



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI LAW COURTS
ELC NO. 514 OF 2013

MOSES C MUHIA NJOROGE.....1ST PLAINTIFF
JACINTA N. MBURU.....2ND PLAINTIFF
JAMES N.KINYANJUI.....3RD PLAINTIFF

=VERSUS=

JANE W.LESALOI.....1ST DEFENDANT
JOSEPH G KAGIKA.....2ND DEFENDANT
ANDRIAN MURIITHI.....3RD DEFENDANT
JOHN G. KIOI.....4TH DEFENDANT
THE DISTRICT LAND SURVEYOR, [KAJIADO].....5TH DEFENDANT
THE DISTRICT LAND REGISTRAR,[KAJIADO].....6TH DEFENDANT

RULING

The Plaintiffs/Applicant have brought this Notice of Motion dated 30th April, 2013 under **Order 40, Rules 1(a) 2(1) (2); Order 51 Rule 1 and 2, and 51(a) of the Civil Procedure Rules, Section 1B, 3A and , 63(e) of the Civil Procedure Act; Sections 21(1), 24, 25 and 26(1) Land Registration Act, 2012, Article 40(1) of the Constitution of Kenya, 2010** and all the enabling provisions of Law seeking for Orders that:-

1. Spent
2. Spent
3. Spent
4. Spent
5. That pending the hearing and determination of this suit, a temporary injunction do issue restraining the 1st, 2nd and 4th Defendants by themselves ,their agents, employees and /or servants from entering, occupying, digging trenches, demolishing perimeter boundaries, constructing ,destroying crops, disposing, offering for sale, selling or otherwise committing any and all forms of waste upon and/or dealing with all those four parcels of

Land otherwise known as Title No.Ngong/Ngong/59356
TitleNo.Ngong/Ngong59355andTitleNo.Ngong/Ngong/59372(OriginalTitleNo.Ngong/Ngong48197).

6. That pending the hearing and determination of this suit, a temporary injunction do issue restraining the 5th Defendant/the (District Land Surveyor Kajiado) his subordinates, servants and/or agents from entering upon, surveying, re-surveying, mutating or otherwise dealing prejudicially with all those four parcels of land otherwise known as Title Ngong/Ngong 59356, Title No.Ngong/Ngong 59355 and Title No.Ngong/Ngong/59372 (Original Title No.Ngong/Ngong/48197).
7. That pending the hearing and determination of this suit, a temporary injunction do issue restraining the 6th Defendant (the District Land Registrar, Kajiado) his subordinates, servants and/or agents from effecting any alternation, cancellations or in any manner dealing with the Registers if titles in respect of all those four parcels of land otherwise known as Title Ngong/Ngong 59356, TitleNo.Ngong/Ngong59355andTitleNo.Ngong/Ngong/ 59372(Original Title No.Ngong/Ngong No.48197)
8. That a mandatory injunction do issue directed against the Defendants, their servants and/or agents to forthwith move out of all those parcels of land otherwise known as **Title No.Ngong/Ngong/59356; Title No.Ngong/Ngong 59355 and Title No.Ngong/Ngong 59352** and in default thereof the OCS Ngong Police Station be and is hereby authorized, directed and commanded to eject and remove them out of the said parcels of land .
9. Costs of this Motion be borne by the Defendants.
10. That the Honourable Court be pleased to issue any other relief or direction as it deems just and expedient.

The application was premised on various grounds among them being that;

- i. That the Plaintiffs' are the duly registered owners of all those parcels of land known as **Title No. Ngong/Ngong/59356, Title No.Ngong/Ngong/59355 and Title No.Ngong/Ngong 59372** respectively.
- ii. That the Plaintiffs Titles were derived out of the subdivision of **Title No. Ngong/Ngong/48197** owned by the 1st Defendant and which Title was closed upon subdivision and issuance of Title Deeds to the plaintiffs.
- iii. That the 2nd, 3rd and 4th Defendants have without color of right whatsoever forcibly entered the plaintiffs' cited parcels of land, demolished the perimeter fence, destroyed the plaintiffs' crops thereon and are in the process of committing various forms of waste including digging trenches and undertaking developments seemingly of permanent nature.
- iv. The 5th and 6th Defendants in purported execution of expired decrees purportedly emanating from District Land Tribunal are intent on re-subdividing the 1st Defendants Title **No.Ngong/Ngong/48197** which is currently non-existence.
- v. The actions of the 5th and 6th Defendants are untenable in law since the Plaintiffs titles are **indefeasible** and the effect of 5th and 6th Defendants if allowed to proceed would create 'Parallel Titles' to those of the Plaintiffs which would amount to legal absurdity and this would be illegal unlawful and contrary to law and the constitution.
- vi. Unless this application is heard urgently and preservative orders granted to protect the properties, the Plaintiffs shall suffer irreparably.

