



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

CONSTITUTIONAL PETITION NO. 3 OF 2019

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES
40 AND 47 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 22, 40 AND 64 OF
THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE LAND ACT

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

BETWEEN

PHILEMON MORARA APIEMI.....1ST PETITIONER

EDWIN ONDUSO APIEMI2ND PETITIONER

VERSUS

CHIEF LAND REGISTRAR.....1ST RESPONDENT

REGISTRAR OF LANDS

KAJIADO LANDS REGISTRY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

What is before Court for determination is the Petitioners' Notice of Motion application dated the 21st February, 2019 brought pursuant to Order 51 Rule 1 of the Civil Procedure Rules, Article 23 (3) (c) of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act. The Petitioners seek conservatory orders prohibiting the 1st and 2nd Respondents by themselves, their servants, officials, agents or employees from making any entries in respect to land parcel number Kajiado/ Kitengela/ 8206, hereinafter referred to as the 'suit land' and or interfering with any requisite registration documents/ records thereof or registering any instruments dealing with the suit land other than in favour of the Petitioners' herein pending the hearing as well as determination of the Petition.

The application is premised on the grounds on the face of it and the affidavit of 1st Petitioner Philemon Morara Apiemi where he deposes that on or about 20th December, 2000 together with the 2nd Petitioner, they entered into a Sale Agreement with one Patrick Kangethe Njuguna for the purchase of the suit land. He contends that they conducted a search at the Kajiado Lands Registry wherein it was confirmed that Patrick Kangethe Njuguna was owner of suit land. He claims in May 2012, they embarked on the transfer process to have the suit land registered in their names. He confirms they adhered to the due process necessary for the transfer of the suit land to wit: Obtaining requisite Consent from the Land Control Board; requisitioning for the valuation of the suit land for purposes of stamp duty from the Chief Valuer Department of Lands and paying the assessed stamp duty. He claims on 18th May, 2012, they lodged duly signed Transfer Form, Booking Forms and

Banking in Slips for Stamp Duty for purposes of registration. Further, they also paid the registration fees and awaited the completion of the said process by the 2nd Respondent. They aver that the 1st and 2nd Respondents have without lawful cause failed to execute their mandate to register suit land in their names. Further, they have never been informed of any reason for failure to process the registration.

The 2nd Respondent opposed the application and filed a replying affidavit sworn by Paul Tanui, the Land Registrar where he deposes that there is a pending caution on the suit land which brings to question how the said land was acquired by the Petitioners. He explains that that the suit land resulted from a subdivision of 4260 which was partitioned from 1967. Further, vide Civil Suit No. 159 of 1991 a Court had issued Orders restraining the Land Registrar from transferring the said land, and a restriction was later entered as the owner of the said land had died. He states that on the same date the restriction was removed vide a Ruling in Civil Suit No. 159 of 1991, the parcel was gifted to Patrick Kangethe Njuguna on 18th October, 1995. He avers that on 17th July, 2003, a caution was placed on the parcel of land by Jacob Muiro on the claims of being Administrator Purchaser. However, subdivision was done on 4260 which yielded 13 parcels including the suit land. He questions why the Petitioners have taken so long in the process of registering the transfer of title and the urgency the Petitioners have suddenly developed, 19 years after the said transaction commenced. He reiterates that the Petitioners filed this application as an afterthought and the process appears flawed.

The Petitioners filed their submissions but the Respondents failed to do so.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 21st February, 2019 including the parties' respective affidavits and Petitioners' submissions, at this juncture the only issue for determination is whether conservatory orders should issue against the 1st and 2nd Respondents prohibiting them from dealing with land parcel number Kajiado/ Kitengela/ 8206 pending the outcome of the Petition.

The Petitioners in their submissions claim they have proprietary and beneficial interest over the suit land and relied on the decision in **ELC 46 of 2013 Hannington Malingi Janji Vs Katana Pekeshe & 7 others** to support this argument. They submitted that they are entitled to the Orders sought and relied on the decisions of **Giella Vs Cassman Brown Co. Ltd (1973) EA 358; Naftali Ruthi Kinyua V Patrick Thuita Gachure (2015) eKLR; Bellamy Vs Sabine (1857) I De J 566 and Bernadette Wangare Muriu Vs National Social Security Fund Board of Trustees & 2 Others (2012) eKLR** in support of their averments.

In line with the first principle enshrined in the case of **Giella Vs Cassman Brown Co. Ltd (1973) EA 358** on whether the Petitioners have established a prima facie case. It is not in dispute that the suit land is registered in the name of Patrick Kangethe Njuguna who sold it to the Petitioners. From the documents annexed to the Petitioners' supporting affidavit which include the Sale Agreement; Consent of the Land Control Board; Transfer Form; and proof of Payment of Stamp Duty, it is clear that the Petitioners claim is not baseless. The 2nd Respondent has provided a history of the suit land and contended that a caution was registered thereon. However, since the registered owner is the one who entered into a Contract with the Petitioners for the sale of the suit land and has not controverted this averment, I opine that the Petitioners indeed have a proprietary interest over the suit land which should be safeguarded. In relying on the decisions of **Giella Vs Cassman Brown Co. Ltd (1973) EA 358 and Naftali Ruthi Kinyua Vs Patrick Thuita Gachure (2015) eKLR** and based on the facts before me, I find that the Petitioners have indeed established a prima facie case to warrant the conservatory orders prohibiting the Respondents from dealing with the suit land.

On the second principle as to whether the Petitioners stand to suffer irreparable loss which cannot be compensated by way of damages. The Petitioners furnished court with all the documentation to prove the process they adhered to, in the acquisition of the suit land from the registered owner but they are yet to receive a Certificate of Title in their names. The 2nd Respondent has questioned the duration they took to apply to be registered as the proprietors of the suit land. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that '**...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. 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.'**

Based on the facts before me and in relying on this decision, I find that the Petitioners claim is not speculative and they stand to suffer irreparable harm if their rights to the suit land are not safeguarded.

On the issue of balance of convenience, from the evidence presented by the parties, I am not in doubt that it is pertinent for the substratum of the suit to be preserved pending the outcome of the Petition.

It is against the foregoing that I find the application dated the 21st February, 2019 merited and will allow it.

Costs will be in the cause.

Dated signed and delivered via email this 21st Day of May, 2020

CHRISTINE OCHIENG

JUDGE