



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 102 OF 2018

HASSAN IDDI MALAMBU and DR. ALI

KOLELA MONTET (Suing as the Administrator of the Estate of

AMINA NAANYU MALAMBU).....PLAINTIFF

VERSUS

BESTEL AGENCIES COMPANY LIMITED.....1ST DEFENDANT

AZELIA INVESTMENTS LIMITED.....2ND DEFENDANT

LAND REGISTRAR, KAJIADO NORTH REGISTRY.....3RD DEFENDANT

RULING

What is before Court for determination is the Plaintiffs' application dated the 21st June, 2018 brought pursuant to Order 40 Rule 2(1) and (2) of the Civil Procedure Rules and Section 1A (a), (b), (c) and (d) and 3A of the Civil Procedure Act; Section 68 of the Civil Procedure Rules. The Plaintiffs seek temporary injunction against the Defendants in respect of land parcel number NGONG/ NGONG/ 5048 hereinafter referred to as the 'suit land', pending the outcome of the suit. The application is premised on the grounds that the Plaintiffs are the administrators of the estate of AMINA NAANYU MALAMBU who was the registered owner of the suit land. The Land Registrar conducted a thorough investigation on the 1st and 2nd Defendants title and found it was fraudulent. The Land Registrar has ordered the 2nd Defendant to surrender the said title for cancellation but it has declined to do so and continues to meddle as well as waste the estate of the deceased without authority or consent from the administrators. There is a real danger that the suit land may be sold to a third party and the deceased estate will suffer irreparable loss.

The application is supported by the affidavit of HASSAN IDDI MALAMBU who together with Dr. ALI KOLELA MONTET are the administrators of the estate of AMINA NAANYU MALAMBU who was the registered proprietor of the suit land having been transferred to her on the 3rd October, 1991 by IDDI HASSAN MALAMBU (her deceased father) by way of a gift. He avers that the deceased died on 21st November, 1986 while still having legal proprietorship over the suit land and on 25th October, 2007 they discovered that the said land had purportedly been transferred to the 1st Defendant that later sold it to the 2nd Defendant on the 19th October, 2010 after which a title deed was issued to that effect. He claims that the purported transfer happened almost twenty one (21) years after the deceased demise and at a time when no letters of administration in respect of her estate had been issued or applied for. He explains that they reported the matter to the police for investigation as they had in their custody the original title deed in the deceased name. He contends that the District Land Registrar, Kajiado North District after investigations established that the deceased's title deed held by them was and is still the only genuine title to the suit land. Further, that the deceased title was never used to effect transfer of the suit land to the 1st Defendant and any transfer done by the 1st Defendant is fraudulent. He states that the Land Registrar recommended that the forged title be surrendered for cancellation and rectification of the Register. He insists the 1st and 2nd Defendants never challenged the findings of the District Land Registrar in any forum. He explains that the 2nd Defendant is currently undertaking business known as Cabro Works on the suit land despite restriction placed over the same. He has given an undertaking to damages and is apprehensive the 2nd Defendant can dispose of the suit land to a third party.

The 1st Defendant opposed the application and filed a replying affidavit sworn by Dr. DANIEL KAIRU KIARAHO who is its Director where he denies the allegations in the Plaintiff's supporting affidavit. He deposes that the 1st Defendant saw an advertisement in the Daily Nation Newspaper dated 25th June, 2007 and through himself contacted the Advertiser who took him to view the suit land and they agreed at a purchase price of Kshs. 4 million. He explains that the 1st Defendant instructed the firm of messrs Kimani Kairu & Company Advocates to undertake the transaction on his behalf where they carried out a search at the Lands Registry; approved the Sale Agreement drawn by Mukono Ondieki advocates; scheduled meeting to obtain consent of the Land Control Board at Kajiado; prepared the transfer and facilitated

