



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 756 OF 2017

(Formerly Nairobi ELC Case No. 1212 of 2016)

JOSEPH SILEMI MAYON (Suing as legal representative

of the estate of SAGINOI OLE NDETUKA aka

SIGINDI OLE NDENTUKA Deceased).....PLAINTIFF

VERSUS

ISIAH MUTONYI.....1ST DEFENDANT

ISAAC GATHUNGU WANJOHI.....2ND DEFENDANT

JOHN EKANI.....3RD DEFENDANT

DISTRICT LAND REGISTRAR KAJIADO.....4TH DEFENDANT

RULING

The application before me for determination is the Plaintiff's Notice of Motion dated the 4th October, 2016 brought pursuant to Order 40 rule 1, 2 and 3 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Section 68 (1) of the Land Registration Act and all the other enabling provisions of the law. It is based on the following grounds which in summary in that the deceased SAGINOI OLE NDETUKA was the registered owner of all that parcel of land known as KAJIADO/ KAPUTIEI – NORTH / 1596, hereinafter referred to as the suit property', measuring approximately 150 acres. At the time of his death, the 1st Defendant was interested and was in the process of negotiating with the deceased to purchase part of the suit property, which negotiations were not concluded as he died on 8th June, 1992 and no administrator was appointed by court to conclude the deal. The suit property was transferred to the 3rd Defendant fraudulently and illegally with the aid and direction of the 1st and 2nd Defendants and subdivided into two parcels namely KAJIADO / KAPUTIEI – NORTH/ 9333 measuring approximately 100 acres as well as KAJIADO / KAPUTIEI – NORTH / 9332 measuring approximately 50 acres and transferred to the 1st and 2nd Defendants' respectively. The Defendants proceeded without any letters of administration and or land control board consent in these fraudulent activities in dealing with the suit property and it would be in the interest of justice to issue orders to preserve it.

The application is supported by the affidavit of JOSEPH SILEMI MAYON the Plaintiff herein where he deposed that he was appointed a legal representative by the court on 26th July, 2016. He claims after the death of SAGINOI OLE NDETUKA, no letters of administration over the deceased estate was taken out to allow for sale, subdivision or distribution of the deceased estate as required by the Law of Succession Act, but the Defendants proceeded to transfer and subdivide the suit property. He contends that the 1st and 2nd Defendant even knowing that SAGINOI OLE NDETUKA had died proceeded through fraudulent means to illegally transfer the suit property to the 3rd Defendant who is a brother to the deceased, on 17th April, 2001, without any letters of administration, in order to have the suit property subdivided as well as transferred to them. He explains that the transfer of the subdivisions by the 3rd Defendant to the 1st and 2nd Defendants were effected on the same day the subdivisions were undertaken. He states that he has been unable to obtain copies of the Green Card for the aforementioned parcels of land owing to the 4th Defendant's refusal to supply him with the same but at a meeting at his office, he was shown two titles to confirm the 1st and 2nd Defendants own the suit property. He insists the aforementioned transactions were not sanctioned by the Land Control Board. He reiterates that the illegal and fraudulent activities all amount to meddling with the deceased estate with full knowledge of the Defendants, which is not capable of conferring proper titles to the 1st, 2nd or 3rd Defendants. He confirms that at no time

has the 3rd Defendants ever been an administrator of the estate of the deceased and hence could not confer title to the 1st and 2nd Defendants. He avers that he has seen groups of people going round the property, asking for beacons and these strangers have indicated they are negotiating to purchase the suit property from the 1st and 2nd Defendants. Further that there is a real likelihood of disposal of the suit property to the third parties.

