



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&L CASE NO. 112 OF 2017

EVALYNE NYANCHAMA NYASANI.....PLAINTIFF

VERSUS

EZRA KEMBOI.....1ST DEFENDANT

ELIUD KIPLAGAT.....2ND DEFENDANT

EMILY KAROSEE.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 14th March 2017 brought by the plaintiff/applicant seeking for orders:

- a) Spent
- b) That ex parte interim orders of temporary injunction do issue restraining the Defendant or his servants or agents and or his employees from annexing, trespassing, tilling harrowing, planting or in any other manner disturbing the Plaintiffs/Applicant peaceful occupation of the 3.425 acres of Land Parcel Number ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT) pending inter partes hearing and thereafter full hearing of the suit herein.
- c) The OCS Eldoret Police Station to supervise and enforce the orders issued herein.
- d) That the Court do issue perpetual injunction restraining the Defendant/Respondents from interfering with the Plaintiff's peaceful occupation and working on land Parcel ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)/740.
- e) Cost of the application be provided for.

This matter was brought to court under certificate of urgency when the same was certified urgent and the applicant ordered to serve within 3 days for inter parte hearing. The court later ordered for the maintenance of status quo pending the inter parte hearing of the application. Counsel later agreed to canvass the application through written submissions which were filed on 24th October 2017.

Plaintiff/Applicant's Counsel's Submission.

Counsel gave a brief background of the plaintiff's case and stated that the Applicant is the legal registered owner of all that Parcel of land known as ELDORET MUNICIPALITY BLOCK 20(KAPYEMIT)/740 measuring 1.37 Ha pursuant to title issued to her on the 21/12/09. Counsel further submitted that the plaintiff/applicant entered into a memorandum of understanding of which she exchanged her title with the former registered owner one KIPYEGO TIROP, now deceased. That the applicant's parcel of land in respect of the exchange was known as land parcel No. SOY/SOY BLOCK 8(SERGOIT)26 measuring 8.8 acres.

Counsel submitted that the plaintiff and the deceased took possession of the respective parcels of land which were subject to the exchange and fenced the same. It was counsel's submission that the applicant followed all the rightful procedures and obtained a title to the suit land in her name. Counsel further submitted that sometime in February 2017 the 1st and 2nd defendants forcefully and unlawfully entered into the plaintiff's parcel of land and ploughed without the plaintiff's consent.

Counsel stated that the plaintiff alerted the provincial administration of the trespass but the defendants persisted with their unlawful activities. Counsel cited the principle of indefeasibility of title but referred to the Registered Land Act which has since been repealed. He

should have cited the Land Registration Act 2012 which also talks of indefeasibility of title unless it is obtained by way of fraud or misrepresentation.

Mr. Angu further submitted on the principles of grant of an injunction as per the Giella Casman Brown case. He stated that the plaintiff had established a prima facie case with a probability of success. He submitted that the plaintiff had followed due process in the acquisition of the suit land and was lawfully registered as an owner after the exchange. He urged the court to allow the application for a temporary injunction.

Counsel for the Respondents' Submission

Counsel for the respondents filed his submissions and opposed the plaintiff's application and denied that there has been any trespass as alleged. Counsel reiterated the contents of the replying affidavit by the 3rd defendant who stated that when her late husband died, her brother in-law, KIPYEGO TIROP, now deceased, was left to run family the affairs including carrying out Sub-division of the suit land. She averred that no exchange ever took place and even if it did, it was between Applicant and KIPYEGO TIROP who kept all the land dealings to himself and all the transactions were solely done by him.

The respondent claimed that the alleged transactions were fraudulent, illegal and therefore null and void. Counsel submitted that the applicant is not entitled to the orders sought. Counsel further submitted that, Section 45 of the Laws of Succession Act prohibits dealing with properties belonging to a deceased person before obtaining grant. It states:-

"(1) Except so far as express/y authorized by this Act, or by any other written law or by a grant of representation under this Act, no person shall, for any purpose fake possession or dispose of, or otherwise intermeddle with any free property of a deceased person.

Counsel cited cases of intermeddling with the property of a deceased person as he alleged that the property belonged the father in law of the 3rd defendant whose estate had not been administered through a succession cause.

It was further the submission of counsel that the purported transaction between the Applicant and one KIPYEGO TIROP amounted to intermeddling of the deceased estate and the same is illegal. Counsel also took issue with the legality of the transaction which he termed as fraudulent. He urged the court to find that the application lacks merit and dismiss it

Analysis and determination

This is an application for a temporary injunction to preserve the suit land pending the hearing and determination of this case. The court had already ordered that the status quo be maintained pending the hearing of this application inter partes.

The plaintiff is the registered owner of the suit land as exhibited in the annexed copy of title. The plaintiff has further demonstrated the process which she acquired the suit land from the memorandum of agreement stage to the titling process. The plaintiff applicant stated that she did not experience any issues until sometime in February 2017. She stated that after the exchange she took possession and fenced the suit land

What I must deal with at this juncture is as to whether the plaintiff /applicant has established a prima facie case with a probability of success. I will not go into the merits of the case as that will be dealt with during the trial. The defendant has alleged fraud in the way the transactions were carried out but I cannot deal with that issue now at this interlocutory stage without proper evidence. This can only be dealt with conclusively at the trial. Counsel also stated that there has been no trespass. If that is the case then the orders sought will not affect the respondent in anyway. It is for purposes of preserving the substratum of the case.

I have looked at the attached documents in support of the plaintiff's application and I find that the plaintiff being the registered owner of the suit land has a prima facie case against the defendants. It would be in the interest of justice to grant an order for a temporary injunction to preserve the suit land pending the hearing and determination of this suit.

I am not convinced by the argument by counsel for the defendants that the suit land belongs to a deceased person whose estate has not been administered. When a property is transferred before someone dies then it no longer forms part of the estate of that deceased person. It cannot be said that a person is intermeddling with the estate of a deceased person when the same has been transferred and registered in a different name.

The upshot is that the plaintiff's application dated 14th March 2017 is hereby partially allowed.

I decline to grant a perpetual injunction as it is tantamount to granting a final order at an interlocutory stage.

Dated and delivered at Eldoret on this 25th day of January, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of:

Miss Tum holding brief for Mr. Angu Kitigin for Plaintiff

Mr. Koech – Court Assistant

Mr. Melly for defendant – absent.