



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC CIVIL CASE NO. 356 OF 2015

FLORENZIO KIVARA KOMBO.....PLAINTIFF

VERSUS

ESTHER MBANDI KAGINA.....1ST DEFENDANT/RESPONDENT

THE ASSISTANT COUNTY COMMISSIONER MBEERE

SOUTH DISTRICT2ND DEFENDANT/RESPONDENT

THE DISTRICT LAND ADJUDICATION OFFICER

MBEERE DISTRICT.....3RD DEFENDANT/RESPONDENT

THE CABINET SECRETARY FOR LANDS.....4TH DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

RULING

This is in respect to the plaintiff's Notice of Motion dated 10th December 2015 and filed on 11th December 2015 seeking the following orders:-

1. Spent

2. Spent

3. That the 1st defendant by herself, her agents, servants or anybody acting under her instructions be restrained from selling, alienating, transferring, charging, sub-dividing and/or in any other way dealing with the parcel No. MBEERE/MBITA/4258 pending the hearing and determination of this suit.

4. That an order of inhibition be issued inhibiting the registration of any dealings with land parcel No. MBEERE/MBITA/4257 and MBEERE/MBITA/4258 pending the hearing and determination of this suit.

5. That costs be provided for.

The application is based on the grounds set out therein and supported by the affidavit of the plaintiff **FLORENZIO KIVARA KOMBO**. Her case is that land parcels No. MBEERE/MBITA/4257 and MBEERE/MBITA/4258 (herein the suit land) are sub-divisions of land parcel No. MBEERE/MBITA/41 which belongs to the Estate of her late father **KOMBO MUNYIRI** (deceased). That the 1st defendant's late husband fraudulently, illegally and irregularly obtained registration of land parcel No. MBEERE/MBITA/41 and subsequently sub-divided it and registered land parcel No. MBEERE/MBITA/4257 in the names of the District Commissioner Mbeere South District and land parcel No. MBEERE/MBITA/4258 in the names of the 1st defendant who is now in the process of sub-dividing it with the intention of selling and/or transferring the resultant sub-divisions to other persons and if that is done, the Estate of the deceased will suffer great loss and damage.

The 1st defendant filed a replying affidavit in which she deponed, inter alia, that all disputes regarding land parcel No. MBEERE/MBITA/41 were determined during the land adjudication process and her late husband had denied selling the suit land to the deceased and even refunded the purchase price of Ksh. 1,700. An appeal to the Minister was dismissed vide Appeal Case No. 38 of 1999 and she and her late husband have since 1974 lived on the suit land and have no intention of sub-dividing it. She added further that the issues raised herein are res-judicata.

Submissions have been filed on the said application by the firm of **DUNCAN MUYODI & CO. Advocates** for the plaintiff and **MULWA ISIKA & MUTIA Advocates** for the 1st defendant.

I have considered the application, the rival affidavits and annexures thereto and the submissions by counsel.

The plaintiff seeks two substantive orders being:

(a) an order for temporary injunction.

(b) an order for inhibition.

The conditions for the grant of a temporary injunction are well settled. Firstly, the applicant must show a prima facie case with a probability of success. Secondly, a temporary injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. If the Court is in doubt, it will decide the application on the balance of convenience – **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** and also **E.A INDUSTRIES VS TRUFOODS 1972 E.A 420.**

A prima facie case on the other hand was defined by the Court of Appeal in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125** as follows:-

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

Being an equitable remedy, a temporary injunction will not be granted where it is shown that the applicant has approached the Court with unclean hands. Further, as was held in the case of **FILMS ROVER INTERNATIONAL LTD VERSUS CANNON FILM SALE LTD 1986 3 ALL E.R 772**, the Court while considering such an application should take the course that appears to carry the lower risk of injustice.

