



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 90 OF 2018

MAUNDU MBAI1ST PLAINTIFF
MUTUKU MBAI.....2ND PLAINTIFF
DANIEL MULWA MBAI.....3RD PLAINTIFF
STEPHEN NZIOKA MBAI.....4TH PLAINTIFF
ERIC MBAI MAUNDU.....5TH PLAINTIFF
JOSEPH MUYA KIMEU6TH PLAINTIFF
JACKSON MUNYAO KIMEU7TH PLAINTIFF

VERSUS

JOHN MBAI KAVOI.....1ST DEFENDANT
ALEX MUSAU MBAI.....2ND DEFENDANT
GLADYS NDUKU MBAI3RD DEFENDANT
COSMAS LELE MBAI4TH DEFENDANT
BONIFACE MUTHIANI MBAI.....5TH DEFENDANT
MWITO HOUSING CO-OPERATIVE
SOCIETY LIMITED.....6TH DEFENDANT
THE REGISTRAR OF LANDS MACHAKOSDEFENDANT

RULING

1. In the Application dated 2nd May, 2018, the Plaintiffs are seeking for the following orders:

a. That Honourable Court be pleased to grant an order of injunction restraining the Defendants/Respondents jointly and severally or through their agents, servants, employees and/or anyone acting under their directions from dealing, disposing off, transferring, charging, leasing, alienating and/or in any other way interfering with the suit properties known as L.R. Nos. Donyo Sabuk/Komarock Block 1/20093, 1/56011-56013, 1/77650, 1/77853-77855 pending the hearing and determination of the main suit.

b. The Honourable Court be pleased to issue an order of mandatory injunction compelling the 6th Defendant to remove all beacons indicting the boundaries and to demolish the fence erected around L.R. No. Donyo Sabuk/Komarock Block 1/77854.

c. The Honourable Court be pleased to issue an order of inhibition, inhibiting the registration of any disposition in the register of

the suit properties known as L.R. Nos. Donyo Sabuk/Komarock Block, 1/20093, 1/56011-56013, 1/77650, 1/77853-77855 pending hearing and determination of this suit.

d. The Honourable Court be pleased to grant an order of specific performance compelling John Mbai Kavoi, the 1st Defendant herein to execute transfer documents in favour of the 5th- 7th Plaintiffs, to enable them acquire Title Deeds for their respective parcel of land they bought.

e. The Honourable court be pleased to issue a production order compelling the production of the 1st Defendant by the 3rd and 4th Defendants to enable the Honourable Court to determine the issues in dispute.

f. That costs for this Application be awarded to the Plaintiffs/Applicants.

2. The Application is supported by the Affidavit of the 1st Plaintiff who has deponed that parcel of land known as Donyo Sabuk/Komarock Block 1/20093, which was subsequently sub-divided to create parcels of land numbers 56011-56013, 77650 and 77853 -77855 is and has always been registered in the name of the 1st Defendant and that all the Plaintiffs are the children of the 1st Defendant.

3. According to the 1st Plaintiff, the 1st defendant donated a Power of Attorney to Alex Musau Mbai; that the 1st Defendant grew old and slowly became senile making him become incapable of having capacity to enter into any formal Agreement and that the 3rd and 4th Defendants have made the 1st Defendant inaccessible and have been using him to fraudulently transfer the suit properties, including a transfer of one of the parcels of land to the 6th Defendant.

4. According to the Plaintiffs, after purchasing parcel of land known as Donyo Sabuk/Komarock Block 1/77854, the 6th Defendant took possession of the said land; that the said sale of family land was illegal and fraudulent and that it is in the interest of justice that any dealings in the suit land to be stopped pending the hearing of the suit.

5. In response to the Application, the 6th Defendant filed Grounds of Objection and a Replying Affidavit. In its Grounds of Opposition, the 6th Defendant averred that the Plaintiffs have no *locus standi* to institute and maintain the suit as against the 6th Defendant.

6. In the Replying Affidavit, the 6th Defendant's Chief Executive Officer deponed that the Affidavit by the 1st Plaintiff has been filed without the authority of the other Plaintiffs; that the Plaintiffs are not the registered proprietors of the suit land and that the suit land is not ancestral or family land.

7. According to the Affidavit of the 6th Defendant's Chief Executive Officer, the 6th Defendant purchased parcel of land known as Donyo Sabuk/Komarock Block 1/77854 from the 1st Defendant; that the donation of a General Power of Attorney to the 2nd Defendant does not negate or extinguish the rights of the 1st Defendant to deal with the suit land and that in any event, the said General Power of Attorney is not registered.

8. It was the deposition of the 6th Defendant's Chief Executive Officer that the payments in respect of the purchase price were made to the 3rd Defendant in accordance with the Sale Agreement between the 6th Defendant and the 1st Defendant and that the 1st Defendant has testamentary freedom to contract and can nominate anyone, including the 3rd Defendant, to receive funds on his behalf.

9. In his submissions, the Plaintiffs' advocate submitted that the Respondents have unlawfully sub-divided and gained possession of the suit land and that the Plaintiffs have satisfied the grounds for granting of interim orders of injunction. Counsel relied on several decisions which I have considered. The Defendants did not file submissions.

10. As was held in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others (2014) eKLR*, in an interlocutory injunction Application, the Applicant has to establish a prima facie case with chances of success, demonstrate irreparable injury if a temporary injunction is not granted and allay any doubts by showing that the balance of convenience is in his favour. In the said case, the court went further to hold as follows:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the Applicant to injunction directly without crossing the other hurdles in between.”

11. The Court of Appeal in *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others (2003) KLR 125* defined “a prima facie” as follows:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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.”

12. The Plaintiffs have admitted in their pleadings that parcel of land known as Donyo Sabuk/Komarock Block 1/20093, which was later sub-divided to create several portions of land was registered in the name of the 1st Defendant. Indeed, from the copy of the official search

annexed on the 1st Plaintiff's Affidavit, the 1st Defendant (*now deceased*), was registered as the proprietor of parcel number 20093 on 15th August, 2008. The title to the said land was closed on 3rd November, 2016 upon sub-division.

13. The sub-division of parcel of land number 20093 was done when the 1st Defendant was alive. Indeed, the Agreement of Sale in respect of parcel of land known as Donyo Sabuk/Komarock Block 1/77854 dated 14th July, 2017 was entered into between the 1st Defendant and the 6th Defendant.

14. Although the Plaintiffs have alleged that the 1st Defendant was senile as at the time of entering into the Agreement of Sale of 14th July, 2017 with the 6th Defendant, they did not produce in evidence a medical report to that effect.

15. The Plaintiffs did not also produce in evidence any document to show that the suit land is ancestral land or that they have always been in occupation of the suit land.

16. In the absence of evidence to show that the 1st Defendant was incapable of entering into an Agreement of Sale, or that he had no right of sub-dividing the suit land and sell portions thereof without consulting the family members, I find and hold that the Plaintiffs have not established a prima facie case with chances of success.

17. Indeed, the 6th Defendant has been registered as the proprietor of parcel of land known as Donyo Sabuk/Komarock Block 1/7784 and has taken possession of the land. In the absence of evidence to show, prima facie, that the said Title Deed was obtained by the 6th Defendant fraudulent, I decline to issue an interim order of injunction.

18. For the reasons I have given above, I dismiss the Application dated 2nd May, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE