



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 71 OF 2015

TESINA INZIANI KHACHENDA.....APPLICANT

VERSUS

PAULINE KHAYALI INGOSI.....RESPONDENT

RULING

The application is dated 21st January and is brought under order 40 rules 1, 2, 3 and 4 of the Civil Procedure rules Section 68 of the Land Registration Act 2012 seeking the following orders;

1. That service of this application be dispensed with, the same be certified urgent and be heard exparte in the 1st instance.
2. That pending the hearing of this application inter partes there be an order of injunction restraining the respondent, her agents, servant and/or employees or any other person claiming through him from cultivating, making use of, wasting, occupying and/or trespassing onto Land Parcel No. Kakamega/Shitoli/1308.
3. That pending the hearing of this application inter parties there be an order of restriction and/or prohibition prohibiting any registration, dealing with title number Kakamega/Shitoli/1308.
4. That pending the hearing and determination of this suit there be an order of injunction restraining the respondent, her agents, servants and/or employees or any other person claiming through him from cultivating, making use of, wasting, occupying and/or trespassing onto Land Parcel No. Kakamega/Shitoli/1308.
5. That pending the hearing and determination of this suit there be an order restriction and/or prohibition prohibiting any registration, dealing with title No. Kakamega/Shitoli/1308.
6. That the costs of this application be provided for.

The applicant submitted that Land parcel No. Kakamega/Shitoli/1308 is currently registered in the names of Pauline Khayali Ingosi, the respondent herein (annexed and marked 'TIK-1 is a copy of the register) That her husband Khachenda Kulenywa Peter purchased land parcel No. Kakamega/Shitoli/1308 from Shivaso Muteshi in 1981 (annexed and marked TIK-2 is a copy of the agreement. That previously they had been staying on the same parcel without any written agreement from 1963. That immediately they took vacant possession of the purchased parcel and started using/cultivating the same from 1963 to-date. That her husband passed on in the year 2004 intestate. That a grant of Letters of Administration Intestate of his estate was issued to her daughter Adelide Khalayi Khachenda as the administrator. That her daughter Adelide Khalayi Khachenda discovered that the land on which her family has been staying on since 1963 to-date which forms the estate of her deceased husband was fraudulently transferred and registered in the names of the respondent herein. That since 1963 to-date, she has been in peaceful use and possession of the said parcel and the respondent has never used it in any way. That her possession of the suit land herein has been open, continuous, notorious and exclusive of the respondent or the registered owner.

That the respondent has fraudulently registered land parcel No. Kakamega/Shitoli/1308 into her name. The applicant in her affidavit stated that the land parcel in question is currently registered in the name of the respondent. Annexure TIK-1 confirmed the same and also confirmed that the transfer was made in 2000 and not in 2010 as stated in paragraph 3 of the respondent's affidavit. It was unclear from the said register how the transfer was made in favour of the respondent when the owners were deceased and when she was not a beneficiary of the deceased's estate. Section 26 of the Land Registration Act provides that a certificate of title is to be held as conclusive proof of proprietorship and shall not be subject to challenge except.

- (a) On the ground of fraud or misrepresentation to which the person is proved a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme.

The applicant in this case has stated clearly that the original owner of the said land was one deceased Shivaso Muteshi, his now deceased wife Dariya Adamba Shivaso petitioned for succession and the title is issued to her as beneficiary in 1990. The applicant stated that she was the surviving widow to deceased Kachenda Kulenywa Peter who purchased the said land from its original registered owner Shivaso Muteshi in 1981 when still alive. She stated further that she and her late husband have been previously using and cultivating the said land since 1963 and even after her husband passed on in 2004, to date. That after the passing of her husband, who died intestate the daughter applied for letters of administration only to realize that the said land had been transferred to the respondent in 2000.

The respondent in her replying affidavit dated 29th February, 2016 has not disputed that the applicant has since 1963 enjoyed possession of the said land. The respondent has not stated if she has ever enjoyed possession of the said land at all in her reply. The respondent also claims to dispute agreement to sell land to which she was not party, and which has been placed before court for determination in the suit and not at this stage. The applicant has brought before this court an agreement for sale of land as annexure TIK-2 and has averred in her affidavit that his deceased husband after purchasing the suit land, passed on before the original owner transferring it in his name.

That the respondent wants to sell the suit land to third parties which the applicant is entitled to. The respondent who has acquired title by way of registration, by fraudulent means as alleged by the applicant, which have not been justified and/or explained by the respondent in her sworn affidavit in reply, it is clear that the applicant is at risk of losing this whole portion of land parcel No. Kakamega/Shitoli/1308 since her interests are no longer reflected on the register of the said land to bar the respondent from transacting anything on it including disposing the same off to an innocent purchaser for value. Justice will only be served if the orders sought are granted to maintain status quo of the suit land until this whole suit is heard and determined. It is clear that the respondent shall suffer no harm at all if the same is granted since the question to be determined herein is whether the applicant has acquired title to the suit land by way of adverse possession.

