation bearing the date **1/10/2020** appears to have been prepared after the instant suit was filed and during the periodic extension of the interim orders restraining the 1<sup>st</sup> defendant's interference with the suit land in any manner. It is

clear that the suit land has now by virtue of the said mutation been subdivided into numerous subplots numbered **11885-11910** (inclusive.)

16. However, delving deeper into the court record, it is evident that the land was registered in the name of the 1<sup>st</sup> defendant before the commencement of the present proceedings.

17. However, the documents on the record also show that by the time the suit was commenced on **4/3/2020** and by the time the initial orders of injunction were issued on that date the suit land had already been transferred to the 2<sup>nd</sup> defendant.

18. It is also evident that title was issued to the 2<sup>nd</sup> defendant on **3/3/2020**. The 2<sup>nd</sup> defendant was enjoined as a party on **22/10/2020** long after title issued in his name. I do not find that there is any evidence that the transfer of the suit land to the 2<sup>nd</sup> defendant or the subdivision of the suit land was in contravention of any court order.

19. Further arising from the foregoing, it is correct for the 1<sup>st</sup> defendant to state that the title to **Parcel No. Naivasha/Olgorai PH 11/875** does not exist the same having been subdivided as stated herein before. However, just as in the case of **Paul Pkemoi Kide v Philip Kimutai Kibor & 2 others [2018] eKLR** this court should not be hindered in the issuance of any orders, if deserved, by the fact that the land has been subdivided. In the **Paul Pkemoi Kide** case the court observed as follows:

**“13. However the application was not amended at any point in time to read the proper land reference numbers that exist at present. The effect of the subdivision of the land is that if the orders were granted as prayed there would be no order capable of being registered against the LR. 6125/10 as it does not exist. Though that is the case, the defendants acknowledge that LR. 6125/10 previously existed and the 3rd defendant’s defence and counterclaim has linked it directly to some 6 subdivisions being LR 6125/11, LR 6125/12 LR 6125/13 LR 6125/14 LR 6125/15 and LR 6125/16.**

**14. The plaintiff entered into an agreement for purchase of the land while it was not yet subdivided. He knew it as a single parcel.”**

20. The reason for taking that stance in the present matter is that just as in the **Paul Pkemoi Kide case** (supra) the subplots all arose from the subdivision of the whole parcel claimed by the plaintiff and no question of which part of the land is claimed arises, and now that the current registered owner is enjoined in the suit the issuance of an injunction order can be considered with propriety.

21. What this court must now consider is whether there is a *prima facie* case against both defendants. In answer to the claim of purchase by the 1<sup>st</sup> defendant, the plaintiff only states that the deceased was very sick at the time of the sale and the 1<sup>st</sup> defendant took advantage of his sickness in the sale. She also states that she never knew of the sale of what she considers family land and her consent was not sought.

22. I do not find any substantive response from the plaintiff to the claim that the proceeds of the sale were applied to the purchase of land on which the plaintiff’s family was settled by the deceased yet the 1<sup>st</sup> defendant has given the identity of the land so purchased. There is no denial by the plaintiff that such a purchase and settlement occurred. In her plaint she avers that the 1<sup>st</sup> defendant’s claim in the proceedings in the succession cause is that he had owned the second parcel and that he surrendered it to the deceased. She disputes that the second parcel ever belonged to the 1<sup>st</sup> defendant and avers that it could not therefore have formed part of the consideration for the sale of the suit land. However in her original affidavit she stated that she is not aware of the second parcel of land. The plaintiff has not also provided evidence of her occupation of the suit land.

### **CONCLUSION**

23. Having considered this case I find that the plaintiff has established a *prima facie* case. However I find that overall, the plaintiff has not established that she would suffer loss that can not be compensated for by way of damages if the orders sought do not issue.

24. If considered on the basis of the two conditions addressed above only, the plaintiff’s application is liable to be dismissed as one of the conditions has not been satisfied. However, I have also considered the balance of convenience and found that it tilts in favour of injuncting the disposal of waste of the suit land since if it is so disposed of or wasted this litigation may be rendered nugatory in the event the court finds for the plaintiff.

25. I therefore order as follows regarding the application dated **24/9/2020**:

**a. The 2<sup>nd</sup> defendant is hereby enjoined from disposing of the subplots arising from the subdivision of Parcel No. Naivasha/Olgorai PH 11/875 pending the hearing and determination of the instant suit.**

**b. The prevailing *status quo* on the ground and on the titles to the subplots mentioned in this suit as arising from the subdivision of the suit land shall be maintained pending the hearing and determination of the instant suit.**

**c. The costs of the application shall be in the cause.**

**d. All the parties shall comply with Order 11 of the Civil Procedure Rules, the plaintiff within the first 14 days of this order and the defendants within 28 days of this order, and appear before this court online for a mention on 18/11/2021 for fixing of a hearing date for the hearing of the main suit.**

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 14TH DAY OF OCTOBER, 2021.**

**MWANGI NJORGE**

**JUDGE, ELC, NAKURU.**