



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO 911 OF 2017

PATRICK KOINERY TUTUL.....PLAINTIFF

VERSUS

**RAINGOT SUIYANKA NOONCHIGENI (1ST ADMINISTRATION OF THE ESTATE OF
SUYIANKA OLOIBONI LENOOLIADAT).....1ST DEFENDANT**

**NAIRONI ENE SUIYANKA OLOIBONI (2ND ADMINISTRATOR OF THE ESTATE OF
SUYIANKA OLOIBONI LENOOLIADAT).....2ND DEFENDANT**

**KAJIADO COUNTY GOVERNMENT (SUCCESSOR TO THE
COUNTY COUNCIL OF OL KEJUADO).....3RD DEFENDANT**

SUSAN NAICHANU GITINKA.....4TH DEFENDANT

PHILIP SAMUEL ODERA.....5TH DEFENDANT

BIPIN JAYANTILAL KANJI PARMAR.....6TH DEFENDANT

MEETA HARILAL LALJI CHOHAM.....7TH DEFENDANT

THARA ORCHARDS LIMITED.....8TH DEFENDANT

CHRISTINE CHEBET TIRIONGO.....9TH DEFENDANT

PRESTON NGIGI MUKURIA.....10TH DEFENDANT

OTUMA SUIYANKA.....11TH DEFENDANT

OLOONTAKIUA INVESTMENT LTD.....12TH DEFENDANT

MOSES NAROK.....13TH DEFENDANT

SAIMON NTASIKOI NOONKANAS.....14TH DEFENDANT

DAVID MUKUI KARUNGU.....15TH DEFENDANT

FELISTAS WANGARI NJOROGE.....16TH DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion applications dated the 14th August, 2019 and 29th August, 2019 respectively. The Application dated the 14th August, 2019 is brought pursuant to Order 40 Rules 1, 2, 3, 4 and Order 51 of the Civil Procedure Rules, Section 3, 3(a) and 63 (e) of the Civil Procedure Act. The Applicant seeks orders restraining the Defendants by themselves, their agents, servants, employees or whomsoever claiming through them from trespassing into, claiming and/or interfering with the Plaintiff's possession, enjoyment or utilization of his property Kajiado/ Mailua/ 862 measuring 131.40 hectares pending further orders of the court or outcome of the suit. The Plaintiff further seeks a permanent injunction against the Defendants by themselves, their agents, servants, employees or whomsoever claiming through them from trespassing into, claiming and/or interfering with the Plaintiff's possession, enjoyment or utilization of his property Kajiado/ Mailua/ 862 measuring 131.40 hectares pending further orders of the court or outcome of the suit. Further, that a declaration that the Plaintiff is the sole and exclusive owner of the property known as Kajiado/ Mailua/ 862 measuring 131.40 hectares.

The application is premised on the grounds on the face of it and supported by the affidavit of PATRICK KOINERY TUTUI where he deposes that he is the owner of the original property known as Kajiado/ Mailua/ 862 measuring 131.4 hectares, hereinafter referred to as the 'suit land. He explains that the 1st and 2nd Defendants were appointed by the Court as the Administrators to the estate of Suyianka Oloiboni Lenooliadat who is the original seller to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Defendants respectively. He claims the 3rd Defendant colluded with the 1st and 2nd Defendants to subdivide the suit land to various portions enabling the 1st and 2nd Defendants to sell the said resultant subdivisions to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Defendants. He contends that vide a Certificate for Confirmation of Grant dated the 17th October, 1997 he was awarded a portion of Kajiado/ Mailua/ 376 measuring 131.40 hectares. He explains that the firm of messrs Agina & Associates Advocates and more specifically Mr. Ojwang Agina represented the Administrators and beneficiaries of the estate of Suyianka Oloiboni Lenooliadat and they raised no objection to him being granted his rightful share from the deceased estate. He further proceeds to explain the chronology of the dispute herein and how the 1st and 2nd Defendants failed to transfer his portion of land to him despite Orders issued to that effect. Further, that following the refusal by the Administrators to execute the transfer documents to enable him get his share of the deceased estate, the Deputy Registrar of the High Court proceeded to do so on 17th July, 2009. He enumerates that the Defendants jointly and severally have been fraudulent in their illegal as well as unlawful dealings with the suit land. He avers that on 16th October, 2017, messrs Prestige Management Valuers Limited presented a valuation report which indicated that the suit land is valued at Kshs. 112, 200,000/= exclusive of any developments thereon. He reiterates that the Defendants will not suffer any harm if the orders sought herein are granted.

