



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 144 OF 2018

SUSAN WANJIKU KIMANI.....PLAINTIFF

VERSUS

THE CREEK VENTURES LIMITED.....1ST DEFENDANT

THE REGISTRAR OF LANDS NGONG.....1ST INTERESTED PARTY

DISTRICT SURVEYOR OF LAND KAJIADO COUNTY.....2ND INTERESTED PARTY

THE ATTORNEY GENERAL.....3RD INTERESTED PARTY

RULING

What is before Court for determination is a Notice of Motion dated the 21st September, 2018 brought pursuant to Order 40 Rule 1(a) & (b), Rule 4 (1&2) of the Civil Procedure Rules and all the other enabling provisions of the law. The Applicant seeks injunctive orders against the Respondents in respect of land parcel number Kajiado/ Olchoro Onyore/ 2182, now known as Kajiado/ Olchoro Onyore/ 29494 hereinafter referred to as the 'suit land'. The Application is premised on the summarized grounds that the Plaintiff is the registered proprietor of the suit land and the Defendant has excised a portion of the said land and renamed it Kajiado/ Olchoro Onyore/ 22305. Further, that the said excised portion is larger than the successor of the suit land Kajiado/ Olchoro Onyore/ 29494. The Defendant has trespassed on a portion of the suit land and fenced it.

The application is supported by the affidavit of the Plaintiff SUSAN WANJIKU KIMANI where she deposes that she is the registered proprietor of the suit land. She explains that she is a successor to the estate of Godfrey Kimani Kariuki who died on 27th November, 2015. She claims the deceased purchased the suit land from Kennedy Sokoian Ole Ndeka who died on 28th January, 1993. Further, that sometime in 2012 the deceased discovered that the Registry Index Map (RIM) did not reflect the position on the ground of the portion of the suit land and adjacent properties including Kajiado/ Olchoro Onyore/ 2262 and Kajiado/ Olchoro Onyore/ 2740 – 2749 with one portion in the vicinity remaining unnumbered. She states that the said discovery was reported to the Director of Surveys Ngong through the District Surveyor and the said Director concurred with the deceased and vide his letter dated the 17th April, 2012 directed the District Surveyor Kajiado to intervene as well as rectify the situation. She discovered the suit land had been fraudulently excised and given a new number Kajiado/ Olchoro Onyore/ 22305 measuring 5.03 hectares and further subdivided into Kajiado/ Olchoro Onyore/ 22150 and 23191. She confirms inviting the 2nd Interested Party to the suit land and he prepared a report stating the extent of its size. Further, on 20th September, 2017 the 2nd Interested Party wrote to the 1st Interested Party that the numberless parcel of the Registry Index Map (RIM) is what constitutes the entire parcel of Kajiado/ Olchoro Onyore/ 2182 with the 1st Interested Party registering the said portion as Kajiado/ Olchoro Onyore/ 29494. She states that on the 14th September, 2018 she discovered that a portion of the suit land had been fenced off by the Defendants. Further, that Kennedy Sokoian Ole Ndeka died on the 28th January, 1993 while the Green Card shows that the transfer of Kajiado/ Olchoro Onyore/ 22305 from the deceased to the Defendant was done on 19th August, 2014 which is 21 years after his demise. She reiterates that the transfer and subsequent amendment to the RIM is fraudulent and deprives her of the suit land.

The application is opposed by the 1st Defendant who filed a replying affidavit sworn by LILIAN WANYEKI who is its Finance Manager where she deposes that the suit land is not indicated in the Certificate for Confirmation of Grant in respect of the estate of Godfrey Kimani Kariuki. She states that in 2014 the 1st Defendant purchased land parcel number Kajiado/ Olchoro Onyore/ 22305 measuring 5.30 hectares from one Julius Ndeka Sokoian who is an Administrator to the estate of Kennedy Sokoian Ole Ndeka, after undertaking due diligence. She insists that if the RIM did not reflect the suit land which was purchased on 20th May, 1988, then the Plaintiff should direct her claim to the vendor or the administrators of his estate. She denies that the 1st Defendant was involved in the numbering of Kajiado/ Ochoro Onyore/ 22305 and that the Plaintiff intends to grab their land through falsehoods and fraudulent tendencies. She avers that it is only the Plaintiff who attended the alleged site visit for resurvey referred to in the letter dated the 25th April, 2017 as she is the owner of the neighbouring parcels of land Kajiado/ Olchoro Onyore/ 2743; 2744; 2745; 2746; 2747 and 2748 respectively. Further, that it would have been pertinent if the proprietors of Kajiado/ Olchoro Onyore/ 1457; 22305; 1711; 1277 and 1264 were also invited for the site visit to undertake the resurvey. She

