



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 124 OF 2018

JOSPHAT KOLE DANIEL.....PLAINTIFF

VERSUS

NEUKIRCHENER MISSION (AIC CHURCH).....1ST DEFENDANT

TONY ESCH.....2ND DEFENDANT

DANSON BUYA MUNGATANA.....3RD DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated and filed herein on 1st April 2019. By the said application the Plaintiff Josphat Kole Daniel prays for orders as follows:-

3. That pending the hearing and determination of this suit, an injunction be issued restraining the Defendants by themselves, agents, servants and any other person claiming interest through them from burying the remains of the late Violet Mungatana or any of their relatives in the suit property identified as Plot No. 1154 Ngao belonging to the Plaintiff/Applicant herein.

4. That the OCS Garsen Police Station be directed to ensure compliance of the orders herein.

5. That the costs of the application be provided for.

2. The said application is supported by an affidavit sworn by the Plaintiff and is based on a number of grounds listed on the face thereof as follows:-

i) That the suit herein is all about ownership of a parcel of land now identified as Plot Number 115(sic) Ngao;

ii) That the 2nd Defendant/Respondent has now violently caused to be dug a grave in the suit property for purposes of burying the remains of his wife Violet Mungatana while the suit is still pending;

iii) That the suit property now identified as Plot No. 115 Ngao belongs to the Plaintiff as per the pleadings herein;

iv) That the dispute is over a small portion within the Plaintiff/Applicant's land measuring one acre;

v) That the Plaintiff/Applicant's family will highly be prejudiced if the remains of the late Violet Mungatana is laid to rest in his property;

vi) That the 2nd Defendant/Respondent family has got their own graveyard where his father is buried;

vii) That all the Plaintiff/Applicant's efforts to stop the 2nd Defendant/Respondent from such illegal acts have not been successful due to the fact that the 2nd Defendant/Respondent has turned so violent and rough against the Plaintiff;

viii) That unless the 2nd Defendant/Respondent is restrained by an order of this Court from burying the remains of the deceased, the 2nd Defendant/Respondent is determined to lay to rest the remains of the deceased in the Plaintiff/Applicant's property; and

ix) That the orders sought herein above do not prejudice the Defendant/Respondent in any manner whatsoever.

3. In a Replying Affidavit sworn and filed herein on 4th April 2019, the 3rd Defendant Danson Buya Mungatana opposes the grant of the orders sought herein. The 3rd Defendant characterises the pleadings filed by the Plaintiff as incurably defective and bad and urges this Court to proceed to dismiss the same. It is his case that the instant application is the product of confusion and a desperate attempt to create a non-existent case and hence the reference to the suit property as Plot No. 115 in certain prayers and as No. 1154 in other prayers before the Court. He further cites the reference to himself in the Plaint as the 3rd Defendant and in this application as the 2nd Defendant as evidence of the confusion.

4. The 3rd Defendant further avers that the suit as filed is time-barred as the Plaintiff seeks to nullify a contract entered into in the year 2002 more than 16 years after the same was executed. It is thus his case that the orders sought herein are incapable of issue.

5. The 3rd Defendant avers that they jointly bought the suit property with his wife the late Violet Mungatana. That his wife died on 25th March 2019 and is due for burial on Saturday 6th April 2019. It is his case that there has been much preparation and huge expense, involved in moving the body from Nairobi to Mombasa and that some family members have travelled from as far away as the USA to attend the burial. It is therefore his case that he stands to suffer greater prejudice if the orders sought herein are granted.

6. In addition to the Replying Affidavit, the 3rd Defendant has filed a Preliminary Objection dated 3rd April 2019 in which he attacks the basis of this suit and asserts that the same is time-barred, defective and sub-judice the same having been subject of proceedings before the defunct Land Disputes Tribunal. The said objection was canvassed as part of the 3rd Defendant's response to the Plaintiffs application.

7. I have considered the application and the response thereto. I have equally considered the oral submissions made before me by Mr. Otara, Learned Counsel for the Plaintiff/Applicant and Mr. Ole Kina, Learned Counsel for the 3rd Defendant/Respondent. I have also perused and considered the authorities to which I was referred by the said Learned Counsels for the parties.

8. While the Preliminary Objection was canvassed before me at length during the submissions, given the circumstances herein and the fact that the 1st and 2nd Defendants are yet to be served with the pleadings, I was hesitant to address the substance of the issue raised therein more so in regard to the suitability of the suit as filed. I will for the moment therefore only address myself to the interlocutory application.