The application is opposed by the 1st and 2nd Defendants who filed a replying affidavit sworn by ISIAAH K W MUTONYI the 1st Defendant herein where he deposes that the Plaintiff has sworn a false affidavit and failed to disclose material facts. He claims the heirs of SAGINOI OLE NDETUKA including the Plaintiff herein on whose behalf the suit and application are brought compromised the cause of action on which it is based when they received from them Kshs. 300,000 and executed an indemnity agreement thereof. He contends that they are the proprietors of the suit property, which they purchased from the previous owner within the meaning of section 27 of the Repealed Registered Land Act. He states that the Plaintiff is a nephew of the original proprietor SAGINOI OLE NDETUKA and that together with his family members have made four claims against him and the 2nd Defendant. He insists that his association with the suit properties dates back to 1985 when the late SAGINOI OLE NDETUKA was introduced to him as a seller of 150 acres of land comprised from a bigger parcel namely: KAJIADO/ KAPUTIEI – NORTH/ 643. He confirms SAGINOI OLE NDETUKA died on 8th June, 1992. Further, that the deceased who had four brothers namely: Lesomo Ole Ndetuka; Mayon Ole Ndetuka; Raraita Ole Ndetuka and Ekan Ole Ndetuka was a bachelor, an eldest son of Mayon Ole Netuka and a member of Ebuyangat Group Ranch. He avers that he met the deceased in 1985 and agreed that the purchase price for the suit land was Kshs. 900 per acre and they made an oral agreement that was reduced into writing in 1988 and he paid part of the purchase price between 1985 and 1992. Further, that as a result of the subdivision, the deceased was issued with a Certificate of title in respect of land parcel number KAJIADO/ KAPUTIEI – NORTH/ 1596, which he did not show him, but whenever he came for the purchase price, he was accompanied by their friend John Martine Ole Lekati, his brother Raraita including the 3rd Defendant herein. He states that after the deceased demise, on 27th June, 1995, the deceased brother Raraita including the 3rd Defendant accompanied by the Plaintiff, then a minor, as well as a man called Pasha came to see him, and informed him that the deceased title in respect of the suit land was held by the said Pasha since he had owed him Kshs. 25, 400. H confirms paying Pasha Kshs. 25,400 who then released the title to him and on the same day an agreement embodying the transaction was signed by himself, Pasha and Raraita. He further contends that in 1995, Raraita died and the 3rd Defendant remained as the sole brother of the deceased. Further, that in late 1999, the 3rd Defendant who was accompanied by John Martine Ole Lekati, including the 3rd Defendant's friend Lepaso Ole Kiruti, came to see him and asked him for the deceased title deed as they were arranging to complete the sale with him. He confirms surrendering the title deed to them and in the year 2000 John Martine Ole and Lekati Lepaso Ole Kiruti came with a title deed in respect of the suit land in his name and informed him, he was ready to complete the sale. He explains that instead of purchasing the whole parcel, he decided to buy 100 acres, that included 15 acres which one Lepaso Ole Kiruti claimed to have bought from the deceased and offered to sell to him, which offer he accepted. He reiterates that it is the 3rd Defendant who arranged for the subdivision of the suit land which created KAJIADO/ KAPUTIEI – NORTH/ 9333 and KAJIADO/ KAPUTIEI – NORTH/9332. Further, that the subdivision was completed and transfer of the latter parcel to him took place on 9th May, 2001 while the 3rd Defendant sold to the 2nd Defendant 50 acres which was transferred to him on 29th August, 2002. Further, the 3rd Defendant certified all the land transfer requirements had been undertaken. He avers that the Plaintiff was well aware of his transaction with the deceased and is seeking to reopen it, despite five meetings held on 1st, 8th, 18th, 25th and 27th September, 2006, which culminated in the execution of an Indemnity Agreement in April, 2010 which resolved that as a final settlement to the matter, 1st Defendant, 2nd Defendant, Lepaso Ole Kiruti as well as Dr. Kimpei Munei were to donate 26.6 acres of land, to the Plaintiff's family, from their respective parcels. He further reiterates that in the course of the abovementioned meetings, it confirmed that the 3rd Defendant was the heir of the deceased and that together with him, they offered to the Plaintiff's members of the family assistance to ensure that the settlement referred to above was implemented.

The Plaintiff, 1st and 2nd Defendants filed their respective submissions that I have considered.

Analysis and Determination

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated the 4th October, 2016 and analyzed that the following are the issues for determination:

- Whether the Court can issue the temporary injunction orders sought by the Plaintiff pending the outcome of the suit.

It is not in dispute that land parcel number KAJIADO/ KAPUTIEI – NORTH / 1569 belonged to the deceased one SAGINOI OLE NDETUKA. From the evidence presented by the 1st and 2nd Defendants, they confirm the deceased died in 1992 before completion of the process of the sale of KAJIADO/ KAPUTIEI – NORTH / 1569 but they continued to pay the 3rd Defendant herein, who was later registered as the owner of the said parcel of land which was subdivided into KAJIADO/ KAPUTIEI – NORTH / 9332 and KAJIADO/ KAPUTIEI – NORTH/ 9333 respectively. As evidenced in the 1st Defendant's replying affidavit KAJIADO/ KAPUTIEI – NORTH/9332 is registered in the name of the 2nd Defendant while KAJIADO/ KAPUTIEI – NORTH/ 9333 is in the name of the 1st Defendant respectively. From the said title deeds, I note KAJIADO/ KAPUTIEI – NORTH/ 9333 was registered on 9th May, 2011 while KAJIADO/ KAPUTIEI – NORTH/ 9332 was registered on 29th August, 2002. It is evident that the subdivision and the resultant transfers were effected after 1992 by the 3rd Defendant who however denies in his Defence and contends that it is the 1st and 2nd Defendants who undertook the said process as he is illiterate. The Plaintiff admits that the 1st and 2nd Defendants had started the process of purchasing the suit land land with the deceased before his demise in 1992, a fact which is confirmed by the 1st and 2nd Defendants who produced a Sale Agreement to that effect. The 1st and 2nd Defendants confirm that the deceased passed on, before the transaction was concluded and they hence engaged with the 3rd Defendant to conclude it. The 3rd Defendant however admits that he received monies from the 1st and 2nd Defendants as he inherited the land from the deceased. It is the 1st and 2nd Defendant's contention that the Plaintiff and some of their family members intend to reopen the negotiations they had with the deceased and insists they have paid some monies to them and as a result of a series of meetings to resolve the dispute herein, a Deed of Indemnity was signed which settles the matter. I however note that the 1st and 2nd Defendants do not indicate whether the 3rd Defendant was a legal administrator of the deceased estate to enable him conclude the transaction.

