



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 52 OF 2020

REDEEMED GOSPEL CHURCH.....PLAINTIFF

VERSUS

JOHN EGIELAN1ST DEFENDANT

WILLIAM ABOK.....INTERESTED PARTY

RULING

1. This ruling is in respect of an application dated **6th August 2020** brought by the plaintiff/applicant seeking the orders set out verbatim as follows:

(1) ...spent

(2) ...spent

(3) ...spent

(4) That this Honourable Court be pleased to issue orders of injunction restraining the defendant, his servants and or agents from selling, alienating, leasing out, transferring, encroaching on, trespassing on, constructing on, and in any manner whatsoever interfering with and or taking possession of parcel of land described as PLOT MEASURING 5 ACRES AT NAIWATORONG, KANAMKEMER within Lodwar town pending the hearing and final determination of this suit and or further orders of the court.

(5) That the OCS Lodwar police station to ensure compliance.

(6) That this court be pleased to grant any other order suitable in the circumstances.

(7) That the cost of the application be in the course.

2. The application is supported by an affidavit sworn on **6/8/2020** by one **Joshua Masika**, a pastor with the plaintiff where he averred that ; the plaintiff purchased and took possession of some land from the interested party after the area chief had confirmed the interested party as the rightful owner of the suit land; that in **2016** the interested party sued the defendant in **Kitale Petition No. 3 of 2016** where the applicant was an interested party over the same land and the court rendered its judgment pronouncing itself regarding the rights of the parties in relation to the said parcel of land.

3. The defendant filed a replying affidavit sworn by the defendant on **15/9/2017**. In his replying affidavit the defendant avers that the suit land is his as confirmed by the lands offices and not the interested party's; that the purported sale conducted between the plaintiff and the interested party in **2014** was *void ab initio* on account of non-compliance with the law; that the respondent and his extended family own the suit land as per the receipts and letters marked **JEE 1-6**; that the judgment in **Kitale Petition No. 3 of 2016** did not amount to a declaration of rights for either of the combatants but faulted a process and reasserted the jurisdiction of the court; that the roles of the chiefs in property matters are peripheral and cannot lend legitimacy to a flawed process like the one entered between the plaintiff and the respondent; that the respondent's registration as proprietor of the suit land among others in the disputed area confers on him the absolute ownership of that land together with all rights and privileges which cannot be defeated or affected unless by a lawful process such as a court order; that injunction is an equitable remedy that should not be granted to parties who approach the court with dirty hands and expect to benefit from equity.

4. The interested party did not file any response to the application.

5. This court then directed that the matter proceed by way of written submissions. The respondent filed his submissions on **2/10/2020** whereas a perusal of the record confirms that the other parties did not file theirs.

ANALYSIS AND DETERMINATION

6. From the application, the replying affidavit and the submissions provided above, I find that the main issues for determination in the instant suit is whether injunctive orders should be issued against the respondent.

7. The power exercised by the court in an application seeking interlocutory injunctive orders is discretionary. This discretion however should be exercised reasonably, judiciously and on sound legal principles. The discretion is guided by the principles established in the case of the **Giella -v- Cassman Brown & Co. Ltd (1973) EA 358** where the court must consider:

(1) Whether the applicant has demonstrated a prima facie case with a probability of success.

(2) Whether the applicant is likely to suffer irreparable harm if injunction is not granted.

(3) Where the balance of convenience tilts if the court is in doubt.

8. In this case the dispute is over the ownership of **PLOT MEASURING 5 ACRES AT NAIWATORONG, KANAMKEMER** in Lodwar. The plaintiff alleges that it owns the suit land having purchased the same vide a recognized and communal sale transaction from the interested party.

9. On his part, the defendant avers that neither the interested party nor his family has ever owned the suit land. The defendant maintains that he owns the land by virtue of being the head of the Egielan family and the custodian of the family land rights which are both historic and customary. The defendant avers that the Turkana County Government which is by law mandated to uphold, preserve and protect the community land rights in the county recognized his and his family's rights over the suit land and did issue him with a planning and survey confirmation letter over **NAIWATORONG BLOCK 2/091 MEASURING 0.0279 HECTARES** which comprises the suit land and that the said letter has not been recalled, cancelled or withdrawn.

10. In the case of **Mrao Ltd -v- First American Bank of Kenya Ltd (2003) eKLR**, the Court of Appeal stated that:

“... A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evident must show an infringement of a right and the probability of the Applicant's case upon trial....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 all explanation from the latter..... ”

11. In this case, both the plaintiff and the defendant claim ownership over the suit land. The main dispute is whether or not the interested party passed a good title to the plaintiff in the purported sale. This is an issue that can only be ascertained at the trial. It is therefore only fair that the *status quo* prevailing be maintained until a determination is made.

12. I therefore grant the injunction sought by the plaintiff to ensure that the *status quo* is maintained until the case is heard and determined.

Dated, signed and delivered at Kitale via electronic mail on this 5th day of November, 2020.

MWANGI NJORGE

JUDGE,

ELC,

KITALE.