9. As Spry VP stated in *Giella –vs- Cassman Brown & Company Ltd(1973)EA 358 at 360:-*

“The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.”

10. That being the case, the first thing that this Court must do is to carry out an assessment as to whether the Plaintiff has established a prima facie case with a probability of success. As to what constitutes a prima facie case, the Court of Appeal offered guidance in *Mrao Ltd –vs- First American Bank Ltd & 2 Others (2003) KLR 125* where Bosire JA observed as follows:-

“So what is a prima facie case?

I would say that in civil cases, 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...But as I earlier endeavoured to show, and I cite ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.”

11. The same Court in *Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR* expounded on the ingredients of a prima facie case and stated as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.....”

12. In the matter before me, the Plaintiff filed this suit on 7th June 2018 seeking the following:-

i) A declaration that the sale agreement of 4th October, 2002 between the Defendants is null and void and that the Plaintiff is entitled to vacant possession of the suit property;

ii) Costs of this suit; and

iii) Any other relief this Honourable Court may deem fit to grant in the circumstances.

13. The basis of the suit can be found in the averments contained at paragraphs 5 to 12 of the Plaint wherein the Plaintiff states that at all

times material to this suit, he was together with his siblings the real owners of a piece of land located at Ngao Village in Ngao Location measuring about eight acres. It is the Plaintiff's case that long before land adjudication was done in the area, his family was approached by the 1st Defendant Church and the family agreed to donate an acre of the said piece of land by way of trust to the 1st Defendant for use as a temporary place of worship.

14. The Plaintiff contends that while the family agreed with the church that the one acre would be returned to them once the church got their own land, they came to learn recently that the church had instead in the year 2002 colluded with the 2nd Defendant, a Christian Missionary then based in Ngao Village to sell the land to the 3rd Defendant. It is the Plaintiff's case that by virtue of the temporary trust created, the 1st and 2nd Defendants could not sell, lease or alienate the said parcel of land without the consent of his family.

15. For some reason, even though the Plaintiff was filed on 7th June 2018, the suit papers were not served upon the parties until the 2nd day of April 2019 after this application was filed and this Court directed that it be served upon the parties for inter partes consideration. As it were, as at the time the application was heard, the 1st and 2nd Defendants were yet to be served and they did not therefore file any response to the application.

16. In his response to the application, the 3rd Defendant has annexed a Sale Agreement between himself and the 1st Defendant dated 4th October 2002 indicating that he purchased the land together with a house erected thereon at a consideration of Kshs 1,000,000/-

17. It is further evident that on 28th May 2013, the 3rd Defendant was issued with a title deed for the land registered as LR No. Tanadelta/Ngao 'A'/108. It is to be noted however that while the 3rd defendant inter alia contests the validity of the Motion before me on the basis that it refers to a different parcel of land, letters attached to his own Replying Affidavit refer to the same parcel of land prior to adjudication as Plot No. 115 AIC Ngao, the same reference number given by the Plaintiff.

18. Be that as it may, the Plaintiff did not annex anything to his application from which the Court could draw any nexus between the unadjudicated one acre piece of land allegedly donated to the 1st Defendant and the parcel of land now registered in the 3rd Defendant's name. From the material placed before me, it is clear that the 3rd Defendant was issued with a title therefor on 28th May 2013 and the Plaintiff has not sought the cancellation thereof.

19. Section 26 of the Land Registration Act provides that:-

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer 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 in the certificate, and the title of that proprietor shall not be subject to challenge except:-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

20. In the matter before me, the Plaintiff has neither sought the cancellation of the 3rd Defendant's title nor given any grounds to warrant a challenge thereof as provided under Section 26 aforesaid.

21. Section 24 of the Land Registration Act provides the effect of such registration as follows:-

24. Subject to this Act

a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incident of the lease.”

22. As the registered proprietor of the suit property, the 3rd Defendant has all those rights and privileges belonging or appurtenant to his registration. As such I did not find any reason to deny him the privilege to inter the remains of his deceased wife on the suit property.

23. Accordingly I find no merit in the Plaintiff's application. The same is dismissed with costs to the 3rd Defendant.

Dated, signed and delivered at Malindi this 5th day of April, 2019.

J.O. OLOLA

JUDGE