



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 322 OF 2018

LINDA CHEPKORIR RUTO.....1ST PLAINTIFF

MUNYAO SILA.....2ND PLAINTIFF

VERSUS

SALLY CHERUTICH.....1ST DEFENDANT

PETER ONDANDE.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE NAKURU DISTRICT LAND REGISTRAR4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. By plaint filed on 17th December 2018, the plaintiffs contend that they are the registered proprietors of a leasehold title in respect of the parcel of land known as Nakuru Municipality/Block 23/728 situate within Nakuru Town (the suit property) by virtue of a certificate of lease issued to them on 2nd December 2010 and that they have been in quiet and exclusive possession of it since the year 2010. They further aver that the 1st defendant purports to have a title to the suit property and that the 2nd defendant purports to be in the process of purchasing it from the 1st defendant. That the 1st defendant’s purported title was issued through fraud and/or misrepresentation of the 1st to 4th defendants. The plaintiffs therefore seek judgment against the defendants jointly and severally for a declaration that they are the genuine proprietors of the suit property, nullification of the purported title held by the 1st defendant alongside any records held by the 3rd and 4th defendants in connection therewith, reconstruction and restoration of the genuine land parcel file and the register containing the plaintiffs’ records, a permanent injunction restraining the 1st and 2nd defendants from interfering with and/or dealing with the suit property as well as general damages and exemplary damages.

2. Together with the plaint, the plaintiffs also filed Notice of Motion dated 17th December 2018, which is the subject of this ruling. The following orders are sought in the application:

1. ...

2. ...

3. *THAT an injunction order do issue against the defendants/respondents jointly and or severally restraining them, their agents and/or servants or anyone acting under their instructions from alienating, selling, leasing, entering, being upon, encroaching and/or trespassing, interfering, wasting, constructing or howsoever dealing with the plaintiffs/applicants' land parcel NakuruMunicipality/Block23/728 pending the hearing and determination of this suit.*

4. *THAT the cost of this application be borne by the defendants/respondents in any event.*

3. The application is supported by an affidavit sworn by Munyao Sila, the 2nd plaintiff. He deposed that upon purchasing the suit property from the previous owner, it was transferred to them and a certificate of lease issued in their names on 2nd December 2010. That they took possession upon registration and have retained possession to date. He added that they fenced the property with barbed wire in the year 2011 and deposited stones and other building materials with a view to erecting a permanent stone wall. On 7th October 2018 while on a routine inspection of the property, they found two strangers digging a trench on it and on enquiring why they were doing so, the strangers stated that they had been instructed by the 2nd defendant to fence the suit property. That upon contacting the 2nd defendant he arrived with leases and certificate of lease purporting to show that the suit property was owned by the 1st defendant from whom he claimed to have purchased it. He added that he believes that the title in the name of the 1st defendant was procured irregularly and fraudulently by the defendants since among others the lease and certificate of lease in the name of the 1st defendant show that they were issued to her on 9th August 2018 and 6th September 2018 respectively, some 8 years after the plaintiffs became registered proprietors. He therefore urged the court to grant the orders sought.

4. The 1st and 2nd defendants opposed the application through two replying affidavits: one sworn by the 1st defendant and the other by the 2nd defendant. The 2nd defendant that the registered proprietor of the suit property is the 1st defendant pursuant to a letter of allotment dated 8th February 1997, a lease dated 9th August 2018 and a certificate of lease dated 6th September 2018. He further stated that he purchased the property from the 1st defendant at a purchase price of KShs 2,500,000 through sale agreement dated 3rd September 2018 and that he has fully paid the purchase price to the 1st defendant who has given him filled transfer form ready for registration. He confirmed that he was in the process of fencing the property and added that the Chief Land Registrar had through letter dated 5th December 2018 confirmed that the plaintiffs' documents are not genuine.

5. The 1st defendant deposed that she is the registered owner of the property, that she supplied to the 2nd defendant the documents which he has relied on and that the 2nd defendant has fully paid her in accordance to the sale agreement.

6. The application was canvassed through written submissions. The applicants and the 1st and 2nd defendants filed submissions. Learned litigation counsel appearing for the 3rd to 5th defendants indicated to the court that the 3rd to 5th defendants do not oppose the application. They neither filed a replying affidavit nor submissions.

7. For the applicants it is submitted that their certificate of lease having been issued on 2nd December 2010 predates that of the 1st defendant and that in any case they have been in possession since 2010. It is further argued that the 3rd to 5th defendants cannot purport to create a new lease and issue a certificate of lease in respect of the suit property which has all along been owned by the plaintiffs and other owners before the plaintiffs. Accordingly, it is argued relying on the cases of **Mrao Limited vs First American Bank of Kenya Ltd [2003] KLR 125** and **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR** that the plaintiffs have a *prima facie* case and that irreparable loss will be occasioned to them if the orders sought are not granted.

