



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO 130 OF 2018

KENNETH KIPKOSGEI KEMBOI.....1ST PLAINTIFF

CAROLINE JEROTICH.....2ND PLAINTIFF

VERSES

LEAH TUWEI.....IST DEFENDANT

WILSON KIPRONO TUWEI.....2ND DEFENDANT

CORNELIUS CHERUIYOT.....3RD DEFENDANT

BOAZ SAINA.....4TH DEFENDANT

SOLOMON KIPCHIRCHIR.....5TH DEFENDANT

SHADRACK KIRWA.....6TH DEFENDANT

RULING

This ruling is in respect of an application dated 10th June, 2019 brought by way of Notice of motion by the Plaintiff/Applicant seeking for the following orders:

- a) Spent.
- b) That pending inter-parties hearing, the 1st, 2nd, 4th, 5th and 6th defendant/ respondents, their families, agents, servants or any other person claiming on behalf of the 3rd defendant, Cornelius Cheruiyot, be restrained from burying his remains on that parcel of land known as Nandi/Baraton/1594, the suit land herein.
- c) That pending hearing and determination of this application and the main suit, the 1st, 2nd, 4th, 5th and 6th defendant/respondents, their families, agents servants or any other person claiming on behalf of the 3rd defendant, now deceased, Cornelius Cheruiyot, from burying his remains on that parcel of land known as Nandi/Baraton/1594, the suit land herein.
- d) That the O.C.S. Kapsabet Police Station be ordered to supervise compliance and enforcement of the orders of the Honourable Court.
- e) That costs of this application be provided for.

The plaintiffs filed this suit vide a plaint dated 10th November 2018 seeking for a permanent injunction restraining the defendants, their agents, and or servants from entering, trespassing, encroaching, ploughing, planting or dealing in any manner with that parcel of land known as NANDI/BARATON/1594. The also prayed for an eviction order and costs of the suit.

On 10th June 2019 the plaintiff/applicants filed this application to stop the defendants from burying the 3rd defendant on the suit land. The court heard the application under certificate of urgency and gave a temporary order stopping the burial scheduled for 14th June 2019. Counsel to the parties argued the application on 13th June 2019.

Mr. Kibii for the applicants relied on the grounds on the face of the application together with the supporting affidavit of the applicant. It was his submission that the applicants are the absolute registered owners of the suit property as evidenced by the annexed green card and the confirmed grant in Eldoret High Court Succession Cause No. 263 of 2015.

Counsel further submitted that the respondents have trespassed into the suit land and erected illegal structures. That the 3rd defendant Cornelius Cheruyot died on 7th June 2019 and the defendants intend to bury him on the suit land and that the defendants have admitted in their replying affidavit that the plaintiff is entitled to exclusive and quiet possession.

Mr. Kibii also submitted that from the defence and counterclaim the defendants have not pleaded fraud in the manner in which the title to the suit property was acquired. That the plaintiffs inherited the suit property from their mother and that the green card indicates that the suit parcel was initially registered in the name of the plaintiffs' father and was later registered in the name of the plaintiffs' mother in 1981 by way of transmission.

It was Counsel's submission that in 2001 the register was closed after a subdivision creating two parcels namely 1593 and 1594 and after the demise of the plaintiff's mother the applicants filed a Succession Cause and they were registered as owners of NANDI/BARATON/1594.

Mr. Kibii stated that from the perusal of the replying affidavit, it revolves around the administration of the estate of CLEMENTINA KOGO who is the applicants' mother in respect of parcel No. 104 which no longer exists. Further that the Succession cause was concluded and therefore the issues raised are res judicata.

Further that the respondents cannot claim trust under a title of their grandfather and yet the green card speaks for itself. That the grandfather KIBUNGUT ARAP KOGO was never registered as an owner of the suit land. Counsel cited the case of ENOCK ISIAHO MMBAITSA VS. STEPHEN MULINYA ANENE & another (2019) Eklr, KAKAMEGA ELC 124 of 2015 where the court was faced with similar situation and the court found for the plaintiff who was the absolute owner of the suit land.

Counsel also referred the court to Section 24 of the land Registration Act which provides for indefeasibility of title. That the defendants have alternative parcels of land as evidenced by the annexed agreements for sale.