The application was also supported by the annexed affidavits of **Moses Clement Muhia Njoroge, Jacinta Nyambura Mburu, and James Ndungu Kinyanjui** the Plaintiffs herein. The application was vehemently opposed by the 3rd and 4th Defendants. The 1st defendant also filed her Replying Affidavit but did not oppose the application. The 1st Defendant averred that the land parcel known as **Ngong/Ngong 8801** was registered in the name of one **Joseph Lemichor Ole Kango** as per annexure **JWL1**. That the said Ole Kango passed on intestate on 28th February, 2007 but while he was still alive, the 2nd and 4th Defendants purported to have executed sale agreements dating back to 6th September 1989 with one **Job Lesaloi Ole Kango** the late husband to the 1st Defendant but who lacked capacity to transact on a property which belonged to someone else. That based on the said sale agreements, the said buyers filed suits at the Land Dispute Tribunal, seeking relief on ownership on what they had allegedly bought. The same is subject of Judicial Review application, being Machakos High Court, **Misc. Cases No. 14/2011** and **279/2011** respectively. She further averred that pursuant to the said review application there exists an order issued on 4th February, 2011 which operates as a **stay** of the **decree** emanating from an award of the Land Dispute Tribunal and any decision by the District land Surveyor to conduct any surveying works on the Land reference **Ngong/Ngong/48197** based on the aforesaid award as per annexed **JWL11**. Further, that the initial **LR No. Ngong/Ngong/8801** in which 2nd-4th Defendants purport to have entered into sale agreements was inherited and sub-divided into various portions held by various beneficiaries.

The 1st Defendant therefore averred that the plaintiffs lawfully obtained the Titles to their respective parcels of Land and are duly registered owners and the original title became absolute by virtue of various sub-divisions.

The 2nd Defendant herein, **Joseph Gathagu Kagika** entered appearance through the Law firm of **Tobiko, Njoroge & Co. Advocates** on 15/3/2013. However the 2nd Defendant did not file a Replying affidavit. On 12/6/2013, M/s Sinkiany for the 2nd Defendant, informed the Court that the 2nd Defendant would not oppose the application. The 5th and 6th Defendants did not enter appearance and therefore the logical conclusion is that they did not oppose the application.

The 3rd and 4th Defendants opposed the Notice of Motion through a Replying Affidavit sworn by **Adrian Muriithi**, the 3rd Defendant with the authority of 4th Defendant **John Gitau Kioi** filed in Court on 11th June, 2013.

The 3rd Defendant averred that the mother Title herein was **Ngong/Ngong/8801** and upon subdivision of the Title, it gave rise to **Ngong/Ngong/48198**, which came into existence on 17/2/2013 and the same was issued in favour of **Jane Waithera Lesaloi**, the 1st Defendant herein. That a restriction had been placed on **Ngong/Ngong/48197**, prohibiting any dealings in the said parcel of land. There was a dispute at Kajiado North Land Dispute Tribunal. However, the transactions in respect of the 1st and 3rd plaintiffs were in August 2011 and January, 2011 during the pendency of the restrictions and the transactions in respect of 2nd plaintiff was in the year 2008 when **Ngong/Ngong/48197** had not come into existence and persisted during the restrictions mentioned as per the Green Card entries marked **AM3**. The Respondents further stated that the 1st Plaintiff paid the purchase price during the pendency of a court restriction on the title. That further, the 3rd Plaintiff paid the full purchase price in full knowledge of the Defendants' proprietary claim and also existence of the prohibition on the title and so consent to subdivide could not be obtained.

