



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 554 OF 2017

NGOTETE OLE ODUNGO.....PLAINTIFF

VERSUS

ADMINISTRATOR AND LEGAL REPRESENTATIVE

of the Estate of the late William Ndisho Ole Kaurai.....1ST DEFENDANT

CECILIA NANEU NDISHO.....2ND DEFENDANT

PATRICIAH NJARE GICHIRU.....3RD DEFENDANT

REGISTRAR OF LAND KAJIADO COUNTY.....4TH DEFENDANT

RULING

The application for determination is a Notice of Motion dated the 22nd March, 2017 by the Plaintiff, brought pursuant to Order 51 of the Civil Procedure Rules and Section 26 of the Land Registration Act. It is based on the following grounds which in summary is that the Applicant is the original owner of land parcel number KAJIADO/OLCHORO ONYORE/1927, having been a member of OLCHORO ONYORE Group Ranch and at no time did he sell his land or offer it for sale to someone known as WILLIAM NDISHO OLE KAURAI or any other person. During registration of the group ranch parcels of land, the Applicant's land was registered in two parts as KAJIADO/OLCHORO ONYORE/1927 and KAJIADO/OLCHORO ONYORE/ 1928. Further that upon completion of the subdivision of the group ranch, the Applicant who was illiterate waited to be called for his title deed, but this did not happen. In 2016 he was informed by his son that some people had invaded their land and claimed ownership. In January, 2017, the local Chief called a meeting but the parties could not agree. The Plaintiff discovered that one WILLIAM NDISHO OLE KAURAI had got himself transferred to land parcel number KAJIADO/OLCHORO ONYORE/1927, seven (7) days after the land had been registered in favour of the applicant, without his authority. Further that upon investigation, it was discovered that WILLIAM NDISHO OLE KAURAI had caused land known as KAJIADO/OLCHORO ONYORE/1927 to be subdivided to KAJIADO/OLCHORO ONYORE/3444 and KAJIADO/OLCHORO ONYORE/3445 respectively. Further that later WILLIAM NDISHO OLE KAURAI transferred land known as KAJIADO/OLCHORO ONYORE/3445 to the 3rd Respondent PATRICIA NJARE GICHIRU who is not known to the Applicant. Upon the death of WILLIAM NDISHO OLE KAURAI, land parcel number KAJIADO/OLCHORO ONYORE/3444 was transmitted to his relative CECILIA NANEU NDISHO, the 2nd Respondent herein. The 4th Respondent has not availed copies of the transfer documents including approvals and consent for land known as KAJIADO/OLCHORO ONYORE/1927 from the Plaintiff to WILLIAM NDISHO OLE KAURAI. It is evident that fraud and illegal methods were used to transfer the said land.

The application is supported by the affidavit of NGOTETE OLE ODUNGO where he deposes that during the land adjudication process he was categorized as part of the OLCHORO ONYORE Group Ranch where he is member number 83. He claims he is illiterate but he has been informed by his children that he was allocated 1579 as the title number measuring 9.81 hectares. He avers that in December 2016 he was informed by his son JOSEPH KIYIEN NGOTETE that strangers had invaded their land and were clearing thickets but the son chased them away. He denied interacting with WILLIAM NDISHO OLE KAURAI except for knowing he was a bar owner in Kiserian Township. He was surprised that strangers were producing agreements allegedly signed by him on the basis of a land transaction and when his children read the said agreements, they were mentioning names of people he did not know. He further denies participating in any land control board proceedings where the transfer of his family land was made and insists there must have been some high level or impersonation, misrepresentation or the carrying out of an illegal and corrupt scheme known to the Respondents that led to the transfer of his family land to strangers. He reiterates that it is proper and just that illegitimate and unlawful transactions which may have been effected by WILLIAM NDISHO OLE KAURAI be cancelled and the register rectified to reflect his ownership of land parcels number KAJIADO/OLCHORO ONYORE/3444 and KAJIADO/OLCHORO ONYORE/3445 which were formerly KAJIADO/OLCHORO ONYORE/1927 that had been subdivided.