The 2nd Defendant opposed the application and filed Grounds of Opposition on 28th August, 2019 where he states thus:

1. That the Plaintiff is not in occupation of any part of former LR No. Kajiado/ Mailua/ 862 hence it is an abuse of the process of this court to be asked to restrain the Respondents from allegedly interfering with her alleged peaceful possession.
2. That prayers 1, 2, 3, 4, 5, 6 and 7 does not lie at this interlocutory stage.
3. That the notice of motion is scandalous, frivolous and or vexatious.
4. That this motion is tailored to prejudice or delay the expeditious trial of the action
5. That the motion is an abuse of the process of the court.

As for the Application dated the 29th August, 2019, it is brought pursuant to Article 48, 50(1), 159 (2) (a) (d) and (e) of the Constitution as well as Order 13 Rule 2 and Order 51 of the Civil Procedure Rules including sections 1A, 1B, 3, 3A of the Civil Procedure Act. The Plaintiff seeks for judgement to be entered against the 1st Defendant on account of the express admissions as contained in paragraphs 1, 2 and 3 of the affidavit dated the 25th June, 2018. Further, that the 1st Defendant does pay for the costs of this Application. The Application is premised on the grounds on the face of it and the affidavit of PATRICK KOINERY TUTUI where he confirms that the 1st Defendant is an Administrator to the estate of Suyianka Oloiboni Lenooliadat. He deposes that vide a Certificate for Confirmation of Grant dated the 17th October, 1997 he was awarded a portion of Kajiado/ Mailua/ 376 measuring 131.40 hectares. He contends that as at the date of filing this suit, the Grant of Letters of Administration issued to the 1st and 2nd Defendants and Moombi Ene Suyianka Oloiboni had not been revoked by any court. He states that on examination of the green card to the parcel of land described as Kajiado/ Mailua/ 862 which is a subdivision of Kajiado/ Mailua/ 376, it reveals that Kajiado/ Mailua/ 862 was closed on subdivision on 4th June, 2009 during the pendency of the application dated 4th July, 2008 which he had filed a few days prior to a Court Order dated 30th June, 2009 and issued on 2nd July, 2009. He reiterates that via an affidavit dated the 25th June, 2018 and filed in court on the said date, the 1st Defendant made express admissions at paragraphs 1, 2 and 3 thereof by confirming being an Administrator to the estate of Suyianka Oloiboni deceased and that land parcel number Kajiado/ Mailua/ 862 validly belongs to the Plaintiff as per the Certificate of Confirmation of Grant issued on 17th October, 1997 in Succession Cause No. 454 of 1996.

The two applications were canvassed by way of written submissions but it is only the Applicant that filed his submissions. I further note that except for the 2nd Defendant, none of the Defendants opposed the two applications.

Analysis and Determination

Upon consideration of the two Notice of Motion applications dated the 14th August, 2019 and 29th August, 2019 including the supporting affidavit, Grounds of Opposition and Submissions, at this juncture, the following are the issues for determination:

- Whether the interim and mandatory injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.
- Whether judgement should be entered on admission as against the 1st Defendant.

As to whether the interim and mandatory injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

The Plaintiff submitted that he had made out a case for an interim and mandatory injunction in respect to the suit land. He relied on the cases of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125**; **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**; **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109**; **Nairobi Civil Appeal No. 194 of 2004 East African Development Bank V Hyundai Motors Kenya Limited**; **National Bank of Kenya Ltd & 2 Others V Samcon Ltd (2003) KLR 462**; **Jane Wambui Ngeru V Timothy Mwangi Ngeru (2015) eKLR**; **Abel Salim & 4 Others V SF Okongo & 2 Others (1976) eKLR** to buttress his arguments.

The Plaintiff claims to be a proprietor of the suit land having been allocated the same vide the aforementioned Certificate for Confirmation of Grant to the estate of Suyianka Oloiboni Lenooliadat dated the 17th October, 1997. He contends that the Defendants have proceeded to unlawfully deprive him of his land. Further, that the 1st and 2nd Defendants declined to honour the said Certificate of Confirmation of Grant where he was allocated the suit land and proceeded to unlawfully subdivide the same as well as sell the resultant subdivisions to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th including 16th Defendants respectively. The 1st Defendant admitted that the Plaintiff was indeed allocated the suit land vide the said Certificate for Confirmation of Grant. The 2nd Defendant insists the Plaintiff is not on the suit land hence not entitled to the orders sought.

