



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 78 OF 2018

SIMON OLE JOSEPH.....PLAINTIFF

VERSUS

ALFRED SANKALE KARASHA.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 29th May, 2018 and filed on 31st May, 2018 brought pursuant to section 25 and 26 of the Land Registration Act, Section 3A of the Civil Procedure Act and Order 40 rule 1 & Order 51 of the Civil Procedure Rules. The Plaintiff seeks restraining orders against the Defendant in respect of land parcels number Ngong/ Ngong/ 92641 upto 92650 hereinafter referred to as the 'suit lands', pending the hearing and determination of the suit herein.

The application is premised on the grounds that the Plaintiff is the registered proprietor of the suit lands. The Defendant who is his biological son has lodged a caution against the suit lands, and yet he has no interest nor rights over them. The Defendant has no overriding interest over the suit lands and by lodging the caution, he is infringing on the Plaintiff's rights as enshrined in the Land Registration Act.

The application is supported by the affidavit of SIMON OLE JOSEPH where he reiterates his claim as stated above.

The Defendant ALFRED SANKALE KARASHA opposed the application and filed a replying affidavit where he avers that the pleadings filed by the Plaintiff are scandalous, vexatious, frivolous, ill intended, as well as concealed material facts and is an abuse of the court process. He contends that the Plaintiff has failed to disclose to the court the existence of a pending suit over the same subject matter and a Court Order dated the 22nd September, 2017 issued by Justice Angote, which has a direct consequence over this instant matter. He disputes the authenticity of the signatures herein. He insists the alleged subdivisions of land by the Plaintiff and the resultant title deeds were illegally, unprocedurally as well as wrongfully obtained despite the Court Order issued by Justice Angote that expressly directed the status quo to be maintained. He insists the alleged subdivisions are void ab initio and that the suit lands belong to the family and form part of matrimonial property between his father and late mother. Further, that he has resided on the suit lands with his family and is his home. He explains that he lodged a caution over the suit lands stating he had a beneficial interest as a Licensee, so as to forbid any untoward transaction from taking place perpetuated by the Plaintiff. He confirms having the following developments on the suit lands: two permanent houses; poultry house; four (4) permanent rental units; underground water tank; fully developed shamba with grown trees; pigsty and cow shed. He reiterates that the applicant has not demonstrated a prima facie case to warrant the orders of injunction sought.

The Defendant filed his submissions but the Plaintiff failed to do so.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 29th May, 2018 and filed on 31st May, 2018 including the supporting and replying affidavits as well as the submissions filed herein, the only issue for determination is whether the interim injunction sought by the Plaintiff should be granted pending the outcome of the suit.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In line with this principle, the Court will proceed to interrogate whether the applicant 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 note the Plaintiff is the proprietor of the suit lands which he subdivided despite the existence of an order of the court granted by Justice Angote on the 22nd September, 2017 vide the Machakos ELC Case No. 108 of 2014 (now Kajiado ELC 937 of 2017), which fact he has been controverted. The Defendant submits that the suit herein is hence res judicata. The Defendant contends that he has only known the suit lands as home and

undertook developments thereon and does not dispute that the same is owned by the Plaintiff, but insists he registered a caution against them to protect his interests as a licensee. Since there is no dispute as to the Plaintiff's ownership of the suit lands, I find that he has indeed established a prima facie case with a probability of success at the trial.

On the second principle as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. The Plaintiff claims he is the registered proprietor of the suit lands and the Defendant who is his biological son has lodged a caution against them, yet he has no interest nor rights over them and this is infringing on his rights as enshrined in the Land Registration Act. The Plaintiff however does not dispute that the Defendant resides thereon and has carried out developments on the suit land. In the **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, the Court provided that in seeking injunctive relief, speculative injury cannot suffice and there must be more than unfounded fear and the injury should be actual as well demonstrable that cannot be compensated by damages. In the current scenario, it is my considered view that the Plaintiff's injuries are speculative as he has failed to demonstrate the harm he will suffer if the injunctive orders he is seeking are denied.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the balance does not tilt in favour of any of them until proper evidence is adduced to enable the court make a determination of the matter.

Insofar as the Plaintiff as the registered proprietor of the suits lands is protected by section 25(1) of the Land Registration Act, but looking at the evidence presented by both parties, it is clear they all have legitimate claims over them, which claim can only be determined when the suit is set down for hearing and not at this interlocutory stage. It is against the foregoing that I will decline to grant the orders as sought but proceed to make the following orders:

1. The obtaining Status Quo be maintained and each party is to remain in possession of their respective parcels of land, pending the outcome of the suit.
2. The caution registered by the Defendant to remain in force pending the hearing and determination of the suit herein.
3. The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajjado this 4th February, 2019

CHRISTINE OCHIENG

JUDGE