It was further deposed that the 3rd and 4th Defendants proprietary interests over **Ngong/Ngong/8801** was lawfully as moved into **Ngong/Ngong/48197** and pursuant to Kajiado North Land Dispute Tribunal awards and decrees issued by Kajiado SRM Court as evidenced by **AM4(a)&(b)**. Therefore, pursuant to the decrees mentioned above, the 3rd and 4th Respondents, applied for removal of the restriction so that the same could be subdivided in their favor. The 3rd Respondents applied for the appropriate Land Control Board consent which was granted on 22/1/2013. Having now secured the land

Control Board consent, the 3rd and 4th Respondent hired a surveyor to prepare the mutation forms but the 1st Defendant protested the exercise. The 3rd and 4th Respondents further averred that the Land Registrar, Kajiado also frustrated the process of surveying and preparation of Mutation forms. They further deposed that the plaintiffs are working in collusion with the 1st defendant and Deputy Land Registrar, Kajiado to defeat the interest of the 3rd and 4th defendants. The 3rd and 4th Defendants/Respondents prayed for dismissal of the Plaintiff's suit.

The parties herein consented to canvass the application by way of Written Submissions. The applicants filed their written submissions on 6/9/2013. The 3rd and 4th Defendants failed to file their Written Submissions by 28/10/2013 when the matter was set down for Ruling. I have however, considered all the pleadings and the Written Submissions and I make the following findings;

The plaintiffs/Applicants have sought for injunctive relief. They must therefore satisfy the principles set out in the case of **Giella Vs Cassman Brown and Co .Ltd (1973) EA 358**. Where the Court held that the applicant must show that :-

for grant of Interlocutory Injunction. These principles are:

- i. *The Plaintiff must establish that he has a prima facie case with high chances of success.*
- ii. *That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.*
- iii. *If the court is in doubt, it will decide on a balance of convenience.*

From the pleadings filed in Court, the Plaintiffs/Applicants each separately bought a parcel of land from the 1st Defendant. They now each have a Title Deed for their parcels of land as evidenced by the annexures. The 1st Defendant is the wife of the late **Job Lesaloi Ole Kango**, who was the son of **Joseph Lemichor Ole Kango**, the registered owner of **Ngong/Ngong 8801**. It was deposed by the 1st Defendant that the said **Ole Kengo** passed on 28/2/2007 but while he was still alive, **Lesaloi Ole Kango**(husband to 1st Defendant) purported to sell the land to 2nd- 4th Defendants vide Sale Agreements executed and dating back to 6th September, 1989. It was the evidence of 1st Defendant that her late husband had **no capacity** to sell land that belonged to someone else.

It is also evident that land Parcel **No. Ngong/Ngong/8801**, was subdivided and one of the resultant parcels of land was **Ngong/Ngong/48197** registered in the names of 1st Defendant. The 1st Defendant confirmed that she later sold the parcels of land to the Plaintiffs after sub-division of **Ngong/Ngong/48197**.

The Plaintiffs/applicants each got a parcel of land and Title Deeds were issued in their names. These are *Ngong/Ngong/59356, Ngong/Ngong 59355 and Ngong/Ngong/59372*. It was the evidence of the Plaintiffs/Applicants that the 3rd and 4th Defendants have encroached on the Plaintiffs properties.

It was the evidence of the 3rd and 4th Defendants that they have proprietary interests in Land Parcel **No. Ngong/Ngong/48197** and the resultants parcels of land. This was after the award of the Kajiado North land Disputes Tribunal which were made an order of Court on 4/1/2011 and 24/1/2011 by Kajiado Court. It was pursuant to the said Court Decree, that the District land Surveyor attempted to survey land Parcel No. **Ngong/Ngong/48197** as per annexures **AM 8b, AM 9 and AM 10**. However, it was evident from annexures **JWL 11**, filed by the 1st Defendant that the 1st Defendant filed a Judicial Review application in Machakos High Court and obtained an Order on 3/2/2011 to stay the Decrees of the Court issued by the SRM Court Kajiado. From the said Order and stay, the District land Surveyor could not implement the court Orders of 4/1/2011 and 24/1/2011 which adopted the Land District tribunal Awards. It is also evident that the plaintiffs herein have title deeds to these parcels of land as evident from the annexures **MCM3, JNM4 and JNK3**.