The application is opposed by the 2nd Defendant who filed a replying affidavit where she averred that she is a widow as well as administrator for the estate of the late WILLIAM NDISHO OLE KAURAI and that the application is filled with falsehoods including half-truths. She confirms the Applicant knew her late husband whom he sold for eight (8) acres of the suit parcel KAJIADO/OLCHORO ONYORE/1927 on 3rd April, 1984 for Kshs. 20,000. Further that in November 1987, the Applicant transferred the said suit parcel to her late husband who took possession and enjoyed quiet possession until 2016 when the Plaintiff's sons chased away her son BERNARD KANUNU who had gone to prepare the land for farming. She contends that they met at the Chief's office with the Applicant who contended that he only sold eight (8) acres to her late husband but his sons denied the father sold the suit land and wanted it back. However, the Applicant's sons later changed their position and claimed the consideration paid for the land was too little. She avers that after the husband had bought the suit land, he realized it was bigger than eight (8) acres and he agreed to have it surveyed with any extra acreage to be reverted to the Applicant; which culminated in the subdivision into two portions which are KAJIADO/OLCHORO ONYORE/3444 and KAJIADO/OLCHORO ONYORE/3445 measuring 3.39 hectares (8 acres) and 0.409 (1) acre respectively. She confirms her late husband retained 3444 while the Applicant regained possession of 3445 which he sold to the 3rd Respondent. She denies undertaking any fraudulent dealings to acquire the suit land and insists all registration documents are available at the Land Registry. She reiterates that the application and the suit in general are an attempt to dispossess her of the suit land .

The Plaintiff filed his written submissions where he relied on the cases of **GIELLA Vs. CASMAN BROWN and KWALITY CANDIES & SWEET LTD Vs. INDUSTRIAL DEVELOPMENT BANK (2005) eKLR** to support his claim. The Defendant however failed to file their submissions as directed.

Analysis and Determination

Upon perusal of the Notice of Motion application dated the 22nd March, 2017 including the supporting as well as replying affidavits and the Plaintiff's submission, I find that the only issue for determination at this juncture is whether the Plaintiff is entitled to temporary injunction pending the outcome of the suit.

The Plaintiff contends the suit land was fraudulently obtained by the late WILLIAM NDISHO OLE KAURAI, subdivided and transferred to third parties. The 2nd Defendant stated that her late husband purchased the suit land from the Plaintiff and produced copies of the Sale Agreement, and Transfer Documents. She further averred that it is the Plaintiff who sold 3445 to the 3rd Defendant and not her late husband. The Plaintiff wants his land KAJIADO/OLCHORO/ONYORE/1927 to be reverted to him and the register rectified.

It is now established in Kenya that 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 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."

In relying on the case above, I wish to interrogate whether the Plaintiff has made out a prima facie case with a probability of success.

I note the Plaintiff has denied knowledge of the Sale Agreements and insists he is illiterate and does not know the people who witnessed the Sale Agreements. The 2nd Defendant contends that they have always used the suit land but the Plaintiff also claims so. The Plaintiff alleges fraud in the transfer of his land. I note that the transfer documents annexed to the replying affidavit were duly signed by both the Plaintiff and the 2nd Defendant's husband. He denies interacting with the 2nd Defendant's husband and claims the 2nd Defendant's husband even sold land to the 3rd Defendant. However the 2nd Defendant disputed this and provided a history on the subdivision.

I find that these are issues best heard and determined at a full trial.

Section 24 of the **Land Registration Act** provides that: **'Subject to this Act—**

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;'

Section 26 of the **Land Registration Act** stipulates that: **'(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

I note the 2nd Defendant has title to the suit land which she inherited from her husband. According to records indicated in the Green Card, the 2nd Defendant's husband has been registered as owner of KAJIADO/OLCHORO/ONYORE/3444 from 1987 to date. In the case of **UCB Vs Mukoome Agencies (1982) HCB22** it was held as follows: **'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 2nd Defendant are granted an opportunity to be heard to enable

the court make a determination on the ownership of the suit lands. Looking at the documents annexed to the respective affidavits and the evidence presented, it is clear that the claim laid by the Plaintiff over the suit lands is not baseless and find that he has established a prima facie case with a probability of success.

As to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and 2nd Defendant claim ownership of the suit land. I note the 2nd Defendant already has a title to it. The Plaintiff's sons have denied the 2nd Defendant's family access to the suit land. I find that since the 2nd Defendant is claiming the husband was a purchaser for value without notice, and she already has a title deed, she is the one who will suffer irreparable loss which cannot be compensated by way of damages as opposed to the Plaintiff.

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 Plaintiff and the 2nd Defendant are staking claim over the suit lands, with the sanctity of the title being in dispute the Court finds that these are issues best determined at a full trial, I will allow the Plaintiffs Notice of Motion application dated the 22nd March, 2017 in the following terms:

a) An inhibition order be and hereby registered by the Land Registrar Kajiado North as against land parcel number KAJIADO/OLCHORO ONYORE/3444 and KAJIADO/OLCHORO ONYORE/ 3445 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 7th day of February, 2018

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Naikuni holding brief for Muchoki for 1st and 2nd Respondents

Munika holding brief for Wainaina