



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT KAPSABET

ENVIRONMENT AND LAND CIVIL CASE NO.122 OF 2021

(FORMERLY ELDORET ELC CIVIL CASE NO ELC 41. OF 2020)

SINGA HAM EDAMBO.....1ST PLAINTIFF/APPLICANT

(Also joined as Legal Representative of the

Estate of Wilson Omoke Odambo)

AGGREY OYAVO EDAMBO.....2ND PLAINTIFF/APPLICANT

ALBERT MADETE EDAMBO.....3RD PLAINTIFF/APPLICANT

VERSUS

EGLYNE CHEPCHIRCHIR CHOGE.....1ST DEFENDANT/RESPONDENT

MIRRIAM ARUM CHOGE.....2ND DEFENDANT/RESPONDENT

CHRISTINE CHOGE.....3RD DEFENDANT/RESPONDENT

JOSEPH ANG'ANG'A.....4TH DEFENDANT/RESPONDENT

(Sued as Administrators and Legal Representatives

of the Estate Kiptum Choge (Deceased)

V.K. LAMU.....5TH DEFENDANT/RESPONDENT

NANDI COUNTY LAND REGISTRAR.....6TH DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....7TH DEFENDANT/RESPONDENT

RULING

1.This Ruling relates to the Notice of motion application filed by the Applicant seeking injunctive orders against the Respondents. The orders sought are interalia that;

1. Spent

2. Spent

3. A temporary order of injunction do issue to remain in force until the date of interpartes hearing, restraining, the defendants/respondents personally and through their agents servant workers, and who ever else may be acting on their behalf, from interfering with the plaintiffs/applicants access to possession of and use of the suit land parcel being NANDI/KAPKETER/279 or relying on the false green card (land register) to lay any claim to the suit land as representatives of the estate of the late Simeon Kiptum Choge or any in any other capacity or interfering with the plaintiffs/applicants rights to the suit land in any other manner whatsoever.

4. *The orders of injunction once issued be extended after the interpartes hearing and/or remain in force until the final determination of this application*
5. *The orders of injunction be further extended and/or remain in force until this suit is finally determined.*
6. *Copies of the orders once granted be served on the OCS Kobujoi Police Station to provide security to the Plaintiffs /applicants if so requested to ensure compliance with the orders herein*
7. *Costs of the Application be recovered from the defendants/respondents.*

2.The Application is brought on grounds on the face thereof and the supporting affidavit of SINGA HAM EDAMBO and annexures thereto. The Application is opposed by the replying affidavits of the 1-4 Defendants /Respondents. The 1st,3rd and 4th Defendants concur and reiterate the depositions of the 2nd Defendant Mirriam Arum Choge. Parties took directions to file written submissions on the Application.

APPLICANT'S CASE

3. The Applicant's argue that the suit property, to wit, NANDI/KAPKETER/279 is registered in their names as the absolute properties and have annexed a copy of the green card as well as a copy of the title. The copy of the title reveals that the Applicants were registered proprietors on 9.11.2012. the said information is equally captured in the green card which further reveals that on 22.1.02 as entry no 1. the suit property was registered in the name of one Eli Edambo Kamidi and on the same day a restriction was registered by the Chief Land Register restricting dealings with the title until the Appeals before the minister are finalized as entry no. 2

4.The Applicants argue that they obtained the ownership of the suit property through a succession cause no.58 of 2004 before the High court in Kisumu. And that the orders for removal of the restriction was issued after they filed in the High court in Kisumu a Miscellaneous Civil Application no. 260 of 2009. The copies of the Certificate of Confirmation as well as the order issued in Kisumu High Court Miscellaneous Civil Application Number N160/2009 are exhibited as annexures.

5. The Applicants argue that a parallel green card which they describe as a forgery was created by the collusion of the defendants and that they got to learn the same at Kobujoi police station where they went to report the defendants who had resisted their attempts to fence the property. They now seek the injunctive orders as above.

6. It is the Applicants submission that this is a case of parallel registers and they ought to be granted the orders as existence of a parallel register is prima facie indicator of possible fraud. In support of this position they have placed reliance on the High court decision in ***Simion Nyoro Nguji vs John Baptisa Irungu Kariuki and Another 2018(Eklr)***.

