



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAROK

ELC CASE NO. 36 OF 2020

ELIJAH OLE NANTEYA.....PLAINTIFF/APPLICANT

VERSUS

KIPAINOI SAYAGIE.....1ST DEFENDANT/RESPONDENT

DISTRICT LAND REGISTRAR, NAROK.....2ND DEFENDANT/RESPONDENT

RULING

1. The application before the court for determination is a Notice of Motion dated 18th October, 2020 expressed to be brought under Article 159 and 40 of the Constitution of Kenya, 2010, sections 1A, 1B, 3, 3A and 63(c) & e of the Civil Procedure Act, Order 40 Rules 1, 3, 4(1), Order 51 Rule 1, 3 and 13(2) of the Civil Procedure Rules, 2010, sections 18, 24, 25 & 26 of Land Registration Act, 2012. In that Application, the Plaintiff/Applicant is seeking the following orders from the court:

i) Spent;

ii) Spent;

iii) Pending the hearing and determination of this suit, this Honourable Court be pleased to make an order directed at the District Land Registrar Narok North/South to forbid all dealings or further registration of any entries in the register over CISMARA/MAJI MOTO/1582 and/or evicting the Applicant from a parcel of land otherwise known as CISMARA/MAJI MOTO/1582;

iv) That this Honourable Court makes such other orders or further relief that it may deem just and expedient to grant for the justice to be met in the circumstances; and

v) Costs of this application be borne by the Defendant/Respondent.

2. The grounds upon which the application is founded on are set out on the face of the motion and in the Supporting Affidavit of the Plaintiff/Applicant, Elijah Ole Nanteya sworn on 18th October, 2020. According to the Plaintiff/Applicant, prior to the filing of this suit, he was a bona fide member of Maji Moto Group Ranch which allotted to him parcel No 1582 later registered as CISMARA/MAJI MOTO/1582 (suit property). The Plaintiff/Applicant pleaded that upon his visit to the 2nd Defendant/Respondent's office to collect the title deed for the suit property, he learnt with shock that the 2nd Defendant/Respondent had registered and issued title documents in respect of the suit property to the 1st Defendant/Respondent.

3. The Plaintiff/Applicant contended that there are no adjudication records that informed the 2nd Defendant/Respondent to register and issue title documents of the suit property to the 1st Defendant/Respondent who he said was not a member of Maji Moto Group Ranch. It was the Plaintiff/Applicant's case that he was shown the suit property by the land adjudication committee whereafter he took possession thereof.

4. It was deposed by the Plaintiff/Applicant that he is in quiet and peaceful occupation of the suit property as the rightful owner, and that he has been in such occupation since inauguration and declaration of Maji Moto Adjudication Section/Group Ranch. He further contended that his quiet and peaceful occupation of the suit property has been recently interrupted by the 1st Defendant/Respondent who he accused of clandestinely and un-procedurally processing title documents to the suit property with the intent of dispossessing him (Plaintiff/Applicant).

5. The court was therefore told that unless it allows the application, the 1st Defendant/Respondent will continue with his illegal and unconstitutional actions to the detriment of the Plaintiff/Applicant. It was further contended that the Plaintiff/Applicant has a prima facie case, and that he is likely to suffer irreparable damage which the Defendants/Respondents cannot compensate in monetary terms.