The applicant has a prima facie case with high chances of success and she stands to suffer irreparable loss unless the orders sought are granted. A prima facie case in the case of **MRAO vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125** as cited in the case of **Beatrice Wachatha Miana vs. Purity Kanana & 12 others (2014) e KLR** is described as follows:-

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to 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.”

It is the applicant's case that she has always enjoyed possession of the said land since 1963, this has not been disputed by the respondent. It has been the applicant's evidence that her husband bought the said land from the deceased Muteshi and has annexed a copy of the agreement therein. The respondent has not explained in her reply how the said land was transferred to her names. The respondent has further not denied her intentions to dispose of the same, and is asking this court to let her dispose of in whichever way despite this suit having been filed. The applicant is at a risk of losing this land at the expense of the respondent, and may not be able to recover the same from an innocent purchaser who diligently confirms from the land register that the respondent is the paper owner of the same. The applicant has a good case on adverse possession. The respondent cannot wish away the fact that the applicant has a right to acquire legal title as the time of filing this suit under limitations of actions act, will be compromised if land is disposed of and court rules in favour of the applicant.

Lastly, no prejudice shall be occasion to the respondent since she has not been enjoying possession/use of the same. The applicant has given substantive reasons to have the orders sought granted in her favour and has satisfied the conditions for granting the same. They relied on the following cases:

1. Nairobi ELC case 280 of 2013.

Beatrice Wachatha Miana vs. Purity Kanana & 12 others (2014) eKLR.

2. Kampala Civil appeal 51 of 1972.

Giella vs. Cassman Brown & Co. Ltd.

The respondent submitted that the application dated 21st January, is seeking for among other orders, an order of injunction restraining the respondent, her agents, servants and or employees or any other person claiming through her from cultivating, making use of, wasting, occupying and or trespassing onto land parcel No. KAKAMEGA/SHITOLI/1308. The applicant claimed that the respondent fraudulently registered L.R. NO. KAKAMEGA/SHITORLI/1308 into her names and that the respondent is also desirous of selling the suit property to third parties and also that the applicant has a prima facie case with high chances of success.

The respondent responded vide a replying affidavit dated 29th February, 2016, where she insisted that she has no intention whatsoever to dispose off the piece of land in question. She further stated that it would be unfair to bar her, her agents, servants and or employees or any other persons(s) claiming through her, from cultivating, making use of, wasting, occupying and or trespassing into the land as she is the sole registered proprietor as indicated in the title deed issued to her on 18th October, 2010. The respondent further stated that she has been in occupation of the suit land since then.

It is in evidence that the prior to the applicant's husband demise in the year 2004, PETER KHACHENDA KULENYWA (deceased), made two unsuccessful attempts to have the suit land registered in his name, which failed miserably. The first was through KAKAMEGA HIGH COURT SUCCESSION CAUSE NO. 479 of 1995 wherein he was granted letters of administration over the estate of SHIVASO MUTESHI/DARIYA ADAMBA SHIVASO which were confirmed on 28th January, 1997. The letters of administration granted to PETER KHACHENDA KULENYWA were nullified on 28th January, 1998 with the title reverting back to the joint administration of family members.

The second attempt by the applicant's husband to get the title of the suit land came vide HIGH COURT CIVIL SUIT NO. 22 OF 1998 (OS) soon after his failed first attempt set out above, whereby he sought orders through originating summons in a suit filed on 17th February, 1998, which matter dragged on until 2nd July, 2002 where he voluntarily withdrew the suit.

When the applicant's husband finally died in the year 2004, he had already vanguarded his rights over L.R. NO. KAKAMEGA/SHITOLI/1308 through KAKAMEGA HIGH COURT SUCCESSION CAUSE NO. 479 OF 1995 where the Letters of Administration granted to him and confirmed on 28th January, 1997 were later on 28th January, 1998 nullified, therefore dying intestate in any other property other than L.R. NO. KAKAMEGA/SHITOLI/1308.

The respondent submitted that, she is the registered proprietor of Land Parcel No. KAKAMEGA/SHITOLI/1308. Section 26 (1) of the Land Registration Act provides that the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved a party and or where the certificate of the title has been acquired illegally, unprocedurally or through a corrupt scheme.

The applicant herein merely mentioned fraud and or illegality in passing without stating its particulars of how the said fraud actually took place. Order 35 of the Civil Procedure rules require the parties to state a very explicit case of fraud or illegality or rather of facts suggesting fraud or illegality, and a mere statement that fraud or illegality had been committed, is not in compliance with the provisions of Order 35 of the Civil Procedure Rules.

