



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC PET NO. 24 OF 2019

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT No. 4 of 2015

And

IN THE MATTER OF THE LAW OF SUCCESSION ACT, CAP 160, LAWS OF KENYA

AND

IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012, LAWS OF KENYA

AND

IN THE MATTER OF ARTICLE 63 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

NABARO KARIANKEI(SUING AS THE ADM OF

THE ESTATE OF MUSANA KARIANKEI).....1ST PETITIONER/APPLICANT

THE ADM OF THE ESTATE OF

MUSANA KARIANKEI.....2ND PETITIONER/APPLICANT

VERSUS

JANE WAMBUI KAMOYE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE DISTRICT LAND REGISTRAR NAROK.....3RD RESPONDENT

THE CHAIRMAN OGIGLAI GROUP RANCH.....4TH RESPONDENT

RULING

1. Before this court are two Notice of Motion applications dated 9th October, 2019 and 3rd June, 2021 respectively. The first Notice of Motion application dated 9th October, 2019 is brought under Article 40 of the Constitution and Rules 13 and 19 of the Constitution of Kenya

(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 seeking the following orders:-

(1) Spent

(2) Spent

(3) **THAT pending interpartes hearing and determination of this Petition, this honourable court be pleased to issue an order of temporary injunction restraining the 1st respondent, her agents, servants and or employees or whomsoever acts on her instructions from selling, auctioning, wasting, charging, mortgaging or in any way disposing all parcel of land known as Title No. Cis Mara/Ololulunga/12222;**

(4) **THAT pending the hearing and determination of this Petition, this honourable court be pleased to issue an order of temporary injunction restraining the 3rd respondent from registering any further dealing in respect of Title No. Cis Mara/Ololulunga/12222 or in the alternative a temporary order do issue compelling the 3rd respondent to register a caveat against all parcel of land known as Title No. Cis Mara/Ololulunga/12222;**

(5) **THAT this honourable court be pleased to issue such further order (s) as may deem just; and**

(6) **THAT the costs of this application be awarded to the Petitioner.**

2. The application is premised on the grounds that Musana Kariankei (deceased) was the registered owner of title number Cis Mara/Ololulunga/3890 measuring approximately 10 acres which he acquired through a transfer from Olugirai Group Ranch and was subsequently issued with a Title Deed in the year 2005.

3. That the 1st respondent connived with the 3rd respondent to cancel the title deed CIS MARA/OLOLULUNGA/3890 and illegally sub divided and registered two parcels of land namely, CIS MARA/OLOLULUNGA/12222 and CIS MARA/OLOLULUNGA/12223 each measuring 5acres. The actions of the 1st and 3rd respondents violates the Petitioners rights to own property as guaranteed by the Constitution. In addition, the aforementioned actions amount to intermeddling with the deceased property contrary to Section 45 of the laws of Succession Act.

4. That the 1st respondent is in actual possession of parcel number CIS MARA/OLOLULUNGA/12222 and went ahead and took a loan with the title deed as collateral. That despite numerus requests, the 1st respondent has failed to vacate the suit land placing the Petitioners at the risk of suffering irreparable loss and damage.

5. The application is supported by the affidavit of the 2nd applicant herein, Sanare Ole Kariankei sworn on 9th October, 2019 which he has deponed on his own behalf and that of the 1st applicant who is also the co-administrator of the estate of Musana Kariankei (deceased). The 2nd applicant avers that in the year 2006 the 1st respondent connived with the 3rd respondent fraudulently cancelled the title deed CIS MARA/OLOLULUNGA/3890 and registered two parcels of land namely, CIS MARA/OLOLULUNGA/12222 and CIS MARA/OLOLULUNGA/12223 in the names of 1st respondent and the deceased.

6. The 2nd Applicant further avers that during the succession proceedings the 1st respondent did not raise any objection or participate in the proceedings and as such her actions to fraudulently acquire parcel number CIS MARA/OLOLULUNGA/12222 deprives the applicants of their right to own property for the reasons that the 1st Respondent has gone ahead and taken actual possession of the land and used the title as collateral for a loan facility.

7. The 2nd applicant is apprehensive that the actions of the Respondents will put them at the risk of loss and suffering irreparable damage and further that the acts and omissions of the Respondents is an infringement of their right to be arbitrarily deprived of property.

8. The Applicant has attached a copy of certificate of Confirmation of Grant, Title Deed to title number CIS MARA/OLOLULUNGA/3890, copy of registered members, Certificate of Death, copies of the transfer documents of land parcel numbers 12222 in the name of the 1st Respondent and 12223 in the name of the deceased.

9. The Application is opposed by the replying affidavit of the 1st respondent herein, Jane Wambui Kamoye sworn on 24th February, 2019 in which she contends that on 22nd May, 2002 she entered into a sale agreement with the deceased for purchase of 5 acres of land being a portion of CIS MARA/OLOLULUNGA/3890 which was witnessed by the 1st Applicant.

