**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**E.L.C NO 68 OF 2018 (O.S)**

**RUTH CHEROTICH ELIJAH**

**DAVID KIPRONO LANGAT (Suing as a representative of the Estate of**

**ELIJAH KIPKURUI CHERUIYOT).....APPLICANTS**

**VERSUS**

**ESTHER CHEROTICH LANG'AT.....1ST RESPONDENT**

**BETTY CHEBET.....2ND RESPONDENT**

**LAND REGISTRAR, KERICHO.....3RD DEFENDANT**

**THE ATTORNEY GENERAL.....4TH RESPONDENT**

**LETSHEGO KENYA LIMITED.....5TH RESPONDENT**

**RULING**

1. The application before me for determination is a motion on notice dated 29th August, 2018 and filed on 30th August, 2018. It is brought under Section 26 of the Land Registration Act, Order 37 Rule 8 and Order 51 Rule 1 of the Civil Procedure Rules and, though Order 40 of Civil Procedure Rules which covers temporary or interlocutory injunctions is not invoked, the application is essentially one for temporary or interlocutory injunctive orders. The applicants – **RUTH CHEROTICH ELIJAH** and **DAVID KIPRONO LANGAT** – have brought the main suit as legal representatives of the late **ELIJAH KIPKURUI CHERUIYOT** who is said to have been the owner of land parcel **NO KERICHO/KABARTEGA/340**.

2. The 1st respondent – **ESTHER CHEROTICH LANGAT** – is accused of fraudulently transferring the land to herself aided mainly by 3rd respondent – LAND REGISTRAR KERICHO - and 4th Respondent – **THE ATTORNEY GENERAL**. She then subdivided the land and used one of the resultant parcels – **KERICHO/KABARTEGAN/1394** – to facilitate the second respondent **– BETTY CHEBET** – to obtain a loan of 5,000,000/= from fifth respondent – **LETSHEGO KENYA LIMITED**. The 2nd respondent defaulted in repayment of the loan and the fifth respondent moved to sell the charged property. The applicants got to know of it and filed this suit. They aver that they are beneficiaries of the estate of the late **ELIJAH KIPKURUI CHERUIYOT** and the land intended to be sold forms part of that estate, hence they stand to loose.

3. According to the applicants, the 1st respondent transferred the land to herself without a proper grant from succession court and proceeded to subdivide it, in effect creating land parcel **NO KERICHO/KABARTEGAN/1394**. The grant she allegedly used, said to have emanated from **KERICHO HC SUCC CAUSE NO 39/1997**, involved parties who are total strangers to the applicants; certainly people who are not members of their families. The 1st respondent therefore had no valid or good title to pass on to anybody or use in the manner she did. In the suit, the applicants want the subdivision that resulted in creation of parcel no. 1394 declared null and void while the land register should be rectified to remove the 1st respondent's name and revert parcel no. 1394 to the original number 340.

4. In the application at hand, the following prayers are made:

**Prayer 1: Spent**

**Prayer 2: Spent**

**Prayer 3: That an injunction do issue against the 5th respondent restraining it by itself, its agents, and/or servants from disposing, alienating, selling or in any manner whatsoever dealing with the land known as KERICHO/KABARTEGAN/1394 pending the hearing and determination of the suit**

**Prayer 4: Spent**

**Prayer 5: That costs of the application be provided for.**

I think it is clear that of the five (5) prayers originally put in the application it is only two – prayers 3 and 5 – that are for consideration at this stage.

5. The 1st and 2nd respondents responded to the application vide a replying affidavit dated 19th October, 2018 and filed on 22nd October, 2018. In the response, there is denial of allegations of fraud and misrepresentation. The 1st respondent said she is the only surviving widow of the late **James Kipkurui Langat** who was her husband and who also owned land parcel NO KERICHO/KABARTEGAN/340. She filed for Letters of Administration in respect of her late husband's estate and got them. Parcel No 340 was part of that estate and she got it transferred to herself before subdividing it and allowing one of the resultant parcels – parcel No 1394 – to be charged to 5th respondent. She said that the Succession Cause she filed, though bearing the same number as that mentioned by the applicants, was a different one, with totally different details and parties and with the requisite grant issued on a different date.

6. Further, the 1st respondent said that the applicants have not challenged the Succession Cause filed by her. She said they have not demonstrated fraud and that she and her family have been living on the land since 1995.

7. The 5th respondent filed its response on 22nd October, 2018. The issues raised by the applicants were said to lack merit, are false, and also foreign to this respondent. The 5th respondent said that parcel No 340 is unknown to it and that parcel No 1394 was properly charged to it and was accepted as security after conducting due diligence. The application was said to be brought in bad faith, the existence of the loan facility having been there for a long time, while the application is being brought belatedly when rights of the 5th respondent to sell it have accrued.

