REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT ELDORET

E&L NO. 120 OF 2019

BASHIR YUSUF.....1ST PLAINTIFF/APPLICANT

NOORDIN MALIM YUSUF.....2ND PLAINTIFF/APPLICANT

VERSUS

TALALEI KIPTENAI.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application dated 23rd October 2019 by the plaintiff/applicants seeking for the following orders:

> a) That an interim order of inhibition does issue inhibiting any further transaction over the defendant/Respondent's immovable property known as **ELDORET MUNICIPALITY BLOCK 21(KINGONGO)5517** pending the hearing inter partes and thereafter pending the hearing and determination of the suit.

The application was based on the annexed affidavit and supplementary affidavits by the applicants. Parties attempted negotiations but did not come up with a consent, therefore counsel agreed to canvass the application vide written submissions.

PLAINTIFF/APPLICANTS' SUBMISSIONS

Counsel submitted that the issues for determination are as to whether the applicants are deserving of the relief of interlocutory injunction as was established by the East African Court of Appeal in **GIELLA VS CASSMAN BROWN. & COMPANY LTD (1973) EA 358 (hereinafter known as the Giella case).** Counsel further cited the case of **NGURUMAN LIMITED VS IAN BONDE NIELSEN & 2 OTHER [2014] EKLR where** it was held as follows:

> *"In an interlocutory injunction application, the applicant has to satisfy the triple requirements. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."*

It was counsel's submission that the Respondent admits in paragraphs 5, 6 and 7 of the Replying Affidavit to the Plaintiffs' purchase and occupation of part of the parcel land. Further that from the annexures and the plaintiff/applicants 'supplementary affidavit, shows that the Defendant/ Respondent is the registered owner of **ELDORET MUNICIPALITY BLOCK 21 (KINGÓNGÓ) 5517.**

Ms Cheso , counsel for the applicants submitted that the Respondent in his own averments in the Replying Affidavit admitted in paragraph 5 that on 14th day of February 2002 the Applicants purchased **ELDORET MUNICIPALITY BLOCK 21(KINGONGO)** measuring 0.087Ha from him at a consideration of Kshs. 1,800.000/= which amount was paid in full and therefore the applicant was obliged to transfer the parcel of land to the applicants.

That the applicant took immediate possession and erected property worth 10,000,000/= in 2002 and thereafter created a 10-year lease over the suit property to Bakri International Company(k) Ltd. The applicants stated that sometimes in April, 2019, while conducting a search over the suit property, they learnt that their title had been cancelled and their land reverted back to the respondent. Further that **ELDORET MUNICIPALITY BLOCK 21(KINGONGO)** has undergone subdivision with the following resultants parcels: Eldoret MUNICIPALITY Block 21(Kingongo)5517 measuring 17.16 Ha and Eldoret MUNICIPALITY Block 21(Kingongo)5518 measuring 11.33 registered in the name of TERESA CHEBICHII RUTO.

Counsel submitted that **ELDORET MUNICIPALITY BLOCK 21(KINGONGO)2448** is found in **ELDORET MUNICIPALITY BLOCK 21(KINGONGO)5517** but the Respondent has refused to cause titles to be processed in favour of the applicants. That the Applicants performed their obligations as per the sale agreement and *prima facie* they are entitled to orders sought against the Respondent.

Ms Cheso counsel for the applicants relied on the case of **RIPPLES LTD VS. MUCUBA [1992] eKLR** quoted with approval by the court in **ABDULKADIR SHARIFF AVDIRAHIM VS. ECO BANK KENYA LIMITED & ANOTHER (2016) eKLR,** where it was stated that-

> *"It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party as that would be inequitable."*

Counsel further submitted that the fact that the Respondent has filed a review application as admitted in paragraph 13 of his Replying Affidavit does not oust this Honourable Court's jurisdiction to grant inhibition orders against the title No. **ELDORET MUNICIPALITY BLOCK 21(KINGONGO) 5517** measuring **17.16 Ha** pending the hearing and determination of the suit and the Respondent has not demonstrated how grant of orders shall occasion him prejudice. Counsel therefore urged the court to find that the applicants have established a prima facie case with a probability of success.