payment of Stamp Duty. He contends that a Transfer was registered in favour of the 1st Defendant and upon completion of the conveyance, they obtained vacant possession of the suit land. He avers that the 1st Defendant was a bona fide purchaser for value and became registered proprietor pursuant to a previous registration made on 3rd October, 1981. He admits that suit land was owned by the deceased but is a stranger to the allegation that she actually died on 21st November, 1986 or at all and no letters of administration had been taken out for her estate. He further admits that on or about January/ February, 2008 the 1st Defendant caused the 3rd Defendant to transfer suit land to the 2nd Defendant. He insists that the Plaintiffs has failed to demonstrate or attribute fraudulent action on the part of the 1st, 2nd and 3rd Defendants as pertains to the suit land. He is a stranger to the report made by the Plaintiffs on 7th March, 2012 or any other date as regards the fake title. He contends that on or about January/ February 2008 the Plaintiffs came to the suit land claiming he had another title to it. He reported matter to the Directorate of Criminal Investigation, who asked Plaintiffs to surrender their title for verification but they failed to do so. He disputes the authenticity of the title deed held by the Plaintiffs and explains that after investigation the Police cleared the 1st Defendant's title after ascertaining it was issued procedurally. He confirms that the 1st Defendant lawfully sold suit land to the 2nd Defendant. Further, that the Plaintiffs never took any steps to challenge sale to the 1st Defendant nor to the 2nd Defendant respectively. He reiterates that the 2nd Defendant is a bona fide purchaser for value. Further, that from 1986 upto 2014, the Plaintiffs never took any action to assert/enforce his purported claim over the suit land by processing as well as completing succession. He reiterates that in a letter dated the 6th May, 2014 to the Ethics and Anti-Corruption Commission the Plaintiffs confirm the Defendants are successive purchasers for value. Further, the Plaintiffs admitted that there was a previous title that existed which was stolen from his father's house and subsequently recovered from the alleged thief but no evidence has been placed to support this allegation. He avers that the Plaintiffs has excluded the vendor's law firm and Amina Naanyu Malambu from the proceedings herein. Further, there is no notice to the Attorney General and that a mandatory injunction against a bona fide purchaser for value would not be an appropriate interlocutory remedy.

The 2nd Defendant opposed the application and filed a replying affidavit sworn by VIRGINIA WANGUI SHAW who is its Shareholder and Director where she avers that they purchased the suit land from the 1st Defendant after adhering to the legal process which included carrying out an official search, obtaining consent of the Land Control Board, executing and registering a Transfer at Ngong Land Registry after which a title deed was issued to it on 19th October, 2010. Further, that the 2nd Defendant conducted a post sale search which confirmed the suit land was registered in its name. She claims the 2nd Defendant took possession of the suit land and enlisted the services of a Physical Planner to obtain change of user for the company to commence development thereon. She states that on 19th June, 2012, the 2nd Defendant received a letter dated 17th May, 2012 addressed to the Chief Land Registrar from the Land Registrar Ngong District claiming that the title document issued to the 1st Defendant herein was not genuine. Further, the 2nd Defendant responded to the letter and informed the Chief Land Registrar that they were beneficial purchasers for value without notice. She contends that on 10th January, 2013, the 2nd Defendant learned that the Plaintiffs had colluded with the Land Registrar to register a restriction on the suit land without notice to it. Further, the 2nd Defendant successfully challenged the said restriction and asserted its claim on the suit property vide Kajiado ELC Misc. Application 98 of 2017 where the Court ordered for removal of restriction. She insists the Plaintiffs' claim is based on the same subject matter and facts as in two previous suits which have concluded by the High Court to wit Nairobi ELC Case No. 877 of 2014 and Kajiado ELC 98 of 2017. She reiterates that the Plaintiffs failed to appeal nor apply for review of the court's decisions. Further, in Kajiado ELC 98 of 2017, the Plaintiffs failed to file pleadings to oppose the 2nd Defendant's claim on the suit land. She avers that no competent authority has ever found fraud on the part of the 1st and 2nd Defendants in relation to any transaction involving title to the suit land. Further, that the suit by the Plaintiffs is res judicata and discloses no prima facie chance of success. She further reiterates that the Plaintiffs does not have any legal rights on this claim as the same has been defeated by statute as well as laches. Further, that the 2nd Defendant will suffer irreparable harm that cannot be compensated in damages if the orders sought by the Plaintiffs are granted.