8. The 1st and 2nd defendants argued that the 1st defendant is the registered proprietor and that the applicants have not demonstrated that the property was acquired illegally, unprocedurally or through a corrupt scheme as required by **section 26 (1) of the Land Registration Act**. It is further argued that the plaintiffs found the 2nd defendant's workmen on the land and that it cannot therefore be said that the plaintiffs had possession prior to 8th October 2018. Citing the case of **Airland Tours and Travel Ltd vs National Industrial Credit Bank, Nairobi (Milimani) High Court Civil, Case No. 1234 of 2002**, it is argued that the applicants have not demonstrated a *prima facie* case and that a finding that the applicants have a *prima facie* case will suggest that the court has prematurely determined that the applicants' title is valid as opposed to the 1st defendant's. Regarding the limb of irreparable damage, it is argued that the applicants will not suffer any such damage since they are not the owners of the suit property. In conclusion, the 1st and 2nd defendants urge the court to dismiss the application with costs.

9. I have considered the application, the affidavits and the submissions. The applicants seek an interlocutory injunction. To succeed, they must satisfy the test in **Giella -vs- Cassman Brown & Co. Ltd [1973] E.A 358**. They must establish a *prima facie* case with a probability of success. Even if they succeed on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants are expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

10. From the materials availed by the parties, it is apparent that the applicants have a Certificate of Lease showing that on 2nd December 2010 they were registered as proprietors of a 99 year lease in respect of the suit property with the term running from 1st February 1998. The applicants' certificate of lease was issued following a sale agreement dated 2nd July 2010 between them and Samuel Kiplangat Cheruiyot and a transfer registered on 22nd November 2010. Samuel Kiplangat Cheruiyot himself had a Certificate of Lease showing that he became registered proprietor on 5th July 2004. On the other hand, the 1st defendant equally has a Certificate of Lease showing that on 6th September 2018 she was registered as proprietor of a 99 year lease in respect of the suit property with the term running from 1st February 1997. Her certificate of lease arises from a lease dated 9th August 2018 and registered on 6th September 2018. In essence therefore, the applicants' certificate of lease is earlier in time.

11. Although the 1st defendant contends that she was issued with a letter of allotment dated 8th February 1997, a perusal of the said letter shows that it required her to accept the offer and pay KShs 18,235 within 30 days from 8th February 1997. She paid the said sum through banker's cheque dated 9th May 2018 and was issued with a receipt dated 9th July 2018. A letter of allotment is not title to land. The allottee has to follow it up, comply with all the conditions of the offer before title is issued. See **Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR**. Looked at from whatever perspective, the applicants have demonstrated an earlier and better claim to the suit property. The 2nd defendant's claim as a purchaser will ultimately depend on whether or not the 1st defendant was in a position to pass

valid title to him. Needless to state, the 1st and 2nd defendants may adduce evidence at the trial to show that they in fact have a better or prior claim but for purposes of an interlocutory injunction, I am required to determine whether on the face of it the applicants' case is more likely than not to ultimately succeed. See Nguruman Limited v Jan Bonde Nielsen & 2 Others (supra). In view of the foregoing, I am satisfied that the applicants have established a *prima facie* case with a probability of success.

12. The next question is whether the applicants will suffer irreparable damage. The applicants have argued that they have been in possession since 2010 and that irreparable loss will be occasioned to them if the orders sought are not granted. The 1st and 2nd defendants have on the other hand argued that the applicants have not established possession since the 2nd defendant was in possession as at 8th October 2018. Suffice it to state that while the applicants have given an account of possession from as far back as the year 2010, the 1st and 2nd defendants have not sufficiently explained their version of possession prior to 8th October 2018. Further, I note that the current status on possession as explained by the 2nd defendant in his affidavit is that the applicants have possession and have erected some structures on the property. Land is the most important factor of production, a precious possession and a very emotive issue in Kenya. See Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR. I do not think that in the circumstances of this case, damages would be an adequate remedy.

13. In view of the foregoing discourse, I am satisfied that the applicants have established a case for the orders sought. There is need to preserve the suit property pending hearing and determination of the suit as has been sought by the applicants.

14. I therefore make the following orders:

(a) An injunction is hereby issued restraining the defendants/respondents jointly and severally, their agents and/or servants or anyone acting under their instructions from alienating, selling, leasing, entering, being upon, encroaching and/or trespassing, interfering, wasting, constructing upon or howsoever dealing with the parcel of land known as Nakuru Municipality/Block 23/728 pending the hearing and determination of this suit.

(b) Costs of Notice of Motion dated 17th December 2018 shall be borne by the 1st and 2nd defendants.

15. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 30th day of April, 2020.

D. O. OHUNGO

JUDGE