6. The 1st Defendant/Respondent opposed the application vide a Replying Affidavit sworn on 25th November, 2020 wherein he deposed that he is the registered owner of the suit property having been issued with a certificate of title to the same on 14th April, 2014. It was his case that he acquired the title to the suit property after he replaced his deceased brother, Tatiya Ole Sayagie, who was a member of Maji Moto Group Ranch since his said brother was not married and had no children.
7. It was further deposed by the 1st Defendant/Respondent that his deceased brother was allotted the suit property by Maji Moto Group Ranch since their family had been residing thereon since the year 1998. The 1st Defendant/Respondent also pleaded that they had immensely developed the suit property so much so that the officials of Maji Moto Group Ranch saw it prudent that they should not be moved, thus, they swapped their parcel with that of the Plaintiff/Respondent. It was also stated that the 1st Defendant/Respondent had even buried his late brother and grandmother on the suit property.
8. The Plaintiff/Applicant was said to have always been aware of everything and that he never raised an objection to the swapping which was said to be a common practice in the Group Ranch. According to the 1st Defendant/Respondent, his brother died after the adjudication by Maji Moto Group Ranch had been concluded, hence his name did not appear in the register as having replaced his deceased brother. It was therefore his case that he replaced his deceased brother, and that he did not disinherit the Plaintiff/Applicant whom he stated has his share as a member of Maji Moto Group Ranch.
9. It was further pleaded that the Plaintiff/Applicant was never shown the suit property by Maji Moto Group Ranch as alleged since the 1st Defendant/Respondent have always been in occupation of the suit property from the year 1998, before the adjudication was done. The 1st Defendant/Respondent further deposed that the Plaintiff/Applicant violently took possession of the suit property in the year 2014 after forcefully evicting the 1st Defendant/Respondent and his family who opted to stay away fearing for their lives.
10. It is said that the area chief tried to resolve the conflict but was unsuccessful, thus, he reported it to the then District Commissioner. To the 1st Defendant/Respondent, the Plaintiff/Applicant is a trespasser and not the owner of the suit property as alleged.
11. The 1st Defendant/Respondent further contended that a certificate of title is conclusive evidence of ownership, and that the Plaintiff/Applicant's case is frivolous, vexatious and an abuse of court process and should thus be dismissed with costs.
12. In support of the application, the Plaintiff/Applicant filed his written submissions dated 8th July, 2021 wherein he contended that his case raises a prima facie case by virtue of the fact that the suit property was allocated to him, and that the Defendants/Respondents are intending to disposes him of the same.
13. The Plaintiff/Applicant further argued that he is likely to suffer irreparable harm having been deprived of his property illegally and the possibility of the property changing hands to defeat the cause of justice. It was also the Plaintiff/Applicant's contention that the balance of convenience is in favour of granting the injunctive order sought. It was also the Plaintiff/Applicant's submission that the mere fact of holding a title does not in itself limit the power of the court.
14. Reliance was placed on the cases of *Mrao vs First American Bank of Kenya Ltd & 2 Others [2003]eKLR*, *Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018]eKLR*, *Film Rover International Ltd & Others vs Common Film Sales Ltd (1986) 3 AER 772*, *Robert Mugo Wa Karanja vs EcoBank (Kenya) Limited & Another [2019]eKLR*, *Alkman vs Muchuki (1984) KLR 353*, *Kenleb Cons Ltd vs New Gatitu Service Station Ltd (1990)eKLR*, *Kenya National Highway Authority vs Shalien Massod Mughal & 5 Others [2017]eKLR* and the case of *Alberta Mae Gacci vs Attorney General & 4 Others [2006]eKLR*.
15. The 1st Defendant/Respondent submitted through his written submission dated 9th November, 2021 that the Plaintiff/Applicant is required to meet the threshold established in the Giella's case. To the 1st Defendant/Respondent, the Plaintiff/Applicant had not met the requirements established therein.
16. It was the 1st Defendant/Respondent's submission that he holds a title to the suit property which had not been challenged by the Plaintiff/Applicant as having been acquired unprocedurally. Further, it was contended that the Plaintiff/Applicant had not established that he will suffer irreparable loss and damage if the injunctive orders are not granted.
17. Having forcefully evicted the 1st Defendant/Respondent from the suit property, it was contended that the Plaintiff/Applicant cannot obtain an equitable remedy while he has committed an illegal act. According to the 1st Defendant/Respondent, the remedies sought by the Plaintiff/Applicant should be denied.
18. **The 1st Defendant/Respondent relied on the cases of Giella vs Cassman Brown & Co. Ltd (1973) EA 358, and the case of Holman vs Johnson (1775) 1 Cowp 341.**
19. Having considered the Notice of Motion application by the Plaintiff/Applicant and the material in support thereof including the submissions as well as the 1st Defendant/Respondent's response thereto and the submissions in reply, the following substantive issues arise for determination by the court:

i) Whether the Plaintiff/Applicant has made out a case for the issuance of the orders sought; and

ii) Whether the application is merited under the circumstances.