The Plaintiffs filed a further affidavit sworn by HASSAN IDDI MALAMBU where he disputes the advertisement in the newspaper advertising the sale of the suit land. He contends that the said Advertisement was placed by unauthorized person whose affidavit has not been furnished by the 1st Defendant. He insists they hold the original title in their custody and the title used for the transaction was fake. Further, that the Land Registrar in Ngong Sub County filed a report after thorough investigations which concluded that the 1st Defendant's title was not valid

Analysis and determination

Upon perusal of the application together with the supporting affidavit, the replying affidavits and the parties' submissions, at this juncture the only issue for determination is whether the interim injunction sought by the Plaintiffs ought to be granted pending the hearing and determination of the main suit.

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**.

As to whether the applicants have demonstrated a prima facie case with probability of success. It is the Applicants' content that they are administrators of the estate of AMINA NAANYU MALAMBU who was the owner of the suit land. They hold a title deed to that effect. The 2nd Defendant also avers that is it the owner of the suit land having purchased the same from the 1st Defendant. They also hold a title deed to that effect. The 1st Defendant stated that it bought the suit land from one AMINA NAANYU MALAMBU which fact the Plaintiffs' dispute and insists the said Sale took place 21 years after the deceased demise. The Plaintiffs allege that the 1st Defendant fraudulently acquired the title and transferred it to the 2nd defendant. The 2nd Defendant submitted that it is an innocent purchaser for value, as it conducted due diligence at the Lands Registry which revealed that it is the 1st Defendant who was owner of the suit parcel, and hence bought the same from the 1st Defendant and took possession of the same. It insists it is a purchaser for value without notice.

Looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Plaintiffs over the suit land is not baseless. Although it will be pertinent to decipher how there were two titles in respect of the suit land. The Plaintiffs have alleged fraud and it is trite law that where fraud is alleged, the issues have to be determined after a full hearing. The 2nd Defendant on the other hand contends that it undertook due diligence and innocently entered into a Sale Agreement with the 1st Defendant and commenced

investing on the suit land. Since the Plaintiffs are administrators of the deceased estate and hold another title to that effect, and in relying on the decision of **MRAO Vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125** where the Court defined a prima facie case, I find that the Plaintiffs have indeed established a prima facie case.

On the second principle as to whether the Applicants stand to suffer irreparable loss which cannot be compensated by way of damages. The Court of Appeal held in the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, that in an application seeking injunctive relief, speculative injury cannot suffice and there must be more than unfounded fear and the injury should be actual as well demonstrable that cannot be compensated by damages. Both the Plaintiffs and 2nd Defendant claim ownership of the suit land and admit. The Plaintiffs insist that if the orders sought are not granted, the 2nd Defendant would sell the suit land to a third party. In the instant case, since the Plaintiffs are administrators of the deceased estate, I find it would be pertinent to preserve the suit land until its ownership is determined as the Plaintiffs will suffer irreparable harm if the orders sought are not granted.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the property is not preserved, it may be wasted away.

Since both the Plaintiffs and the 2nd Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and the 2nd Defendant having purchased it from 1st Defendant and taken possession, the Court finds that these are issues best determined at a full trial, I will decline to grant the orders as sought but will proceed to make the following order:

- An inhibition order be and hereby registered by the Land Registrar Kajiado North as against land parcel number NGONG/ NGONG/ 5048 of any dealings, lease, transfer or charge pending the hearing and determination of the suit.
- The Obtaining Status Quo be maintained wherein suit land should remain as it is pending the outcome of the suit.
- The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 14th day of October, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

M/S. Munyiri holding brief for M/S. Shaw for 2nd defendant

Ochieng for 1st defendant

Court assistant - Mpoye