



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 789 OF 2017

JEDIDAH WANJIKU KANGETHE.....APPLICANT

VERSUS

LENKAI OLE LENKAIKONI.....1ST DEFENDANT

OTELEKU OLE LENKAIKONI.....2ND DEFENDANT

IKOYO OLE LENKAIKONI.....3RD DEFENDANT

Sued on their own behalf and As administrators of the

Estate Of The Late NTOIKA ENE LENKAIKONI

RULING

The application for determination is dated 21st July, 2017 brought pursuant to Order 40 rule 1(a) (b), 3(3), 4(1), Order 50 rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Section 101 of the Land Registration Act and all the other enabling provisions of the law.

The application is based on the following grounds which in summary is that the Applicant has a prima facie case against the Respondents as she has been in actual possession of a portion of five (5) acres of land excised from LR No. LTK/ROMBO 'B'/2 which she purchased from the Respondents in 1989. Despite having been granted five (5) acres of the land pursuant to a Confirmation of Grant vide Nairobi Succession Cause No. 1185 of 1988 (**In the matter of the estate of NTOIKA ENE LENKAIKONI**), the Respondents have totally refused and declined to transfer the said portion of land to the Applicant who had paid the purchase price in full. The Respondents have recently used goons and the Provincial Administration to harass and intimidate the Applicant including her servants who reside on the suit land with a view to having them vacate. The Applicant is unable to put the land to meaningful use since the beginning of 2017 due to the continuous harassment and intimidation by the Respondents. The Respondents acts are not only illegal but unconstitutional and amount to infringement of the Applicant's rights, yet they have no interest over the suit land. In any event the Respondents have not transferred the land to the Applicant, who in the alternative has acquired the land through adverse possession.

The application is supported by the affidavit of JEDIDAH WANJIRU KANGETHE who is the Applicant herein where she deposes that the Respondents are the sons as well as administrators of the estate of the late NTOIKA ENE LENKAIKONI who passed away on 1st November, 1984 and was the proprietor of land parcel number LTK/ROMBO 'B'/2 measuring approximately 38.75 acres. She avers that on 13th September, 1989, she entered into a written agreement with the 1st Respondent for the sale of five (5) acres of land to be excised from LTK/ROMBO 'B'/2 at a consideration of Kshs. 20, 000 per acre and the

said sale was subject to the Respondents obtaining Letters of Administration in respect of the Estate of NTOIKA ENE LENKAIKONI. She paid the purchase price amounting to Kshs. 100,000 on diverse dates as follows: Kshs. 79,100 on 13th September, 1989; Kshs. 12,057 on 4th April, 1990; Kshs. 4000 on 9th May, 1990 and Kshs. 8,000 on 28th June, 1997. She claims she is in possession of an application form seeking consent of the Land Control Board as well as transfer form duly executed in her favour in respect of the five (5) acres she purchased. Further that the transfer and application for consent of the Land Control Board was to be held as security pending the actual subdivision of LR. No. LTK/ROMBO "B"/2 so as to provide a new number in respect of the five (5) acres. She avers that the Respondents have failed to transfer the land to her despite being awarded her five (5) acres vide the succession cause and efforts to use the provincial administration has proved futile. She contends that the Respondents despite acknowledging she purchased five (5) acres from the suit land claimed through their lawyers messrs. Ndeda & Co Advocates vide a letter dated 15th February, 2017 that she had not finalized paying the purchase price, yet she has done so. She states that on 24th March, 2017, the Assistant County Commissioner issued a letter to one Patrick Kagunda Nganga whom she had leased to land for numerous years, to vacate the five (5) acres within the next thirty (30) days or face eviction. She reiterates that the Respondents have continued to use local Administration to harass her and issue eviction threats. She seeks the courts intervention to compel the Respondents to issue her with a title deed for the portion of the five (5) acres she had purchased from them.

The application is opposed by the Respondents who filed a Replying Affidavit sworn by OTELEKU OLE LENKAIKONI the 2nd Respondent herein where he disputed the Applicant's claim that she is the proprietor and been in actual possession of five (5) acres of the suit land. He denies that the Respondents have been Administrators of the estate of the late NTOIKA ENE LENKAIKONI as in 1988 they were all minors and in no way capable of being so. He deposes that the succession cause no 1185 of 1988 alluded to by the Applicant is a fraud and has never been heard nor determined by a court of competent jurisdiction. Further that the actual succession to the estate of NTOIKA ENE LENKAIKONI is number 1854 of 2012 where JACKSON MAIYANI MENGELI and JOSEPH K. KIMAIYO were appointed administrators. He avers that it is strange for the Applicant to claim ownership of the suit, yet she is not the dependant to the estate of the late NTOIKA ENE LENKAIKONI and that the Respondents have never used goons as well as local Administration to harass her as she has never been in actual possession of the suit land as claimed. He contends that after inheritance, they have occupied the suit land continuously and enjoyed quiet and undisturbed possession thereon from 1986. Further that in the course of time they have exercised ownership over the suit property and carried out various activities including construction of both permanent and semi-permanent houses; building schools, churches and shops; constructing roads; rearing livestock and planting crops as well as trees. He reiterates that the Applicant intends to interfere with their enjoyment of their land as she wants to evict them from it, and if the orders sought are granted, they will lose the only place they call home together with their lifetime investments. He states that this will interfere with their constitutional right to adequate housing and they shall suffer irreparable loss and damage incapable of being compensated in monetary terms.