contends that vide the letter dated the 20th September, 2017 the 3rd Interested Party misled the 2nd Interested Party about a numberless plot in the map dated 21st August, 2014. She further states that the Defendant is a stranger to the allegation of fraud as it followed the due process in subdividing land parcel number Kajiado/ Olchoro Onyore/ 22305 and disputes the Plaintiff's title of Kajiado/ Olchoro Onyore/ 29494 or the approved mutation to increase the acreage of the suit land. She denies the 1st Defendant's knowledge of the Plaintiff and states that they came to know that she was subdividing their land when they were showing their plots to third parties. Further, the Defendant wrote to the District Surveyor and commenced fencing the resultant subdivisions in order to secure the boundaries. She contends that on 3rd May, 2014, the Plaintiff's husband through Moha Survey Consultant presented mutations for combination of Kajiado/ Olchoro Onyore/ 2182 and 2740 – 2749; 2262 – 2263 with other adjacent parcels resulting to Kajiado/ Olchoro Onyore/ 21995 measuring approximately 15.85 hectares. Further, that prior to the death of the Plaintiff's husband in 2015, the RIM had been amended after picking had been completed on 21st August, 2014. She reiterates that after due diligence, the Defendant discovered the following acts of fraud: Kajiado/ Olchoro Onyore/ 22305 had been deleted from the RIM; mutation dated 15th August, 2017 had allegedly been signed by the deceased Godfrey Kariuki Kimani who died on 27th November, 2015; Certificate of Official Search indicating issuance of title for Kajiado/ Olchoro Onyore/ 29494 in the name of Susan Wanjiku Kimani on 12th July, 2018; and Mutation No. 04317841 in respect of Kajiado/ Olchoro Onyore/ 29494 dated 15th August, 2017 signed by the deceased. Further, the Plaintiff while processing title for Kajiado/ Olchoro Onyore/ 29494 interchanged the forged Mutation dated 15th August, 2017 with an earlier one dated 2nd May, 2014 which had been cancelled by District Surveyor J.K. Kibuba and she is attempting to sell land which was previously Kajiado/ Olchoro Onyore/ 22305 to unsuspecting members of the public. She further reiterates that the Defendant is a purchaser for value without notice and the Plaintiff's claim is for ownership of land clothed in a boundary dispute.

The Plaintiff filed a further affidavit where she reiterated her claim and explained that the suit land was given a new number Kajiado/ Olchoro Onyore/ 29494 to correct the anomaly of the correct span which had not been captured in the RIM. Further, it is out of the said parcel that the Defendant obtained title for Kajiado/ Olchoro Onyore/ 22305, which has since been subdivided.

Both the Plaintiff and the 1st Defendant filed their respective submissions which I have considered.

Analysis and Determination

Upon perusal of the instant application, supporting and replying affidavits including the submissions, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.

The Plaintiff claims the 1st Defendant has encroached on her land and fenced part of it. She challenges the process the 1st Defendant used to acquire its land. The 1st Defendant on the hand insists it is the Plaintiff who has fraudulently relied on a forged mutation to claim its land. Further that the original size of the suit land was less than the current size which the Plaintiff claims. It contends that the original parcel has already been subdivided and disputes participating in the site visit. The Plaintiff has submitted that she had demonstrated a prima facie case and relied on the case of **Giella Vs Cassman Brown Co. Ltd (1973) EA 358 and Michael Kimani (Suing on his own behalf and as the executor of the estate of Mweya Karonga) Vs George Kimani Gitau (Suing on behalf of the estate of Gitau Karonga) eKLR** to support her arguments. The 1st Defendant submits that the Plaintiff has not established a prima facie case to warrant the orders sought and relied on the following cases: **Nyeri High Court Civil Suit No. 11 of 2014 Nairobi Kiru Line Services Ltd Vs County Government of Nyeri & 2 others and Humphrey Kilambo Mcharo Vs Kenya Commercial Bank Civil Application No. 51 of 2005** to buttress its arguments.

The principles on whether an injunction can be granted or not are well established in the case of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358**. As to whether the Plaintiff has established a prima facie case to warrant the orders sought. From the facts presented above, both the Plaintiff and the 1st Defendant hold titles to their respective parcels of land. The Plaintiff claims she was reissued with a title deed to rectify an anomaly, which was in the RIM. The 1st Defendant contends that that they hold titles to their parcels of land and it is the Plaintiff who has fraudulently obtained extra acreage of her land and got a new title number to it. The issues raised by both parties cannot be determined at this interlocutory stage but once viva voce evidence has been adduced.

It is against the foregoing and based on the evidence before me that I direct that the obtaining status quo be maintained pending the outcome of the suit.

Costs will be in the cause.

Dated and Delivered in Kajiado this 3rd day of June, 2019

CHRISTINE OCHIENG

JUDGE