



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 709 OF 2017

LENAIYA NEMATANG OLE IDILAI.....PLAINTIFF

VERSUS

BENJAMIN SENTEMAN SUPEE.....1ST DEFENDANT

MOSOITO OLE GOLGOL.....2ND DEFENDANT

RULING

The application for determination is the Plaintiff's Notice of Motion dated the 10th May, 2017 brought pursuant to sections 1A; 3A and 63 (e) of the Civil Procedure Act and Order 40 rule 1 & 4 and Order 51 rule 1 & 3 of the Civil Procedure Rules and all the other enabling provisions of the law. It is based on the following grounds which in summary is that the Plaintiff was bonafide owner of KAJIADO/KIPETO/800 and had sold fifty five (55) acres to the Defendants and they took the original title to undertake subdivision but they illegally allocated themselves more than forty three (43) acres and processed the title without the Plaintiff's consent. The Defendants have now denied the Plaintiff right to graze at his land. The Defendants have illegally processed the title number KAJIADO/KIPETO/1819; KAJIADO/KIPETO/1820 and KAJIADO/KIPETO/2143 hereinafter referred to as the 'suit lands' without the Plaintiff's consent. The Defendants have caused the cutting down of trees, fencing and denied the Plaintiff access to the grazing land. Unless the injunctive orders sought are issued, the Plaintiff will suffer irreparable loss and damage should the Defendants and their agents continue to interfere with the suit land. Further if the Defendants are not restrained from interfering with the vacant possession of the property, they may end up transferring a defective certificate to an innocent purchaser for value and/or illegally developing Plaintiff's property. In a bid to preserve the suit property, it is in the interest of justice that the Defendants are restrained from further transaction and or in any way dealing with the suit property until parties claim in the suit land is rightly determined.

The application is supported by the affidavit of LENAIYA NEMATANG OLE IDILAI the Plaintiff herein where he deposes that he was allocated the suit land by the community and on 25th October, 1995, he sold fifty five (55) acres of the same to the Defendant. He claims the Defendants took the title deed and indicated they were going to get a surveyor but in the process illegally allocated themselves forty three (43) acres of the suit land. He insists application has been made propitiously and upon discovery of mischief. He confirms he is ready and willing to abide by any reasonable conditions that the Court may order as condition for the grant of the Orders sought. He contends that he stands to suffer prejudice, irreparable loss and damage if the Defendants are not restrained from further dealing with the suit land.

The Defendants opposed the application and filed a replying affidavit sworn by MOSOITO OLE GOLGOL the 2nd Defendant herein where he averred that the suit is incompetent, an abuse of the court process and offends the provisions of section 7 of the Limitation of Actions Act. He deposed that the Notice of Motion Application does not meet the threshold for grant of temporary injunction. He claims title number KAJIADO/KIPETO/1819 is registered in his name in trust of his late father SUPEET OLE MUSHORO while title number KAJIADO/KIPETO/1820 and KAJIADO/KIPETO/2143 are registered in the name of his late father. Further that his late father was also owner of KAJIADO/KIPETO/1647. He contends that the suit properties were purchased by his late father from the Plaintiff between 1995 and 1997 in a series of transactions which were witnessed by the area local chief JEREMIAH SANKAIRE. He confirms that they have been peaceably residing on the suit properties since then and to date including his father who died on 12th March, 2017. He reiterates that the Plaintiff for over 22 years has never laid any claim on the suit properties until after the demise of their father when he filed the present suit as an afterthought. He insists the Plaintiff has not placed any materials before this Honourable Court to support his claim that the Defendants are in the process of disposing of the suit lands. He reiterates that the suit properties which are still in the name of his late father are not subject to any disposal since as a family they have not instituted the application for letters of administration intestate in respect to his estate. He reaffirms that the Plaintiff has failed to establish any prejudice, irreparable loss or damage he may suffer if the interim orders sought are granted and said Plaintiff can be compensated with damages if the orders herein are not granted.

The Defendants further filed a Notice of Preliminary Objection dated the 16th May, 2017 where they are seeking the following orders:

1. That suit is time barred by the Limitation of Action Act, section 7 of this Act prohibits the recovery of land after the lapse of twelve (12) years.