8. The applicants were said not to have shown a prima facie case as they seek to preserve land, parcel No 340, which is unknown to the 5th respondent. Neither is irreparable harm demonstrated as required by the law, while damages are said to be clearly ascertainable and quantifiable should the need arise. The 5th respondent also deposed that it risks losing its money advanced to the 2nd respondent on the strength of 1st respondent's title. There is default in payment and the arrears stand at Kshs. 3,415,018.70 as at 12th June, 2018 and the accruing interest may push the amount owing to a level that outstrips the value of the contested property. The court was urged to dismiss the application.

9. The 3rd and 4th respondent didn't respond to the application. Their response is not all that crucial as the application mainly seems directed at the 5th respondent.

10. The application was canvassed by way of written submissions. The applicants submissions were filed on 20th November, 2019. The applicants submitted, interalia, there is need to issue injunctive orders in order to preserve the property until the suit is determined since sale or disposal before then might render the orders sought nugatory.

11. A prima facie case was said to be shown as the 1st respondent lacked capacity to transfer or subdivide the land as she had not taken out letters of Administration in respect of the estate of the late **ELIJAH KIPKURUI CHERUIYOT** or even her late husband – **JAMES KIPKURUI LANGAT**. Her transactions were said to have been fraudulent. Equally, irreparable loss that damages cannot recompense can arise from the same fraud as the applicants stand to loose land that they are entitled to. The balance of convenience was said also to favour the applicants as they have demonstrated that they will suffer if the application is not allowed.

12. To drive the message home, the applicants sought succor in the cases of **GIELA VS CASSMAN BROWN & CO. LTD (1973) EA 358, ROBERT MUGO WA KARANJA VS ECO BANK KENYA LIMITED & ANOTHER (2019) eklr**, and **PAUL GITONGA WANJAMA VS GATHUTHI TEA FACTORY COMPANY LIMITED & 2 OTHERS (2016) eklr,** among others.

13. The 1st and 2nd respondents filed their submissions on 11th September, 2019. The 1st respondent was said to have obtained title legally and procedurally through a properly filed succession cause in which she, and not strangers, was involved. She explained that the land belonged to the late **ELIJAH KIPKURUI CHERUIYOT** as alleged by the applicants but it was transferred to her late husband, whom she succeeded. She said that she obtained title and the benefits afforded by Section 26 (1) of Land Registration Act to a registered proprietor therefore accrue to her in full measure.

14. The applicants were faulted for merely making allegations they didn't prove. The 1st respondent denied fraud and/or forgery and submitted that she got her title legally. She could therefore charge it as she did or transact as she pleased. The applicants were also said to be caught up by the statute of limitation as the land changed hands long ago. To her late husband, it was transferred in 1995 and it was subsequently transmitted to her in 2003 after the death of her husband. The tort of fraud alleged by the applicants has a limitation period of three years, meaning that the applicants should have taken action within three years after the transfer to her late husband or within three years after she became the owner of the land.

15. These respondents also took the position that the applicant's case should be a succession claim. The succession cause filed by the 1st respondent was also said not to be challenged. The two respondents sought to give weight to their arguments by citing the cases of **VIJAY**

**MORJARIA VS NANSING H MADHUSINGH DARBAR & ANOTHER (2000) eKLR, NDOLO VS NDOLO (2008) IKLR (G&F) 742, KINYANJUI KAMAU VS GEORGE KAMAU NJOROGE (2015) eKLR and JAREO IQBAL ABDULRAHMAN & ANOTHER VS BENARD ALRED WEKESA SAMU & ANOTHER: CACA NO 11 OF 2001**.

16. The 5th respondent filed its submissions on 17th October, 2019 and gave a summation of the case. It then delineated the issues for determination in line with the threshold set in Giela's case (ante), which involve establishing a prima facie case with probability of success, demonstrating irreparable harm not compensable with damages, and considering the balance of convenience where the first two requirements are doubtable.

17. The applicants were said not to have shown a prima facie case as they have not demonstrated a good claim to the charged land. The 1st respondent was said to have a superior claim by dint of her demonstrated registration as owner. The applicants' allegations of fraud were said to lack the requisite weight as they do not fall within the tenents envisaged by Section 26(1) of the Land Registration Act. The tenents require, interalia, that the registered owner be shown to be complicit in the alleged fraud. On its part, the 5th respondent submitted that it conducted due diligence before accepting the property as security. Its interests therefore ought to be protected and should not be defeated on mere allegations by the applicants.

18. On the issue of irreparable harm, the plaintiffs were said not to have demonstrated ***"the extent and nature of the injury they are likely to suffer if the orders sought are not granted".*** Finally, the balance of convenience was said to favour dismissal of the application as the 5th respondent stands to suffer more if the application is allowed.