I have therefore considered the application for temporary injunction taking into account the above principles. It is not in doubt that the suit land is registered in the names of the 1st defendant and the District Commissioner Mbeere South as per the certificate of search. It is also clear that the original land parcel No. MBEERE/MBITA/41 was registered in the names of **SILAS KAGINA GICHONI** the 1st

defendant's late husband before being sub-divided into the suit land in 2011. The 1st defendant has deponed, and it has not been rebutted, that she and her late husband have lived on land parcel No. MBEERE/MBITA/4258 since 1974 and that she has no intention of selling, sub-dividing it or even shifting. Indeed no such evidence was placed before the Court. It is also clear from the record that the deceased had previously litigated over the original land parcel No. MBEERE/MBITA/41 but lost. For instance, in the **DISTRICT MAGISTRATE'S COURT SIAKAGO LAND CASE No. 48 of 1968**, he filed a suit against one **NDWIGA MUGAMBI** claiming to have bought the land at Ksh. 200 but his claim was dismissed. Then there was Minister's Appeal Case No. 38 of 1999 where on 3rd December 2009, it was ordered that the land be given to the deceased (represented by his wife the 1st defendant herein). It was further directed that the Government be apportioned 2 ½ acres while the rest would be given to the 1st defendant. A letter dated 11th January 2011 was thereafter written to the District Surveyor Embu by the Director of Land Adjudication and Settlement directing that new adjudication records and new numbers be issued for the resultant sub-divisions which are the suit land herein. As indicated above, the 1st defendant and her late husband have always been in possession of one portion of the suit land since 1974 while the 2nd defendant took possession of the other portion in 2011 after the appeal to the Minister was dismissed. The plaintiff is not in possession and from the material now before me, I am not persuaded that the plaintiff has shown a prima facie case with a probability of success as required in the **GIELLA** case (supra). And since the plaintiff has been unable to surmount the first hurdle in the **GIELLA** case (supra), it follows that her application for temporary injunction stands dismissed and there is no need to consider the other two grounds. This is because, as was held by the Court of Appeal in **NGURUMAN LTD VS JAN BONDE & TWO OTHERS C.A CIVIL APPEAL No. 21 of 2014:**

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration”

In the circumstances, the prayer for temporary injunction must be dismissed.

The plaintiff similarly seeks an order for inhibition. Such an order is issued pursuant to the provisions of **Section 68 (1) of the Land Registration Act** which states that:

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”

An order of inhibition is similar to a temporary injunction as it seeks to preserve the property in dispute pending the hearing and determination of the suit or until further orders. In considering whether or not to grant such an order, the Court will take into account several factors including:

- 1. Whether the applicant has good grounds for the grant of such a remedy.***
- 2. Whether the property is at risk of being alienated or transferred to the detriment of the applicant.***
- 3. Whether failure to grant the order would render the suit nugatory.***
- 4. The prejudice, if any, that will be caused to the other party.***
- 5. The conduct of the parties.***

From the material placed before me, I see no good grounds to grant the order of prohibition sought. One portion of the suit land is in the names of the 1st defendant who has been in possession thereof since 1974 and has deponed that she has no intention of selling or transferring it. The other portion is registered in the names of the District Commissioner Mbeere South District. No evidence has been placed before me that either the 1st defendant or the District Commissioner Mbeere South District have any intentions of alienating the suit land and in the circumstances, the issue of this suit being rendered nugatory does not arise. In any event, once the Minister rendered his decision in the Appeal Case No. 38 of 1999, that order

became final in terms of **Section 29 (1) of the Land Adjudication Act.**

In the circumstances therefore, I find no merit in the plaintiff's Notice of Motion dated 10th December 2015. The same is accordingly dismissed with costs to the 1st defendant.

B.N. OLAO

JUDGE

1ST FEBRUARY, 2017

Ruling dated, delivered and signed in open Court this 1st day of February 2017

Ms Kiragu for Mr. Muyodi for the Plaintiff present

No appearance for the Defendants.

B.N. OLAO

JUDGE

1ST FEBRUARY, 2017