2. The Plaintiff/Applicant herein has filed a suit for recovery of land whose Sale Agreements were executed in the year 1995 and 1997. That is twenty two (22) years after the purported Sale Agreements.

3. FURTHER the 1st Defendant herein is non – suited as the suit properties are duly registered in the names of the 2nd Defendant and the father of the Defendants who died on 12th March, 2017.

4. The said application is presented mala fide.

REASONS WHEREFORE the 1st and 2nd Defendants pray that the Plaintiff/Applicant's application be dismissed with costs.

The Plaintiff filed a further affidavit sworn by himself where he averred that this application does not offend the provisions of Section 7 of the Limitation of Actions Act, since Section 9 of the same Act applies when he discovered ground of fraud and taking of the additional 43 acres.

Further that this was in the year 2014 and issues can only be determined after evidence has been presented in court. He insists he has established a prima facie case given that the original title to the suit property belonged to him with the Defendants being given authority to only subdivide and obtained the fifty five (55) acres that he sold to them. He contends that the Defendants acted contrary to the agreement by allotting themselves an extra fourty three (43) acres. He reiterates that he stands to suffer irreparable harm as the Defendants will proceed to sell and undertake further illegal demarcation of the suit land since they have already commenced cutting down trees, fencing and denied him access to grazing. Further that the Defendants instituted a criminal case No. 449 of 2017 for illegal grazing, after he had filed this suit. He does not dispute the titles KAJIADO/KIPETO/1819, KAJIADO/KIPETO/2143 and KAJIADO/KIPETO/1820 being registered in the names of the 2nd Defendant and their late father SUPEET OLE MUSHORO but contends that the said titles were fraudulently transferred to themselves without consent where they illegally allocated themselves Fourty three (43) acres. He denies the local chief Jeremiah Sankare witnessed any transactions between them. He confirms that the Defendants have been residing on the fifty five (55) acres he sold to them but not in the fourty three (43) acres they allocated themselves. He insists he had given the 2nd Defendant his title to undertake the transfer and he promised to subdivide the suit land and remove the fifty five (55) acres and return him the balance. Further that since the 2nd Defendant was his friend and neighbor, he did not suspect any fraud until he was informed by his sons BENSON ROMO LENAIYA and CLYFORD PANAI LENAIYA who discovered that the 2nd Defendant as well as his father had allocated themselves the land in 2014. He affirms that he has been grazing on the suit land since time immemorial and only filed this suit when they failed to resolve the matter amicably. Further that he cannot be compensated by way of damages if his animals die due to starvation, yet they have always grazed on the disputed land. He seeks the court to appoint a surveyor to determine the fifty five (55) acres and return to him the fourty three (43) acres. He deposes that the village elders and area chief are aware he only sold the fifty five (55) acres and that his wife was also aware of only this transaction. He denies dealing with Mosoito Ole Golgol who is the son to the deceased Supeet Ole Mushoro who claims he transferred to him KAJIADO/KIPETO/1819 measuring 5.6 hectares.

Both parties filed their respective submissions that I have considered.

Analysis and Determination

Upon perusing the Notice of Motion dated the 10th May, 2017 including the supporting, replying and further affidavits as well as the annexures thereon, the main issues for determination are:

- Whether the Plaintiff's application is statute barred in accordance with section 7 of the Limitation of Actions Act
- Whether the 1st Defendant herein is non – suited as the suit properties are duly registered in the names of the 2nd Defendant and their deceased father.
- Whether the Plaintiff is entitled to the orders of temporary injunction pending the outcome of the suit.

Plaintiff does not deny he sold fifty five (55) acres of the suit land to the Defendants. What he denies is selling fourty three (43) more acres to the Defendants and insists they fraudulently allocated themselves the extra land without his consent. He claims the Defendants are harassing him, fenced off his land and have denied him the right to graze his cattle on the disputed land. He insists his claim is not statute barred as he discovered the fraud in 2014 and the deceased promised to resolve matter but died before doing so. He relied on the cases of **ISHMAEL KAGUNYI THANDE V. HOUSING FINANCE KENYA LIMITED CIVIL APPLICATION NO. NAI 157 OF 2016 (unreported)** and **MRAO LTD V. FIRST AMERICAN BANK OF KENYA & 2 OTHERS** to supported his claim. The Defendants on the other hand insist the Plaintiff sold them the suit land and they have been residing thereon, but the Plaintiff started claiming they took the fourty three (43) acres after their father had died in March, 2017. They insist the Plaintiff's claim is statute barred. They relied on various cases including **HARON ONYANCHA VS. NATIONAL POLICE SERVICE COMMISSION & ANOTHER, GATHONI VS. KENYA COOPERATIVE CREAMERIES LTD, JONES M.MUSAU VS NAIROBI HOSPITAL & ANOTHER, GIELLA VS. CASSMAN BROWN** and **MRAO LTD V. FIRST AMERICAN BANK OF KENYA & 2 OTHERS** to support their position.