19. I have had a look into the matter as filed. I have considered the application, the responses made, and the rival submissions. The applicants case is founded on the tort of fraud. And the alleged fraud is captured succinctly in the originating summons (see ground C) thus: **"The 1st Respondent fraudulently procured the title to L.R NO KERICHO/KABARTEGAN/340 in her name and later subdivided it giving way to a new title L.R KERICHO/KABARTEGAN/1394."** The alleged fraud was said to consist in either transferring the land without first doing succession or using fake succession papers to transfer it.

20. The particulars of the alleged fraud however are not given and this is a blot on the applicants case as filed. The law clearly requires – see Order 10 Rule 2(a) of Civil Procedure Rules, 2010 – that such particulars be given. To further emphasise fraud, the applicants made heavy weather of the alleged fact that the succession papers used by the 1st respondent were fake or false. The 1st respondent however responded and availed papers which, though bearing the same case number as those availed by the applicants, show that she possibly went to court and obtained the requisite grant. And the papers show that her late husband was the owner of the land and when she succeeded him, she subdivided the land, in the result creating parcel No 1394.

21. Given the scenario, it becomes difficult for the court to buy the applicants allegations of fraud at this stage. Maybe they will prove it later in the case but at this stage, nope. There is a real possibility that the 1st respondent did not use fake succession papers as alleged.

22. A further look at the applicants' case reveals another weakness. The weakness is to be found in some of the prayers made. Prayer 4 is particularly instructive in this regard. Prayer 4 is as follows:

> **"That the subsequent subdivision of KERICHO/KABARTEGAN/340 to produce KERICHO/KABARTEGAN/1394 in the name of ESTHER CHEROTICH LANGAT be declared null and void."**

Question is: Since a subdivision necessarily gives rise to two or more parcels of land, how can the court declare it null and void without knowing the fate or ownership of the other parcels that resulted from subdivision? If, for instance, the other parcels are owned by other people, will the court not be condemning them unheard if it declares the subdivision null and void? And even if it is the 1st respondent who owns the other parcels, is it not clear that the applicants are not contesting the ownership of these parcels?

23. One could raise the same observations regarding prayer 2, which seeks nullification of title for parcel No 1394 and a reversion to parcel No 340. Parcel No 340 was much bigger than parcel No 1394. How can parcel No 1394 revert to parcel No 340 while other parcels resulting from the subdivision are not included? I raise all these issues, first, to show that the applicants case as of now is not well thought through and, second, for the applicants to take action going forward regarding the weaknesses already pointed out. But it's also useful to point out that a case with such weaknesses is not one that can be said to have good prospects of success. I cannot therefore say that a prima facie case is established.

24. There is also another crucial factor which the court cannot overlook. The factor is this: The application as filed is essentially against the 5th respondent. The restraining order sought is targeted at this party. Crucially, none of the allegations of fraud made by the applicants is attributed to this party. Yet if the orders sought are granted, this party will bear the brunt of the consequences arising from wrongs not committed by it. I think the process of justice would be unfair were it to turn a blind eye to this obvious reality. It would be wrong in my view to make the 5th respondent carry the cross of others.

25. I also note that the applicants have not given an undertaking to pay damages. They have come rather late to interfere with an arrangement already existing between different parties. Knowing that they are outsiders to that arrangement, they seek to interfere with it without giving a corresponding undertaking to compensate the other parties if it ultimately turns out that they are wrong. **In GATI VS BARCLAYS BANK (K) LTD (2001) KLR 525**, the court held, interalia, that an undertaking to pay damages is one of the criteria for granting an injunction and where none has been given an injunction cannot issue. In fact, in a matter like this one where the amount of money involved is not small, I would insist that the applicants demonstrate on balance their means to pay the damages. I say this because the 5th defendant itself is a going concern and I do not very much doubt its ability to pay damages. The applicants means are unknown. What would happen if they are men of straw?

26. Now turning to the threshold set in Giela's case (supra), I have already said that the applicants case at this stage seems weak. I wouldn't say that a prima facie case with good probability of success is made out. I wouldn't also say that the likely harm to the applicants is irreparable. The value of the land can be quantified in monetary terms and the applicants can be compensated. They are not shown to be living on the land and cannot therefore claim sentimental attachment to it. Besides, the copies of green cards availed by them show that parcel number 340 has been charged to various banks at different times in its history. This shows that long before the 5th respondent came into the picture, that land has been potentially eligible for the kind of sale that the 5th respondent is now intent on undertaking. But the more crucial consideration here is that prima facie, you don't grant an injunction where damages are an adequate remedy.

27. And given my sentiments regarding the place of 5th respondent in relation to the alleged fraud in this case, I am persuaded that the balance of convenience in this matter tilts in its favour. I would hold a different view if the 5th respondent was shown to have been involved in blameworthy conduct. That however is not the scenario here. The 5th respondent seems to have undertaken due diligence before giving the loan.

28. The upshot, when all is considered, is that the application under consideration has no merits. I therefore dismiss it with costs.

**Dated, signed and delivered at Kericho this 23rd day of January, 2020.**

**…....**

**A. K. KANIARU**

**JUDGE**