7. The Applicant's further place reliance on the decision in ***AVID Development Limited vs Blue horizon Properties Limited and 2 others 2021 eklr*** in support of the fact that the Courts of law cannot protect a title or register where the defendants acted fraudulently.

RESPONDENTS CASE

8. The Respondents oppose the application and have filed a replying affidavit by the 1st to 4th Respondents. The affidavits of the 1st,3rd, and 4th Respondents, all seem to agree with the Affidavit of the 2nd Respondent.

9. It is the Respondent's case that even though the land was registered in the name of the Eli Edambo Kamidi the said registration was erroneous as the adjudication process had not been completed.

10. It is the Respondents' case that even though the Late Elly Edambo Kamidi was registered as the owner when the green card was opened on 22.01.2001, that on the same said date the Registrar registered a Restriction as they was appending appeal that had been lodged by the late Choge to the Minister , and that the said appeal was subsequently resolved in favour of the late Choge hence the green card ought to have been corrected then to reflect that position and since it wasn't done the land registrar has now administratively corrected the error.

11. They further argue that the subsequent transfer by transmission to the plaintiff's was a nullity as the adjudication process had not been completed in that the Ministers decision on appeal had not been factored in.

12. The Respondents argue that the Applicants created the illegality themselves and that they cannot benefit from the illegality, that the applications is overtaken by events as the Respondents are in occupation of the suit property, the respondents thus pray that the application be dismissed.

ANALYSIS AND DETERMINATION.

13. The reliefs sought by the Applicants in prayer 3 is hybrid in nature as a limb of the prayer has been expressed to be in the nature of temporary prohibitory injunctions. However, with the submission by the Respondent's that the they are in occupation of the suit property, the other limb is basically seeking for temporary mandatory injunctions in their spirit leaving the court with the question; Can the orders sought by the Applicant be granted at this stage.

14. At the interlocutory stage the court is called upon to inquire onto certain facts without making any determination and/or finding thereon. As observed in the preceding paragraph the substantive prayer 3 of the Application is hybrid in nature; as it seeks to restrain the Respondents from interfering with the access to, possession of and use of the suit property making it a prayer for a temporary mandatory injunction as the

Respondents are in possession of the suit property; on the other hand it seeks to restrain the Respondents from relying on the false green card to lay any claim making it a prayer for a temporary prohibitory injunction as indeed if the Respondent is laying any claim on the suit property, it would enable the Respondents by virtue of such a claim to dispose off the suit property.

15. Thus in answer to the question posed earlier on as to whether the Applicants can be granted the said reliefs, the court observes that the Applicants own title has been challenged in the Counterclaim by the Respondents on account that the Registration of the suit property in the name of Elly Edambo Kamidi was done before the conclusion of the adjudication process, it follows therefore that the Applicants have not established a prima facie case so as to be entitled to the grant of the orders sought in line with the principles in ***Giella vs Cassman Brown***.

16. As the orders sought is hybrid in nature; In applying the principles in granting of a temporary mandatory injunction , the same ought to be granted in clear cases as was held in the case of ***Lucy Wangui Gachara vs Minudi Okemba Lore 2015 ekr*** where the Court of Appeal noted that the special circumstances that would be incline the court to grant a mandatory injunction at the interlocutory stage would include those involving simple acts that could easily be reversed or remedied should the court find otherwise after trial. Noting then that the Applicants own title is in challenge, then this is not the clearest cases to grant the temporary mandatory injunction as sought.

17. Having found that the applicant has not established a prima facie case with probability of success as well as this being not the clearest case to grant a temporary mandatory injunction the application is therefore denied. Whereas the application and the orders sought therein have been disallowed; in order to safeguard and preserve the suit property against the possibility of transfer by the Respondents, the court invokes rule 28(K) of the Practice directions issued vide Gazette Notice 5178 OF 2014 and orders the Parties herein to maintain the status quo.

18. For avoidance of doubt the Respondent continue being in possession of the suit property but they are prohibited from selling, transferring and/or subdividing the suit property till hearing and determination of this suit.

19. The court makes no award as to costs of the application.

20. Orders accordingly.

DATED AT KAPSABET THIS 9TH DAY OF DECEMBER 2021.

JUSTICE M. N. MWANYALE,

JUDGE OF THE ENVIRONMENT AND LAND COURT.