The 3rd and 4th Defendants allegedly bought their parcels of land from one **Lesaloi ole Kango**

who was not the registered owner of the **Ngong/Ngong/8801**.

From the above analysis of the facts before this Court, are the plaintiffs entitled to the orders sought?.From the principles stated in the case of **Giella Vs Cassman Brown**, the applicants, needed to establish that they have a prima facie case with probability of success. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125**, the Court of Appeal held that:-

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

From the available evidence and annexures herein, Land Parcel **NoNgong/Ngong/48197** was subdivided in the year 2013 and it gave rise to several parcels of land among them the land parcels owned by the plaintiffs herein. It is evident that the Plaintiffs/Applicants have Title Deeds to these parcels of land. Section 26(1) of the Land Registration Act 2012 provides that:-

“ The certificate of Title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima-facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge”.

The plaintiffs/applicants herein are the registered owner of the parcels of land in question. The 1st Defendant was the registered owner of **LR.No.Ngong/Ngong/48197** which was subdivided to give rise to the titles in dispute herein. There are sale agreements annexed to the affidavits of the Plaintiffs herein. The plaintiffs bought the parcels of land from the 1st Defendant. 1st Defendant inherited the land from the estate of one **Joseph Lemichor Ole Kango** the father to her late husband **Jacob Lesaloi Ole Kengo**. Though the 3rd and 4th Defendants alleged that they have proprietary interests over Land Parcel **No.Ngong/Ngong/48197**, having entered into sale agreements with the late, **Job Lesaloi Ole Kango**, those are issues to be interrogated during the full trial. However, the Plaintiffs/Applicants herein have established they have titles to these parcels of land. They have therefore established that they have a **prima-facie case** with high probability of success.

Secondly, the applicants must establish that they will suffer irreparable injury which would not adequately be compensated by an award of damages (**See EA Industries Vs Trufoods (1972 EA 420)**). Having considered the Replying Affidavit by the 3rd and 4th Defendant and annexures **AM8, AM9, and AM10**, it is evident that the District land Surveyor had attempted to implement the Court Orders issued on 4/1/2011 and 24/1/2011 respectively. The said orders were stayed by the Machakos High Court on 3/2/2011 vide **JWL**. However, there was eminent damage that the plaintiffs parcel of land might be subdivided and interfered with. The plaintiffs stand to lose what they allegedly bought from 1st Defendant. The Plaintiffs have developed their parcels of land and they have planted crops on them. The Plaintiffs/Applicants stands to suffer irreparable injury which might not be compensated by an award of damages.

There is no doubt that the plaintiffs /applicants hold Title Deeds to the parcels of land. The balance of convenience shifts in favour of the plaintiffs/Applicants (**See James Jamwa Ndeda Vs Dorine Alouch Oluoch, Kisumu high Court , Civil case No. 136 of 2007**).

In prayer No.8 , the applicants have sought for a **mandatory injunction**. I have considered all the facts of this case and have taken into account that granting of a mandatory injunction as an interlocutory relief is a very exceptional form of relief to grant but it can be granted (**See Canadian Pacific Railway Vs Rand (1949) 2KB 239 at 249**). I also refer to the case of **Locabail International Finance Ltd Vs Afro-Export (1988) ALL ER 901**, where the Court held that the principle governing the grant of Mandatory Injunction are as follows:-

“ 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 a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff mandatory Injunction will be granted on an interlocutory application”.

I find that this is a clear, straight forward case and I would not hesitate to issue the mandatory Injunction as prayed by the Plaintiffs/Applicants in prayer No.8 of their Notice of Motion.

Having now considered the Plaintiffs Notice of Motion dated 30/4/2013, and the annexures therein; I find that the plaintiffs/Applicants application is merited. I allow the said application entirely with costs to the Plaintiffs/Applicants to be borne by the 3rd, 4th, 5th and 6th Defendants herein

It is so ordered.

DATED and DELIVERED at Nairobi this 14th day of March, 2014

L.N. GACHERU

JUDGE

In the Presence of:-

M/s Kagiri holding brief for Mr.Njengo for the Plaintiffs/Applicants.

Mr.Nyakundi for 1st Defendant/Respondent

None appearance for 2nd, 3rd, 4th, 5th and 6th Defendants though notified.

Lukas: Court Clerk

L.N.GACHERU

JUDGE