In line with the principles on injunction enshrined in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** the Court will proceed to interrogate whether the Plaintiff has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I wish to make reference to the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** where the Court defined a prima facie case. In line with this definition, I note in the Certificate for Confirmation of Grant dated 17th October, 1997 which was annexed to the Plaintiff's application, he was included as a beneficiary to the estate of Suyianka Oloiboni Lenooliadat and awarded a portion of Kajiado/ Mailua/ 376 measuring 131.40 hectares. From the averments which were not controverted, the 1st and 2nd Defendants were appointed by the Court as the Administrators but failed to effect the transfer of his portion to him. They instead proceeded to subdivide the land and sold to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Defendants. I note it is only the 2nd Defendant who opposed the instant application and insisted the Plaintiff was not entitled to the orders sought since he was not in occupation of the suit land. It further emerged that following the refusal by the Administrators to execute the transfer documents to enable the Plaintiff get his share of the deceased estate, the Deputy Registrar of the High Court proceeded to do so on 17th July, 2009 but the Plaintiff was still unable to get a portion of the land as the Court had ordered. The 1st Defendant admitted that the Plaintiff was indeed entitled to a portion of Kajiado/ Mailua/ 376 measuring 131.40 hectares as per the Certificate for Confirmation of Grant. Based on the facts as presented and relying on the two cited decisions, I find that the Plaintiff has indeed established a prima facie case to warrant the grant of orders sought.

On the second principle as to whether the Plaintiff stands to suffer irreparable loss which cannot be compensated by way of damages. I note the 1st and 2nd Defendants failed to effect transfer to the Plaintiff of his portion of land and proceeded to subdivide it and sell to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Defendants. The Plaintiff did not indicate to court if he ever took possession of the suit land. The Plaintiff proceeded to engage the services of messrs Prestige Management Valuers Limited who valued the suit land at Kshs. 112, 200,000/= exclusive of any developments thereon. 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. 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.**'

Based on my analysis above and associating myself with this decision, I find that the Plaintiff's injury is not speculative as he will indeed suffer grave and irreparable injury if the injunctive reliefs are denied.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the suit land is not preserved pending the determination of the dispute herein, it will indeed be wasted away. In the circumstance, I find that the balance of convenience indeed tilts in favour of the Plaintiff.

On the issue of a mandatory injunction sought by the Applicant, I wish to make reference to the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** where the Court of Appeal held that, '**a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.**'

In the current scenario, the Plaintiff seeks a mandatory injunction as against the Defendants by themselves, their agents, servants, employees

or whomsoever claiming through them from trespassing into, claiming and/or interfering with the Plaintiff's possession, enjoyment or utilization of his property Kajiado/ Mailua/ 862 measuring 131.40 hectares pending the outcome of the suit. From the evidence before Court, the 1st and 2nd Defendants failed to effect transfer to the Plaintiff of his portion of land and proceeded to subdivide it and sold to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Defendants. I opine that since the suit land is in the hands of third parties, it would be pertinent for viva voce evidence to be adduced to enable the Court arrive at a proper determination of the dispute at hand. It is in these circumstances and in relying on the above cited judicial authority that I decline to grant the mandatory injunction at this juncture.

As to whether judgement should be entered on admission as against the 1st Defendant. Order 13 Rule 2 of the Civil Procedure Rules provides that: **' Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.'**

I note from the pleadings herein, the 1st Defendant expressly admitted at paragraphs 1, 2 and 3 of the affidavit dated the 25th June, 2018 that he is an Administrator to the estate of Suyianka Oloiboni deceased and that land parcel number Kajiado/ Mailua/ 862 validly belongs to the Plaintiff as per the Certificate of Confirmation of Grant issued on 17th October, 1997 vide Succession Cause No. 454 of 1996. I opine that this admission is unequivocal and clear. I note the said application was not opposed by any of the Defendants. It is against the foregoing that I proceed to enter judgement on admission as against the 1st Defendant.

In the circumstance, I find the Notice of Motion applications dated the 14th August, 2019 and 29th August, 2019 respectively merited. However, since the Plaintiff is staking a claim over the suit land, which has been subdivided and transferred to the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Defendants, and with the sanctity of the title being in dispute, I find that these are issues best determined at a full trial, I will decline to grant the orders as sought but will proceed to make the following order:

1. An inhibition order be and hereby issued directing the Land Registrar Kajiado to register the same as against land parcel number Kajiado/ Mailua/ 862 measuring 131.40 and any resultant subdivisions therefrom owned by the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th Defendants, of any dealings, lease, transfer or charge pending the determination of this suit.
2. Judgement on admission be and is hereby entered as against the 1st Defendant with costs to the Plaintiff.
3. The Plaintiff is awarded the Costs of the Notice of Motion applications dated the 14th August, 2019 and 29th August, 2019 respectively.

Dated signed and delivered via email this 13th Day of May, 2020.

CHRISTINE OCHIENG

JUDGE