On the authorities cited by Counsel for the defendant. Mr. Kibii submitted that the said authorities are distinguishable as the suit property existed and in the current case the parcel number does not exist. He therefore urged the Court to allow the application as prayed.

In response to the application Counsel for the defendant/respondents relied on the replying affidavit sworn by the respondent and the authorities filed in court. It was Counsel's submission that the plaintiffs and the defendants are 1st cousins and that the defendants are claiming customary trust as they have been in occupation of approximately 3acres of the suit land since 1980. That the defendants have put up semi-permanent structures and planted trees.

Counsel submitted that the suit land is ancestral land which belonged to Kibuigut Arap Marori who died before land adjudication took place. That the land was held in trust for the family by Kipkemboi Arap Kogo. Counsel urged the court to look at the green card which was annexed.

Mr Sambu submitted that the land was later registered in the name of Clementina Kogo whom the defendants alleged that she secretly filed a Succession Cause without involving the defendants. It was Counsel's further submission that a family meeting was convened after they realized that succession cause had been concluded in favour of Clementina Kogo.

Counsel also faulted the subdivision and registration of the suit land to having been done fraudulently. Counsel elaborately dwelt on the succession Cause which is not before this court and relied on the authorities filed to prove customary trust.

Counsel therefore urged the court to dismiss the application with costs.

Analysis and determination

This is an application to restrain the defendants from burying the 3rd defendant on the suit land as the ownership is disputed. Before this application was filed parties had agreed to comply with order 11 of the Civil Procedure Rules and the matter was to be mentioned before the Deputy Registrar to confirm the same. Unfortunately the 3rd defendant died before this could happen.

The issues for determination are as to whether the plaintiff has established a prima facie case with a probability of success against the defendants. Whether the orders sought should be granted at an interlocutory stage.

The power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

- 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.*

The principles for grant of injunction are now well settled as per the Giella Casman Brown case.

From the pleadings and the documents annexed to the application more so the green card that was referred to by both the plaintiffs and the defendants, it is clear that the plaintiff are the registered owners of the suit land having been registered as such vide transmission which was done after filling of succession Cause. The extract of the green card gives the history of the land from 1971 to 2017. The process of change of ownership is clear and at no point was there an entry on the purported grandfather in the register. There is no evidence of land being held in trust for other persons who are not registered in the title. The court is aware of the provisions section 28 of Land Registration Act which provides for overriding interest and customary trusts even if it is not noted in the register.

From the supporting documentation I find no proof that there was an intention for creation of customary trust. This parcel of land has changed hands over a period of time since 1971 with deaths occurring and succession causes being filed. It should be noted that Succession Cause is a public document which is filed in court and subjected to a Kenya gazette Notice whereby parties who have objections are asked to do so within 30 days.

Further the parties are also not shut out even after the grant of letters of administration, if a party is aggrieved then they can file summons for revocation of grant on the grounds that the same was either fraudulent or was filed with concealment of material facts about the real beneficiaries. I notice that this was not done, the defendants opted to hold family meeting to undo what a court of law had done. There is already a grant on record and the estate distributed as per the grant. Further the transfer was done by way of transmission.

It should also be noted that there is no caution or restriction lodged on the suit title of land.

I have considered the pleadings, the submissions and the documents attached by both parties and find that the plaintiff deserve the orders as prayed as if the same are not granted they would suffer irreparable harm of exhuming the body of the deceased should the case succeed.

The issues that have to be determined on the ownership tilt in favour of the plaintiffs as they are the registered owners of the suit land. It is also on record that the defendants have alternative land which they can inter the remains of the deceased but if they want to wait until the determination of the case then that would be their choice.

I therefore find that the application has merit and is therefore allowed and make the following orders:

a) That the 1st 2nd 4th , 5th and 6th defendant/respondents, their families, agents servants or any other person claiming on behalf of the 3rd defendant, now deceased, Cornelius Cheruiyot, are hereby restrained from burying his remains on that parcel of land known as Nandi/Baraton/1594 until this suit is heard and determined.

b) The O.C.S. Kapsabet Police Station is hereby directed to supervise compliance and enforcement of this order.

Dated and delivered at Eldoret on this 18th day of June, 2019.

M.A. ODENY

JUDGE

RULING READ IN OPEN COURT in the presence of Mr.Kibii for Plaintiffs/Applicants and Mr.Sambu for Defendants/Respondents.

Mr.Emmanuel – Court Assistant