On the second issue as to whether the applicants will suffer irreparable harm if the order is not granted, counsel cited the case of **MACHARIA MWANGI MAINA AND OTHERS V DAVIDSON MWANGI [2014] eKLR** where the Court of Appeal observed that-

> *"This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; No man shall benefit from his own wrongdoing and equity detests unjust enrichment."*

Counsel further submitted that if the Respondent's title is left in his name, he might adversely deal with it either as a security to a loan, lease the same, and/or sell it therefore prejudicing the applicants 'interest in the property. Further Counsel urged the court to refer to annexure NMY9 which is a certificate of title at the encumbrance section that confirms that there is a lease for over KShs. 250, 000 for a period of 10 years which was issued by the Plaintiffs to Bakri International Energy who are running a Petrol Service Station on part the suit property. They would be adversely affected by any adverse dealings by the Respondent.

Counsel therefore urged the court to grant the orders as prayed and relied on the case of **NGURUMAN LTD VERSUS JAN BONDE NIELSEN (2014)** where the court had this to say about balance of convenience:

> *"It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted."*

RESPONDENT'S SUBMISSIONS

The respondent opposed the application vide a replying affidavit and stated that the applicants purchased **ELDORET MUNICIPALITY BLOCK 21 (KING'ONG'O**) measuring 0.087 Ha at a consideration of 1,800,000/= whereby a certificate of title to the property known as **ELDORET MUNICIPALITY BLOCK 21 (KING'ONG'O) 2448** measuring 0.087 Ha was issued to the applicants.

Counsel submitted that the applicants were given their certificate of title and the transaction was deemed as concluded hence the Respondent owes the applicants nothing and there is no claim against the respondent. Further that the Respondent is not aware of any new existing certificate of title and does not know where the land parcel as ELDORET MUNICIPALITY BLOCK 21 (KING'ONG'O) 2448 as claimed by the applicants now lies.

Counsel submitted that the issues for determination in an application for injunction are as were laid down in the case of GIELLA **VS. CASSMAN BROWN AND COMPANY LTD (197) EA 358**. That a party must satisfy the following that; -

a) He/she has a prima facie case with high chances of success.

b) He/she will suffer irreparable loss that cannot be compensated by an award of damages if injunction is not granted.

c) The balance of convenience tilts in his/her favour.

Counsel further submitted that the proper party to be sued was one Teresa Chebichii Ruto who as alleged by the applicants, caused a new subdivision to be effected as stated by the applicants, so that she can come and elaborate to the Court where the applicants land parcel now lies in the new titles issued as alleged.

Mr. Kitiwa counsel for the respondent submitted that the respondent was not part of the process of subdivisions and was never notified on the issuance of new titles hence the applicants have failed to establish a prima facie case against the respondent.

It was counsel's submission that the respondent through his replying affidavit stated that he has lodged an application for review of the Judgment issued in the Court of Appeal, **ELDORET CIVIL APPEAL NO. 88 OF 2016 on 7/3/2019** vide **ELDORET COURT OF APPEAL CIVIL APPLICATION NO 8 'A' OF 2019**. That in view of the pending application for review the defendant could not have participated in issuance of new titles as it would jeopardize his pending application

On whether the applicants will suffer irreparable harm counsel relied on the case of **SHADRACK KURIA KIMANI VS STEPHEN GITAU NG'ANG'A & ANOR (2017) eKLR,** where it was held that an applicant must show that irreparable loss will occur to him if an injunction is not granted and there is no other remedy open to him by which he can protect himself from the consequences of the apprehended loss. It was counsel's submission that the applicant has failed to demonstrate that he will suffer any loss.

Counsel therefore urged the court to dismiss the application with costs to the respondent as the balance of convenience tilts in favour of the respondent.

ANALYSIS AND DETERMINATION

The applicants seek for an order of inhibition and an order of injunction. Under Section 68. (1) of the Land Registration Act, Act No.3 of 2012, the court may make an order of 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 issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of a property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off.

The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.

Both parties agree to have entered into an agreement of sale of the suit land and that the said parcel of land was subsequently transferred to the applicants. From the submissions by both counsel it follows that no prejudice will be occasioned to the defendant/respondent if an order of inhibition is granted as prayed.