10. The 1st respondent contends that all due processes and procedures were followed in obtaining parcel number CIS MARA/OLOLULUNGA/12222 in which she was issued with a title deed dated 18th May, 2007. Further, that the deceased passed on in the year 2007 and not 2003 as claimed by the 2nd Applicant. That in support of the fact that the deceased passed on in the year 2007, the 1st respondent avers that the deceased sought medical attention at Tenwek Hospital and since he owed the hospital kshs. 6,000/- upon discharge, he had to surrender his National Identity Card with the hospital which is still in the possession of Tenwek Hospital as at the filing of her replying affidavit and remains uncollected.

11. The 1st respondent further contends that she has been in occupation of the suit land since the year 2002 and being the absolute owner she has taken a loan on several occasions. That she could not participate in the succession proceedings since she had already obtained the title deed before the demise of the deceased. That the applicants herein are misleading this court by giving false information.

12. Finally, that under Article 40 of the Constitution, she is protected from any interference from her property and under Section 25 and 26 of the Land Registration Act of 2021 she has exclusive rights to her land. As such, the application is fatally incompetent, frivolous and vexatious and an abuse of the court process. The 1st respondent relies on copies of the sale agreement dated 2nd May, 2002, Mutation Form, Application for Consent of Land Control Board, Letter of consent, Title Deed for CIS MARA/OLOLULUNGA/12222, documentation from Tenwek Hospital, Mutation Forms and Transfer Forms for CIS MARA/OLOLULUNGA/3890.

13. It was during the pendency of this application that the Applicants herein filed a 2nd Notice of Motion application dated 3rd June 2021 brought under similar provisions of the law in their Application dated 9th October, 2019 seeking the following orders: -

(1) Spent

(2) Spent

(3) **THAT this honourable court do issue the Applicant with the necessary direction regarding the Ruling pending on the application dated 9th October, 2019;**

(4) **THAT the applicant be granted leave to submit oral and written arguments in this application;**

(5) **THAT this honourable court be pleased to issue such further order (s) as may deem just; and**

(6) **THAT the costs of this application be provided.**

14. The application is premised on the grounds contained in the supporting affidavit.

15. The Application is supported by the affidavit of Sanare Ole Kariankei, the 2nd applicant herein sworn on 3rd June, 2021 on his own behalf and on behalf of the 1st Applicant herein, Nabaro Kariankei, in which he avers that sometime in the year 2006, the 1st respondent together with the 3rd respondent jointly connived and fraudulently caused the cancellation of parcel of land number CIS MARA/OLOLULUNGA/3890 and further caused registration of two parcel of land CIS MARA/OLOLULUNGA/12222 and CIS MARA/OLOLULUNGA/12223 each measuring 5 acres and registered in the names of the 1st Respondent and the deceased respectively.

16. That sometime in the month of January, 2021 the 1st Respondent with her spouse took occupation of 5 acres of the suit land, tilled and planted claiming they were in occupation. That the applicants have always utilized the parcel of land namely CIS MARA/OLOLULUNGA/3890. That on 31st May, 2021 the 1st Respondent together with her spouse and one Oloshiro Kamoye evicted the Applicants from land parcel number CIS MARA/OLOLULUNGA/7859 which had been allocated to the 1st Applicant by her deceased father –Parmale Kamoye.

17. The applicants' eviction from land parcel number CIS MARA/OLOLULUNGA/7859 left them no option but to occupy land parcel number CIS MARA/OLOLULUNGA/3890.

18. The applicant further contends that the 1st respondent and her spouse together with Nina Kamoye have constantly been harassing them including arrests at the Narok Police Station on allegations of fraud where no prosecution has been preferred. It is on this basis that the applicants pray for a speedy dispensation of justice as the actions of the respondents' amount to infringement of their right to property. The applicants have annexed a copy of a complaint reported at the Ololulunga Police Station dated 21st May, 2021.

19. The application is opposed by the replying affidavit of Jane Wambui Kamoye, the 1st respondent herein sworn on 9th June, 2021 in which she contends that the current application is an attempt to have the court adjudicate the issue between the same parties on the same subject matter yet the same is contained in the Notice of Motion application dated 9th October, 2019 that is parcel number CIS MARA/OLOLULUNGA/3890 and which act is tantamount to trifling with the court process. The 1st respondent has reiterated the contents of her replying affidavit dated 24th February, 2019. The 1st respondent is of the view that the application is an abuse of the court process and the same ought to be dismissed with costs.

20. Considering that the applications are seeking somehow different prayers although arising out of the same suit, I will proceed to determine each application separately. Most notable in both applications, this court on 29th September, 2021 granted leave of 14 days to the respondents to file their replying affidavits and written submissions but the directive has not been complied with. Despite the same, this court will proceed to give its determination.

21. In the application dated 9th October, 2019 counsel for the applicants filed written submissions dated 10th September, 2021 in which they submit that the applicants are the legal administrators to the estate of the deceased. They have relied on the case of **Mrao –versus-First American Bank of Kenya Ltd & 2 Others (2003)KLR 125**. They have also relied on Section 26 (1) of the Land Registration Act, 2012. The applicants have also relied on the Birth and Death Registration Act to buttress the fact that the deceased passed on in the year 2003 and not 2007 as alleged by the 1st respondent. They have quoted forms 3,4 and 6 of the Birth and Death (Late Registration) Rules, 1971 and Section 21 of the said Act.