(I) WHETHER THE PLAINTIFF HAS MADE OUT A CASE FOR THE ISSUANCE OF THE ORDERS SOUGHT:

20. The principles the court applies when asked to consider an application for grant of interlocutory injunctions are now well settled by the leading and often cited case of *Giella vs Cassman Brown & Co. Ltd.(1973)EA358* For an application seeking the grant of interlocutory injunctions to succeed, the Applicant is required to prove the following:

i) **Existence of a prima facie case with a probability of success** – an applicant must present before the court sufficient evidence to persuade the court that they have a prima facie case with a probability of success. In the Court of Appeal case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others/2003)eKLR*, a prima facie case was defined by the court as follows: **“In civil cases it is 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.”**

Further, in the Mrao case above, the Court of Appeal further opined that: **“...a prima facie case 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 the Applicant's case upon trial...”**

In this case, it is the Plaintiff/Applicant's case that he is the owner of the suit property having been allotted the same by Maji Moto Group Ranch which he said he was a member of. He accused the 1st Defendant/Respondent of unprocedurally acquiring the title documents to the suit property. He further contended that he has been in occupation of the suit property before its adjudication. It was therefore the Plaintiff's/Applicant's case that his quiet and peaceful occupation of the suit property has been recently interrupted by the 1st Defendant/Respondent who he accused of clandestinely and un-procedurally processing title documents to the suit property with the intent of dispossessing him.

On his part, the 1st Defendant/Respondent denied the allegation that the Plaintiff/Respondent is the owner of the suit property. He argued that his deceased brother was allotted the suit property by Maji Moto Group Ranch since their family had been residing thereon from the year 1998. The 1st Defendant/Respondent also pleaded that they had immensely developed the suit property so much so that the officials of Maji Moto Group Ranch saw it prudent that they should not be moved, thus, they swapped their parcel with that of the Plaintiff/Respondent. It was also stated that the 1st Defendant/Respondent had even buried his late brother and grandmother on the suit property. The 1st Defendant/Respondent further deposed that the Plaintiff/Applicant violently took possession of the suit property in the year 2014 after forcefully evicting the 1st Defendant/Respondent and his family who opted to stay away fearing for their lives.

There is no dispute that the Plaintiff/Applicant is currently in occupation of the suit property. Based on the material on record, there is nothing to suggest that the suit property is under any kind of immediate threat as would waste it hence defeating the course of justice. It is therefore apparent to the court that the Plaintiff/Applicant has not established a prima facie case as would warrant granting of the orders sought.

ii) **That the Applicant is likely to suffer irreparable loss and damage if the orders sought are not granted** – the Black's Law Dictionary (9th Ed) defines irreparable loss as an injury which cannot be remedied by an award of monetary damages.

In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi)* the Court of Appeal held as follows with regard to Irreparable loss and damage:

“ On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury.

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.”

Having shown that the Plaintiff/Applicant is in occupation of the suit property and that the suit property is not in any kind of immediate threat of being wasted, the court holds the view that there is equally no evidence that the Plaintiff/Applicant is likely to suffer irreparable injury if the orders sought are not granted.

iii) The balance of convenience

Having failed to satisfy the preceding requirements, the balance of convenience in this case will ultimately tilt in favor of **DECLINING** the orders sought by the Plaintiff/Applicant.

21. In the above cited case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi)(supra)* the Court of Appeal explained further that all the three conditions established in *Giella's* case are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

22. With the above in mind, I find that the Plaintiff/Applicant's application is not merited under the circumstances. The same is hereby dismissed with costs to the 1st Defendant/Respondent.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 14TH DAY OF DECEMBER, 2021.

MBOGO C.G,

JUDGE

14/12/2021

IN THE PRESENCE OF:

T.CHUMA:CA