In the case of **FILMS ROVER INTERNATIONAL & OTHERS VS CANNON FILMS SALES LTD 1986 3 ALL E.R 772** , the principle that the Court should always take the course that carries the lower risk of injustice was enunciated. The court finds that the injustice that would be caused to the defendant/respondent if the plaintiff/applicants were granted the prayer of inhibition and later failed at the trial is lower than the injustice that would be caused to the plaintiff/applicants if the prayer for inhibition was dismissed and they succeed in proving their case. Balancing the two competing interests, the cause of justice will best be served if the order of inhibition is granted. An order of inhibition will not affect those rights but serve the greater interest by preserving the suit land while their proprietary interests are determined.

On the issue of grant of a temporary injunction, the principles of grant of temporary injunctions are well settled as per the Giella Casman Brown case. The court is guided by these principles and I need not reinvent the wheel.

The first principle that the applicants must prove is a prima facie case with a probability of success. It is on record from the documents filed and the sworn affidavits of both the applicants and the respondents that indeed the applicants entered into a transaction for the sale of the suit land. It is also not in dispute that the applicant paid the purchase price in full and was issued with a certificate of title. What is in dispute is that there were further subdivisions which allegedly affected the proprietary interest of the applicants as showed on the encumbrance section of the title.

In the case **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557** Bosire J (as he then was) held that:-

> *"to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction."*

The applicants have established that they have a proprietary right which ought to be protected by the court by way of an injunction. The respondent argue that they do not owe the applicants anything as the transaction was concluded and the applicants got their title. The question is, if the respondent thinks that the transaction was completed and they owe the applicants nothing, then the protection of the applicants 'rights vide the issuance of a temporary injunction will not prejudice the respondent in anyway. The respondent will be a bystander when the applicants enforce their rights.

The respondent referred to an application for review of a Court of Appeal Judgement vide **ELDORET COURT OF APPEAL CIVIL APPLICATION NO 8 'A' OF 2019** which is pending before the court. This alone shows that the respondent will not be a bystander but a party who is enmeshed in the case of enforcement of the applicants 'rights. How will that review affect the applicants? The court was also urged not to grant the orders for injunction on the ground that there is a pending application for review. That application remains as such because there are no stay orders of these proceedings. It is not enough to mention that there is an application for review of a judgment in another court without applying that the parallel proceedings be stayed.

Further it is trite that in an application for a temporary injunction the court should not delve in substantive issues and make finally concluded views of the dispute before hearing oral evidence as was held in the case of **Agip(K)Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999.**

It is also trite that no injunction should be granted in cases where the applicant can be compensated by way of damages as was held in the case of **Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322,** The court had this to say:-

> *"However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them".*

In the case of **Alternative Media Limited vs. Safaricom Limited (2004) eKLR**, the court held as follows:

> "*The second principle established by the Giella case for the grant of an interlocutory injunction is that the Plaintiff will suffer irreparable harm which would not be compensated in damages. Considering this very point in the case of Mureithi vs City Council of Nairobi (1979) LLR 12 Madan JA (as he then was) cited with approval the speech of Lord Diplock in the case of American Cynamid Co. vs Ethicon (1975) 1 ALLER 504 at page 506 where he said:- the object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial… if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff's claim appeared to be at that stage."*

From the pleadings and the submissions by counsel I find that the applicants have established that they will suffer irreparable harm whereby compensation by way of damages would not be adequate.

On the issue on whose favour the balance of convenience lies, I will rely on the case of **R.J.R. MACDONALD V ATTORNEY GENERAL (1941) 1 S.C.R 311** where the Court held that-

> "*in determining the balance of convenience, the court will look at which party will suffer greater harm from granting or refusing the remedy pending a decision on merits; that a court needs to weigh relative strengths of the parties' case."*

I have considered the pleading, the submission by counsel and the relevant judicial authorities and come to the conclusion that the plaintiff/applicants have met the threshold for grant of temporary injunction and grant of orders of inhibition against the suit title of land. The application is hereby allowed as prayed.

DATED and **DELIVERED** at **ELDORET** this **23rd DAY** OF **JUNE, 2020**

M. A. ODENY

JUDGE