



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 45 OF 2018

ABDI ABDKULLA TARI.....PLAINTIFF/APPLICANT

VERSUS

ELECTIONS COORDINATOR IEBC ISIOLO NORTH

CONSTITUENCY OFFICE.....1ST DEFENDANT/RESPONDENT

ELECTIONS COORDINATOR,

IEBC ISIOLO COUNTY OFFICE.....2ND DEFENDANT/RESPONDENT

THE CHAIRMAN, IEBC.....3RD DEFENDANT/RESPONDENT

RULING

1. The Applicant herein filed the notice of Motion dated 19th November 2018 Praying for the following Orders;

a. Spent

b. Spent

c. That this honourable court do issue restraining orders preventing the Respondents whether acting by themselves, their servants, agents, contractors and/or other persons whatsoever, from developing, damaging, transferring, charging or registering in the name of the Respondents or any person other than the Applicant or in any other manner howsoever interfering with the Applicant's right to ownership, possession and quiet enjoyment of the property known as Isiolo Township plot No. 7918/286 measuring approximately 0.0630 hectares pending the hearing and determination of the suit.

d. That this Honourable Court do issue an eviction Order to the Respondent to forthwith evacuate the suit property.

2. The application is supported by the grounds set out on the face of the application and in the Affidavits of **Abdi Abdkulla Tari**. Applicant avers that he is the legal owner of the suit premises, Isiolo Township plot No. 7918/286 pursuant to an allotment of Certificate of title issued on 1st March 1999. That he leased the suit land to the Electoral Commission in the year 1999, whereby, the Respondents dully paid rent for the years 1999-2007, but have since refused and/or declined to pay the outstanding arrears. Applicant avers that the Respondent is purporting to have the suit land transferred to its name.

3. Applicant has also averred that the suit property i.e. Isiolo Township 1/286 as registered in the title document is the same property referred to as Isiolo Township 7918/286 to which he was issued with the lease on 1st March 1999 which was registered on 10th November 2006. He denies being an employee of the Respondent.

4. The Respondents have opposed the application via the affidavits of **AbdiKadir A. Ahmed**, who is the Respondent's Constituency elections Coordinator-Isiolo North Constituency. He averred that the property is public land and cannot be private land as alleged by the Respondent. He further avers that the evidence produced by the applicant i.e. Certificate of lease and official search refers to a totally different property being Isiolo Township Block 1/286 which contradicts the particulars of the suit land given in the application as Isiolo Township Plot 7918/286.

5. Ahmed also stated that the application by the applicant is unsubstantiated since no lease Agreement has been provided to prove the allegations. He averred that if there was a lease Agreement, the same terminated in the year 2007 after the then Electoral Commission of

Kenya expressed an interest to purchase the suit premises as evidenced in its letter dated 22nd November 2006. That vide a Sale Agreement dated 25th May 2007, the applicant sold the suit property to the then Electoral Commission of Kenya for consideration of Kshs. 1,100,000/= and a transfer was duly executed and witnessed. That the full purchase price was paid to the applicant vide cheque dated 14th March 2007 in favour of the applicant and the same was acknowledged. That as a result of the aforementioned events the suit property has been set aside and planned for public purpose and for use by the Electoral Commission of Kenya offices.

Analysis and Determination

6. This case is at the infancy stage. To grant or not to grant the prayers in the application is what is to be determined. There is a dispute as to who is the legal owner of the suit premises herein. The plaintiff claims to be the owner of the suit premises by virtue of the Certificate of lease issued on 1st March 1999. The Respondents conceded that the plaintiff/Applicant is the previous owner of the aforesaid premises, but they take issue with the manner in which he secured the premises and aver that they bought the same from him at a consideration of Kenya Shillings 1,100,000/=.

7. The Orders sought by the plaintiff/Applicant are couched in the same terms as a prayer for temporary injunction. In **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR**, the Court defined the various conditions to be met before the court can grant a temporary injunction when it stated as follows;

“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.”

8. The aforementioned principles were laid down in the case of **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358**, Where the court held that the Plaintiff must show that he has a *prima facie* case with a probability of success and that he stands to suffer irreparable damage. If the court is however in doubt on the foregoing, it will decide the matter on the balance of convenience.

9. In the case of **Mrao Ltd- v – First American Bank of Kenya Ltd (2003) eKLR**, the Court of Appeal stated that:

“... A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right. It is a case which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for all explanation from the latter.....”.

10. I find that the applicant has referred to his land as no. Isiolo Township Plot No. 7918/286 in both the plaint and the application. However, the certificate of lease he has availed is for Isiolo Township Block I/286. The registration of the suit land was done years ago on 10.11.2006. How comes the applicant did not find it necessary to identify the suit land in the plaint and in the application in terms of the particulars set out in the certificate of lease. Why didn't he state that the land is one and the same in his pleadings? It is not enough for the applicant to state that the two properties are one and the same.

11. Even if this court moves on the assumption that the two properties are one and the same, I still find that the evidence of the applicant is glaring in various respects. The applicant alleges that they entered into a lease agreement with the Defendant for the lease of the suit premises for a periodical timeline. This timeline has not been ascertained. The applicant has not attached a lease agreement that may guide this Honourable Court to decide whether or not the defendants are in breach of the same. Far from it, the Defendants/Respondents have alleged that they bought the suit premises from the Plaintiff. They have attached a sale agreement and a cheque paid to the Plaintiff/applicant. The applicant has not rebutted this evidence. The Defendants/Respondents evidence has been supported by their occupation of the premises for the last ten (10) years i.e. since the year 2008.

12. It is therefore this Honourable Courts finding that the applicant has not raised a prima facie case. Whether or not the applicant shall suffer irreparable harm and whether the balance of convenience shifted in the favour of the applicant in this case would have arisen had the applicant raised a prima facie case. It then follows that the applicant has not established the ingredients to be met to warrant a prayer for temporary injunction.

13. However, in view of the averment made by the applicant that the suit is to be transferred to the respondent, and in order to preserve the substratum of the suit land, I do give an order that the land is not to be alienated.

14. Final orders:

1) The Plaintiff's Application dated 19th November 2018 is therefore dismissed but the suit land is not to be alienated until further orders are given by the court.

2) The costs of this application shall abide the out-come of the main suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 9TH DAY OF OCTOBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Miss Kiruma holding brief for Makaka for plaintiff

Manyange holding brief for Mwangela for respondent

Defendants

Applicant

HON. LUCY. N. MBUGUA

ELC JUDGE