A brief history of the land is that, this suit land previously belonged to Daria Atamba Shivaso who died in the year 1992 leaving behind her two daughters, Hannah Busolo and Deresina Lihavi. Before that, the applicant's husband, Peter Khachenda (deceased) was the nephew of Daria Atamba Shivaso (deceased) who only came to stay with her aunt to help with the work around the land. When Daria Atamba Shivaso died in 1992, Peter Khachenda had already married the applicant and had children too. He fraudulently obtained grant over that estate claiming to be the son of Daria Shivaso, got the title but the same was revoked when the fraud and illegality was discovered and the grant and title reverted to the daughters of the Daria Shivaso. The daughters sold the land to the respondent's father but it was the respondent who paid the last instalment over the land as her father had died. The applicant and her husband were told to vacate the land but they refused. The applicant's husband died and was forcefully buried on that land and has since refused to vacate and the case over the land has been dragging for ages. The applicants stay was never continuous as it was marred with cases after cases including this one that has dragged for ages all, which are in evidence. This is just a ploy to frustrate the respondent until she gives up that land which is not fair at all.

They submit that the plaintiff has no prima facie case as she is not the registered proprietor of the suit land and has no legal right whatsoever over the suit land. It is quite absurd for the applicant to allege that she will suffer irreparable loss if the injunction order is not granted because actually she is not the owner of that land making her a trespasser. It was held in the case of **Kamau Muchua vs. Ripples Limited Civil Appeal No. 106 of 1992** that:-

“A party as far as possible ought not to be allowed to retain a position of advantage that is obtained through a planned and blatant unlawful act.”

It is in evidence that the applicant's husband tried to get that suit land fraudulently twice but failed. Now the applicant is using the same documents and style to again lay a claim on the suit land just to frustrate the respondent from utilizing it. The applicant has refused to vacate from the suit land and has prevented the respondent from ever accessing the land yet she (respondent), is the registered proprietor of that land.

The court's discretion is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice as held in **Stallion Insurance Company Ltd. Vs. Rosemary Olao Nairobi Civil Appeal No. 85 of 1998**. It is in evidence that the suit land has been marred with cases and it will be prudent for this honourable court to clear this case so that the respondent can finally enjoy her land. They relied on the following authorities:-

1. Koinange & 13 others vs. Koinange (1968) KLR 23.
2. Bruce Joseph Bockle vs. Coquero Limited (2014) e KLR.
3. Nairobi Permanent Markets Society and 11 others vs. Salima Enterprises and 2 others Civil Appeal No. 185 of 1997 (U.R.)
4. Peter Mbiri Michuki vs. Samuel Mugo Michuki (2014) Eklr.
5. Giella vs. Cassman Brown (1973) EA 358.
6. Mrao vs. First American Bank of Kenya and Two others (2003) KLR 125.
7. Kamau Muchua vs. Ripples Limited Civil Appeal No. 106 of 1992.
8. Maher Unissa Karim vs. Edward Oluoch Odumbe (2015) eKLR.

This court has carefully considered both the applicant's and the respondent's submissions and the annexures therein. The principals governing the grant of interlocutory injunction are clear beyond peradventure. As stated in the case of **Giella vs. Cassman Brown (1973) EA 358**.

“The conditions of granting an injunction are now, I think well settled in East Africa. 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 compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003)** Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or 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”

Further he goes on to state that *“..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”*

The application is grounded on the annexed affidavit of Tesina Inziani Khachenda – Applicant and the following grounds; That the respondent fraudulently registered Land Parcel No. Kakamega/Shitoli/1308 into her name. That the respondent wants to sell the suit land to third parties which the applicant is entitled to. That the applicant has a prima facie case with high chances of success and he stands to suffer irreparable loss unless the orders sought are granted. That it is in the interest of justice if this application is allowed.

The respondent states that, it is in evidence that the applicant’s husband tried to get that suit fraudulently twice but failed. Now the applicant is using the same documents and style to again lay a claim on the suit land just to frustrate the respondent from utilizing it. The applicant has refused to vacate from the suit land and has prevented the respondent from ever accessing the land yet she (respondent), is the registered proprietor of that land.

It is not disputed that the applicant is currently in occupation of the suit land. It is been the applicant’s case that she has always enjoyed possession of the said land since 1963, this has not been disputed by the respondent. It has been the applicant’s evidence that her husband bought the said land from the deceased Muteshi and has annexed a copy of the agreement therein. The balance of convenience tilts in favour of the applicant. I find that the applicant has shown a prima facie case with a probability of success. The applicant has also shown that she might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. This application is merited and I grant the following orders;

1. That pending the hearing and determination of this suit there be an order of injunction restraining the respondent, her agents, servants and/or employees or any other person claiming through him from cultivating, making use of, wasting, occupying and/or trespassing onto Land Parcel No. kakamega/Shitoli/1308.
2. That pending the hearing and determination of this suit there be an order restriction and/or prohibition prohibiting any registration, dealing with title No. Kakamega/Shitoli/1308.
3. That the costs of this application be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 6TH DAY OF MARCH 2018.

N.A. MATHEKA

JUDGE