The Applicant swore a supplementary affidavit where she deposed that the contents of the replying affidavit were not true as she has been in occupation of the five (5) acres of the suit land and it is the Respondents who are trying to evict her as evident from the letter addressed to Patrick Kagunda Nganga who is her caretaker. She reiterates that even from the contents of the letter from Ndeda & Company Advocates the Respondents admitted that she purchased the portion of the suit land. She is surprised that the Respondents are not administrators to the estate of the late NTOIKA ENE LENKAIKONI vide Nairobi Succession Cause No. 1185 of 1985, yet this was also alluded to by their own advocates. She insists the Grant of Confirmation annexed in the 1st Respondent's Replying Affidavit marked as annexure 'OOL1' is a forgery and the Respondents should tell the court where they obtained it from. Further that the Deputy Registrar wrote vide a letter dated the 30th August, 2017 and disowned the said annexure 'OOL1' and stated that the said Succession Cause No 1854 of 2012 relate to the estate of KAMAU KABUI alias SAMUEL KAMAU KABUGI and not NTOIKA ENE LENKAIKONI. Further that on perusal of the 2nd Respondent's bundle of documents, she noted that the purported application for transmission of suit land clearly relates to LTK/ROMBO/"448" and not LTK/ROMBO 'B'/2. She contends that Form 54 attached to the 2nd Respondent's list and bundle of documents is also a forgery.

She insists that LTK/ROMBO 'B'/2 has not been subdivided as the purported documents for subdivision are all forgeries and that the Respondents were all adults when they applied for Letters of Administration Intestate in respect to the estate of NTOIKA ENE LENKAIKONI as she obtained copies of the Grant from the 1st Respondent as part of the completion documents to the sale of the portion of her five (5) acres. She reiterates that the Respondents are using the local administration to harass her and trying to chase away her caretaker.

Both parties filed their respective submissions which I have considered.

Analysis and Determination

The only issue for determination at this juncture is whether the Plaintiff is entitled to the injunctive orders sought.

The principles of granting interlocutory injunction were settled in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** where the court held inter alia that for an injunctive order to be granted the Applicant has to demonstrate it has prima facie case with a probability of success, and it stands to suffer irreparable loss or injury which cannot adequately be compensated in damages. If the court is in doubt, it should decide the application on a balance of convenience. In line with the said principles, I wish to interrogate the evidence presented as to whether the Plaintiff has established a prima facie case with probability of success.

In the first instance as to whether the Applicant has a prima facie case with probability of success, the Court notes that the Applicant paid Kshs. 100,000 for the purchase of five (5) acres out of the suit land. I note the Respondents did not deny the receipts of the monies which were annexed to the supporting affidavit. Further even the Respondents through their lawyers messrs Ndeda & Co Advocates vide a letter dated 15th February, 2017 admitted the Applicant indeed purchased five (5) acres out of the suit land but had not finished effecting the payments. I further note that the Applicant was even included in the Certificate of Confirmation of Grant where she was granted five (5) acres out of the suit land. The Applicant contends that she has been on the suit land since 1989 and now the Respondents are harassing her and threatening to evict her. They are even using the local Provincial Administration to do so. I notice that the Assistant County Commissioner actually wrote to one Patrick who is the Applicant's caretaker giving him thirty (30) days' notice or risk being evicted. In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: '*In civil cases, a prima facie is a case in 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 an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.*'

In relying on the facts as enumerated above, I find that the Application indeed raises triable issues which need to be heard and determined. From the submissions herein, it is clear the Applicant has established a prima facie case with a probability of success.

On the second issue as to whether the Plaintiff stands to suffer irreparable loss or injury which cannot adequately be compensated in damages. The Court notes that the Applicant paid Kshs. 100,000 as purchase price of the five (5) acres as had been agreed upon. She has produced evidence of payment which has not been controverted by the Respondents. The Respondents have declined to sign the transfer forms yet the Court vide Succession Cause No.1185 of 1988 had already allocated her the five (5) acres. She has enjoyed quiet possession of the suit land since 1986, a fact not denied by the Respondents. From these facts, I find that the Applicant will indeed suffer irreparable loss, which cannot be adequately compensated in damages.

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.

In the circumstances, I find that the Applicant's application dated the 21st July, 2017 is merited and proceed to allow it in the following terms:

1. 'An inhibition order be and is hereby registered by the Land Registrar Kajiado as against Land Parcel Number LR LTK/ROMBO 'B'/2 of any dealings including disposing of, transferring , leasing or charging pending the hearing and determination of the suit.'

2. 'The Respondents by themselves, their representatives, servants, assigns and/or any persons authorized by them, from interfering with, and/or meddling or issuing eviction threats to the Applicant, her servants, agents and/or assigns in respect of the five (5) acres portion of land in LR No. LTK/ROMBO "B"/2 that she is occupying pending the hearing and determination of this suit.

3. Costs will be in the cause

Dated signed and delivered in open court at Kajiado this 23rd day of January, 2018.

CHRISTINE OCHIENG

JUDGE

Present

Cc Mpoye

Agre for Ndeda for Respondent

Ms Njoroge for Plaintiff