22. On whether the applicants stand to suffer irreparable loss that cannot be compensated by way of damages, counsel submits that the subdivision of land parcel number CIS MARA/OLOLULUNGA/3890 has hampered any possible occupation or development of the said parcel of land. They have cited the case of **Korari Agencies Ltd –versus-Epco builders Ltd (2013)eKLR and Joseph Siro Mosiomo –versus-**

23. On whether the 1st respondent is likely to suffer any loss, counsel submits that the 1st respondent do not stand to suffer any harm for the reason that there are no permanent developments done on land parcel number **CIS MARA/OLOLULUNGA/12222**. They relied on the case of **Virginia Edith Wambui –versus-Joash Ochieng Ougo, Civil Appeal No. 3 of 1987 (1987)eKLR**

24. In the application dated 3rd June, 2021 counsel for the applicants filed their written submissions dated 5th July, 2021 which submissions are similar to the application dated 9th October, 2021. Counsel has submitted on Article 43 (1) (c) of the Constitution on the Applicants rights to be free from hunger. That the actions of the 1st respondent and her allies to evict them from land parcel number **CIS MARA/OLOLULUNGA/7859** amount to gross violation of their rights as enshrined in Article 43 of the Constitution.

25. On whether the applicants are likely to suffer irreparable loss which cannot be compensated by damages, counsel has cited the case of **Kipchirchir Kogo –versus-Frank Kimeli Tenai (2018)eKLR** in which the court described irreparable injury to mean that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie is not itself sufficient. Counsel has relied on this case to demonstrate that the respondents do not reside on the suit land unlike the applicants and are therefore not likely to suffer harm as compared to the applicants. Counsel has also relied on the case of **Robert Mugo Wa Karanja –versus- Ecobank (Kenya) Ltd & Ano (2019)eKLR** that the importance of **Order 40 Rule 1** of the **Civil Procedure Rules**, requires proof by the applicant in order for the court to grant orders to preserve property that is in danger of being damaged, wasted or alienated.

26. I have analysed the application dated 9th October, 2019, the replying affidavit, the annexures and written submissions filed by counsel and the issue for determination is whether the applicants are entitled to grant of temporary injunction. **Order 40 Rule 1** of the **Civil Procedure Rules** provides a basis upon which a temporary injunction may issue and states:-

‘where in any suit it is proved by affidavit of otherwise-(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.’

27. In an application for an interlocutory injunction, the onus is on the applicant to satisfy the court that it should grant an injunction. In the case of **Giella –versus-Cassman Brown & Co. Ltd (1973)EA 358**, the court set out the principles for the grant of interlocutory injunctions which are:-

- (a) The plaintiff must establish that he has a prima facie case with high chances of success**
- (b) That the plaintiff would suffer irreparable loss that cannot be compensated by an award of damages; and**
- (c) If the court is in doubt, it will decide on a balance of convenience.**

28. In addition, an injunction is a discretionally remedy. As was held in **Kenleb Cons Ltd –versus-New Gatitu Service Station Ltd & anor**, **“to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”**

29. In the instant application, the applicants despite demonstrating that they are the legal administrators of the estate of the deceased, they have not satisfied the required legal principles of **Giella –versus-Cassman Brown & co. Ltd**. What the applicants have done is merely to state that they are the legal administrators of the estate of the deceased and that they are in occupation of the suit land. The burden was on the applicants to satisfy this court by leading evidence that they have a prima facie case and in this case that was not done. The applicants have also not demonstrated the loss they are likely to suffer and which cannot be compensated by way of damages. Even if this court was in doubt, it would still not agree with the applicants because a perusal of the sale agreement dated 2nd May, 2002 marked as exhibit ‘JWKL1’ on the execution page shows the 1st applicant appended his thumb print as a witness to the sale agreement.

30. I have also analysed the Notice of Motion application dated 3rd June, 2021, the replying affidavit, annexures and the written submissions filed by counsel. The issue for determination is whether the applicants are entitled to grant of temporary injunction. The principles regarding grant of temporary injunction are now well settled and at this stage, I will only reiterate what I have stated elsewhere in this ruling. In this instant case, the applicants have now introduced a different parcel of land being land parcel number **CIS MARA/OLOLULUNGA/7859**. The grounds relied upon are similar to that of the previous application in which I have already stated my opinion. I do agree with the 1st respondent that the issues raised in this application are similar to the issues raised in the application dated 9th October, 2019. It is trite law that a litigant will not be allowed to litigate a matter through filing an almost similar application when another application has been filed containing the same parties, same issues for determination and is pending determination before the same court. I find this to be an abuse of court process.

31. Arising from the above, I am of the view that the order that recommends itself for issuing is one of status quo. In the circumstances, I hereby direct that an order of status quo as at the time of filing this suit do issue pending the hearing and determination of the substantive suit. Costs of the two applications shall abide the outcome of the substantive suit.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 10TH DAY OF NOVEMBER, 2021.

MBOGO C.G

JUDGE

10TH NOVEMBER, 2021

IN THE PRESENCE OF: -

CA:CHUMA