Section 7 of the Limitation of Actions Act provides that: ' **An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.**'

Section 26 gives an extension of time and states as follows: '**Where, in the case of an action for which a period of limitation is prescribed, either—**

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover,

or enforce any mortgage upon, or set aside any transaction affecting, any property

which—

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.'

In the current scenario, I note that the Plaintiff alleges fraud against the Defendants for the transfer of fourty three (43) acres of the suit land. The question we need to ask is whether the Plaintiff was aware of the alleged transfer but never lodged any claim until it was statute barred. From the facts presented, the Plaintiff insists he discovered the issue of the transfer in 2014 through his sons and when the deceased agreed to resolve the issue amicably but died before doing so. I further note these averments were not controverted by the Defendants. I note the title deeds annexed to the replying affidavits were obtained as follows: for KAJIADO/KIPETO/1819 on 7th January, 1997; for KAJIADO/KIPETO/1820 on 11th February, 1997 and for KAJIADO/KIPETO/2143 on 6th October, 1999. What is not clear is whether these titles which were issued on different dates were all from one transaction and if the Plaintiff was a party to it. These are questions which beg an answer and can only be determined once oral evidence is adduced and not through the facts as presented in the affidavits. I note there are no sale agreements nor transfer forms annexed to the respective affidavits. In relying on section 26 of the Limitation of Actions Act, I will not term the Plaintiff's claim of fraud as baseless.

In the case of **Gathoni Vs Kenya Cooperative Creameries Ltd (1982) KLR 104**, Potter J stated thus:- ' .. **The law of limitation of Actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, this Act does not help persons like the applicant whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.**'

In the circumstances, I find that the Plaintiff's claim is not statute barred in accordance with the provisions of section 7 as read together with section 26 of the Limitations of Actions Act.

As to whether the Plaintiff is entitled to the injunctive orders sought, I wish to interrogate this by relying on the principles set in the celebrated case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** where it was held as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

As to whether the applicant has made out a prima facie case with a probability of success at the trial. The Applicant alleges fraud on the part of the defendants who took 43 acres of the suit land.

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 the first instance as to whether the applicant has demonstrated a prima facie case with a probability of success, in the applicants contention on fraud on the part of the defendants, I am persuaded by the case of **UCB Vs Mukoome Agencies (1982) HCB22** where it was held that 'where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'. In the instant case I find that it would be pertinent if both the Plaintiff and the 1st Defendant are granted an opportunity to be heard to enable the court make a determination on the ownership of the suit land.

As to whether the Plaintiff will suffer irreparable harm which cannot be compensated by way of damages, I will rely on the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where it was held that '...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy. '

In relying on the case above and based on the circumstances at hand, I find that the Plaintiff's alleged injuries are not speculative as he has demonstrated that he is unable to graze his animals and the defendants might dispose of the suit land if the harm he will suffer if the injunctive orders are denied.

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 suit lands is not preserved, it may be wasted away. I further find that the 1st Defendant is now suited as none of the suit properties herein are registered in his name.

Since the Applicant and 2nd Defendant are staking claim over the suit lands and the 2nd Respondent insisting they have resided thereon since 1997 when the father purchased it, 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:

1. Status quo be maintained pending the hearing and determination of this suit.
2. An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel numbers KAJIADO/KIPETO/1819; KAJIADO/KIPETO/1820 and KAJIADO/KIPETO/2143, of any dealings, lease or charge pending the hearing and determination of the suit.

The costs will be in the cause.

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

Dated signed and delivered in open court at Kajiado this 14th day of February, 2018.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Obel for Respondent

N/A for Plaintiff