



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 801 of 2017

SARPHINE OLE NTEKA.....PLAINTIFF

VERSUS

LENDEKI OLE SOKOYION.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 23rd April, 2019 brought pursuant to section 3A and 63 of the Civil Procedure Act and Order 40 Rule 1,2,3 4 & 5 of the Civil Procedure Rules. The Applicant seeks injunctive orders against the Defendant, his agents, proxies or relatives from removing, disposing, alienating or interfering with any parcel of land excised from Kajiado/ Olchoro Onyore/ 282 which parcels include Kajiado/ Olchoro Onyore/ 29178; 29179; 29180; 29181 as well as all 18 parcels of land cut from Kajiado/ Olchoro Onyore/ 29182. Further, that the Land Registrar, Ngong be directed to place cautions on the aforementioned parcels of land and Court do issue orders for a comprehensive report on the actual measurement of the initial land parcel number Kajiado/ Olchoro Onyore/ 282.

The application is supported by the affidavit of Plaintiff SARPHINE OLE NTEKA who is the beneficiary to the estate of SOKOYION OLE NTEKA. He deposes that there was a land subdivision in 1982 in which his brother unfairly and without reasonable justification apportioned to himself extremely large portions of their late father's land Kajiado/ Olchoro Onyore/ 282 on the excuse that he was the elder brother. He recently discovered that the aforementioned parcel of land had extra acreage which was not included in the initial survey report nor in the title deed. He explains that the said parcel Kajiado/ Olchoro Onyore/ 282 was reported to measure 72.39 hectares yet in the official mutation form, one of the parcels of land alienated therefrom measures 86.36 hectares. He contends that the omission has left the family baffled as to why the Defendant concealed such critical information as he was aware the said land was to be divided equally between the two of them. He states that he lodged a restriction to be registered in the Lands Registry in June 2017, before alienation of Kajiado/ Olchoro Onyore/ 282 and further filed Civil Suit No. 801 of 2017. Further, that the said restriction was never registered and no reasons were given. He contends that subsequent visits to the Land Registry reveal that the Green Card is missing and it is hard to ascertain if the restriction was registered. He claims the subdivision which was done by his brother was fraudulent and meant to defeat justice. He reiterates that efforts to engage a private certified surveyor to give a report on the initial actual measurement of the land is not possible owing to the feud between them. Further, that unless the orders sought are granted, his interest and that of his family will be severely affected. In his further affidavit, he reiterated his claim above and explained that they were given a parcel of land by their late father which was subdivided into two but he unjustly received a small portion. Further, that he discovered about the extra acreage through the surveyor and insists the Defendant fraudulently concealed this material information with the aim of disinheriting him.

In opposition to this application, the Defendant LENDEKI OLE SOKOYION filed a replying affidavit where he deposes that the orders sought are incompetent, as part of the land has been registered in the names of other persons. He confirms that there have been further subdivisions of Kajiado/ Olchoro Onyore/ 29182 that have been registered in the names of other persons who have not been enjoined in this suit. He insists the Land Registrar has no power to put a caution in respect of land registered under section 71 of the Land Registration Act. Further, that order No (4) as sought by the Applicant is incompetent and not provided for under Order 40 of the Civil Procedure Rules. He denies that the subject matter of the suit herein has ever been part of their father's estate. He denies holding Kajiado/ Olchoro Onyore/ 282 in trust for the Applicant. He insists there has never been a succession cause in respect of Kajiado/ Olchoro Onyore/ 59 which was the original title. He contends that their father died before the land adjudication and registration of Kajiado/ Olchoro Onyore/ 59. Further, that during adjudication of the Olchoro Onyore Scheme, all adults were entitled to land. He disputes the surveyor's report and denies knowing them.

Both parties filed their submissions which I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion application dated the 24th April, 2019 including the parties' affidavits, annexures thereon and submission, the only issue for determine at this juncture is whether the Plaintiff is entitled to orders of interlocutory injunction in respect of Kajiado/ Olchoro Onyore/ 282 which parcels include Kajiado/ Olchoro Onyore/ 29178; 29179; 29180; 29181 as well as all 18 parcels of land

excised from Kajiado/ Olchoro Onyore/ 29182, pending the outcome of the suit.

The fulcrum of this suit revolves around a claim for a share of land acquired through the adjudication scheme. The Plaintiff who is a younger brother to the Defendant claims that the brother allocated him a smaller share of land, which emanated from their father's estate. The Defendant disputes the Plaintiff's averments and insists he got his land from the Adjudication Scheme as he was an adult and subdivided a portion for the Plaintiff out of good will. Further, that the land did not form part of the father's estate. The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I note the Plaintiff is claiming a share of the land registered in the name of the Defendant. I wish to make reference to the case of **Mrao Ltd Vs First American Bank of Kenya Limited (2003) KLR 125** where the Court of Appeal had defined a prima facie. The Plaintiff's claim revolves around how the Defendant acquired the suit land. He contends that the Defendant acquired land, which was to be held in trust for him. Further, that the Defendant concealed material facts and subdivided the land and gave the Plaintiff a smaller portion while retaining a bigger piece. The Defendant insists that the suit land was his and had never belonged to their late father's estate. Further, that he has since subdivided the same with several resultant subdivisions registered in the names of third parties. A cursory glance at the documents presented by the parties, I note the Defendant indeed acquired the land through an adjudication section. From the averments in the instant application, I cannot decipher whether he inherited the said land from his father. However, from the Plaintiff, I note it raises issues, which are triable that I cannot disregard. I opine that the issues being raised in the instant application regarding the Defendant holding land in trust for the Plaintiff cannot be determined at this juncture but unless viva voce evidence is adduced. On the issue of an order as to preparation of a comprehensive report, I concur with the Defendant that this does not have a basis in respect of principles governing issuance of injunctions. I will hence decline to grant the same. Since the fulcrum of the suit revolves around a claim for land, I opine that it would be pertinent to preserve the substratum of the suit as well as maintain status quo where no party should interfere with the person in current occupation of the suit lands until the case is determined.

In the circumstance, I direct that:

1. An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel number Kajiado/ Olchoro Onyore/ 282 which parcels include Kajiado/ Olchoro Onyore/ 29178; 29179; 29180; 29181 as well as all 18 parcels of land excised from Kajiado/ Olchoro Onyore/ 29182, pending the hearing and determination of the suit.
2. The Prevailing Status Quo be maintained pending the outcome of the Suit.
3. The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing expeditiously.

Dated signed and delivered in open court at Kajiado this 30th day of October, 2019

CHRISTINE OCHIENG

JUDGE