The 1st and 2nd Defendants cited various judicial authorities including **Giella Vs Cassman Brown (1973) EA 358, Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125; Uhuru Highway Development Limited V Central Bank of Kenya & 2 others (1995) eKLR; Nabro Properties V Sky Structures Limited (2002) 2KLR 299; John Muritu Kigwe and another V Agip (K) Ltd Nairobi High Court Commercial Division Civil Suit No. 2382 of 1999; and Kyangaro V Kenya Commercial Bank Limited & Another (2004) 1KLR 126** to oppose the Plaintiff's application. The 1st and 2nd Defendants insist the Plaintiff has failed to disclose material facts and does not have clean hands to be entitled to the remedy of an injunction.

The principles for granting of temporary injunctions were 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."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

As to whether the Plaintiff has established a prima facie case with a probability of success, it is important to confirm whether the Plaintiff has locus to institute the suit herein. The Court in the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** defined the parameters of a prima case and held as follows: *' 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.'*

The 1st and 2nd Defendants' contend that the 3rd Defendant was the legal representative of the deceased estate and concluded the transaction with them after his demise in 1992. It is pertinent to confirm whether the 3rd Defendant had capacity to conclude the transaction with the 1st and 2nd Defendants. From the evidence presented by the 1st and 2nd Defendants, it is not indicated as to whether the 3rd Defendant had procured Letters of Administration Intestate in respect of the deceased estate at the time of continuing with the transaction. But I however note the Plaintiff was granted Limited Grant of Letters of Administration Ad Litem in respect of the deceased estate vide Nairobi HCSuccession Cause No. 66 of 2013 on 17th January, 2013 and amended on 26th July, 2016, which he has presented in court.

Section 2 of the Law of Succession Act provides as follows:

'(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons. '

Further Section 45 (1) of the said Act provides that: **' Except so far as expressly 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, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.'**

I note the 3rd Defendant did not file an affidavit to oppose this application and controvert the averments of the Plaintiff herein. It is against the foregoing that I find that the Plaintiff by virtue of being the holder of Letters of Administration Ad Litem, has the locus standi to institute the suit herein. It is against the foregoing that I find that the Plaintiff has indeed established a prima facie case with a probability of success.

On the second limb as to whether the Plaintiff can suffer irreparable injury, which would not adequately be compensated by an award of damages. I note the Plaintiff has been granted Letters of Administration Ad Litem with his duties highlighted therein as it relates to the suit land.

In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, 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 facts above and the cited judicial authority, I find that the Plaintiff's injuries are not speculative and his fear is real since the 1st and 2nd Defendant already have title to the subdivisions emanating from the suit land. It is in those circumstances that I make a finding that the Plaintiff will indeed suffer irreparable injury if the orders sought are not granted.

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 land is not preserved, pending the outcome of the suit, it may be wasted away.

Since both the 1st and 2nd Defendants already have titles to the suit land and with the Plaintiff claiming beneficial interest over the same, the

Court finds that these are issues best determined at a full trial and not at this juncture, I will proceed to make the following order:

1. An inhibition order be and is hereby registered by the Land Registrar Kajiado North as against land parcel number KAJIADO/ KAPUTIEI – NORTH / 1569 and resultant subdivisions into KAJIADO/ KAPUTIEI – NORTH / 9332 and KAJIADO/ KAPUTIEI – NORTH / 9333 respectively of any dealings, lease, subdivision, transfer or charge pending the hearing and determination of the suit.’

2. The obtaining status quo be maintained 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 30th day of April, 2018.

CHRISTINE OCHIENG

JUDGE