



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

FORMERLY NAKURU HCCC NO. 169 OF 2004

ELC NO. 71 OF 2018

OLE UNUA TONKEI & 17 OTHERS.....PLAINTIFFS

-VERSUS-

SUKA OLE NKOYIEI & 3 OTHERS.....DEFENDANTS

RULING

By an Application dated 6th November, 2018 and brought under Order 40 Rule 1,2 and 4 the Plaintiff/Applicant sought for orders of restraining the defendant by himself, agents and/or employees from interfering with encroaching, destroying structures thereon or doing any act that is prejudicial to the Plaintiff's proprietary interest in land parcel No. **TRANS MARA/KIMINDET 'D'/1280** pending the hearing and determination of the suit and an order that the OCS Kilgoris Police Station do enforce the order of the court.

The Application was based on the grounds that the Applicant has a good case against the Respondent that it should be heard on merits and that they have been residing on the suit parcel of land for over 40 years and the Applicant has destroyed their crops and houses with the intention to forcefully evict them.

The Applicant further argued that the 1st Defendant has no right to the suit land and unless the orders sought are granted they will suffer irreparable loss and damages.

The Application was further supported by the Affidavit of **OLE TUNUA TONKEI** in which he deponed on his own behalf and that of his co-applicants that they have been residents of the suit land for more than 40 years and that the 1st Respondent had fraudulently registered the land in his name in the year 2004 and the 1st Defendant has been attempting to evict them from the land without having any right to the land.

The Application was opposed by the 1st Respondent by way of a Replying Affidavit in which he avers that he is the registered proprietor of Land Parcel No. **TRANS MARA/KIMINDET 'D'/1654**. He stated that he was a member and resident of Kimindet Adjudication Section and proprietor of land parcel No. **TRANS MARA/KIMINDET 'D' /1280** and upon its allocation he sub-divided the same into different parcels and sold them to third parties but retained **PARCEL NO. TRANS MARA/KIMINDET 'D'/1654** and therefore parcel NO. **TRANS MARA/KIMINDET 'D'/1280** does not exist.

The Respondent further contends that contrary to the Applicants assertions it is the Applicants who have been invading the land and threatened him and his sons with death leading to the charging of the Applicant with a criminal offence at Kilgoris Law Courts vide **PMCC NO. 215 of 2018 REPUBLIC –VERSUS- OLE UNUA TONKEI**.

The Respondent contends that he is the absolute owner of the land to the exclusion of others and to support his assertion he has attached a copy of title, a copy of adjudication record, mutation forms and a certificate of official search.

I have read the application before me and the opposing submissions that were filed by the parties and the issue for determination before me is whether the Applicants have satisfied the conditions for grant of orders of injunction as held in the case of **GEILLA –VERSUS- CASSMAN BROWN (1973) 175 EA**.

The grant for an order of injunction is a discretionary relief a party seeks but it is incumbent that the Applicant must demonstrate that they have established a prima facie case with a probability of success, that damages may not be adequate compensation and lastly the balance of convenience tilts in their favour.

From the pleading before me the Applicants claim to the land is that they have lived on the suit land for a period of 40 years and the Respondent fraudulently transferred the land to himself.

The allegation of fraud is a serious indictment that a party must prove it is not enough to claim that there was fraud and no particulars of the same are placed before the court. The Applicants' only assertion of fraud does not extinguish their responsibility to prove the same and that has not been discharged by them as this is a matter that will require witness testimony heard during the full hearing.

The Applicants claim that they lived on the land for 40 years and they have no document in their possession that falls short of fulfilling the first condition for grant of injunction that is to establish a prima facie case with a probability of success.

The Respondent has placed before court a copy of his title to the land, mutation forms, Adjudication record and a search certificate that shows he is the registered owner at the time the instant application was filed and from the foregoing it is my finding that the Applicants have not fulfilled the 1st condition for grant of order of injunction.

On whether damages will not be adequate compensation the Applicants have not placed before me what loss they will suffer and neither did they seek for an undertaking as to damages from the Respondent and I thus find that damages will be adequate compensation.

On whose favour does the balance of convenience tilt, the Applicants have not placed in court any document or title to show that they indeed have an interest in the suit land, however, the Respondent has shown that he has title to the land which is absolute and I find that the balance of convenience tilts in favour of the Respondent.

Considering the pleadings and submissions I find that the Notice of Motion dated 6th November, 2018 is not merited and I thus dismiss the same with costs.

DATED, SIGNED and DELIVERED in open court at NAROK on this 12th day of July, 2019

Mohammed Kullow

Judge

12/7/19

In the presence of:-

Mr Kilele holding brief for Kamwaro for the Defendants

N/A for Mitey for the Applicants/Plaintiffs

CA:Kimiriny

Mohammed Kullow

Judge

12/7/19