



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 810 OF 2017

JOYCE TIRINDI KIBANGA

(Administrator of the estate of

BENJAMIN KARIUKI).....1ST PLAINTIFF

MARY NYAGIKUYU KOGLI.....2ND PLAINTIFF

VERSUS

ISAAC TUMPES NTAIYA.....DEFENDANT

RULING

The application before Court for determination is a Notice of Motion by the Plaintiff dated the 12th July, 2017 brought pursuant to section 3A of the Civil Procedure Act, Order 40 Rule 1 of the Civil Procedure Rules and Article 40 of the Constitution. It is based on the following grounds which in summary is that in the year 1995 or thereabout, the 1st Plaintiff's husband Benjamin Nganga Kariuki purchased a parcel of land known as KAJIADO /KITENGELA /6109 from the Defendant measuring approximately 2.02 hectares (5 acres) being a portion divided from the Defendant's larger parcel of land known as KAJIADO / KITENGELA / 2490. In 1992, the 2nd Plaintiff jointly purchased another five (5) acres of land with the deceased, Benjamin Nganga Kariuki from the Defendant being parcel number KAJIADO / KITENGELA / 6108 which property was registered jointly in both her name and her co – owner (deceased) names and the title deed issued in 1996. The Plaintiffs later discovered that the Defendant had used the original title number KAJIADO / KITENGELA / 2490 that had been used to subdivide KAJIADO /KITENGELA / 6108 and KAJIADO / KITENGELA / 6109 herein and subdivided it into four other parcels which he sold to third parties without the Plaintiff's knowledge. By engaging in other transactions with reference to the properties mentioned herein, the Defendant unlawfully and illegally defrauded the Plaintiffs and the estate of Benjamin Nganga Kariuki of their rightful property.

The application is supported by the affidavit of JOYCE TIRINDI KIBANGA who is the 1st Plaintiff herein where she deposes that she is the legal wife of the late Benjamin Nganga Kariuki as well as the Administrator of his estate. She confirms that on 13th November, 1997 her husband Benjamin Njenga Kariuki passed away and she was thereafter appointed as the administrator of his estate. Further that after the husband's demise, she relocated to the United States of America (USA) where she resided and worked for a number of years. She claims in 2015 upon her return from the USA, she went to inspect the suit land but was forcefully turned away by the Defendant who threatened to get violent with her. Further, in

April, 2017 she visited the suit property in the company of the 2nd Plaintiff as well as their advocates but were again violently chased away by the Defendant and his sons. She states that she discovered that the Defendant has misrepresented facts to the Land Registrar at Kajiado to cause the opening of another card for parcel number KAJIADO / KITENGELA / 2490 when the same had already been extinguished by prior subdivisions in the early 1990s. She avers that the Defendant is offering the said parcels of land for sale to third parties knowing too well the Plaintiffs had already acquired interest and title deeds to the same. She reiterates that the Plaintiffs are being unlawfully, fraudulently and illegally denied of their rightful property and the court ought to grant the orders sought herein to prevent further suffering of the Plaintiffs.

The Application is opposed by the Defendant herein ISAAC TUMPES NTAIYA who filed a replying affidavit where he deposed that he is the legal and bona fide indefeasible owner of land parcel number KAJIADO / KITENGELA / 2490 which he subdivided on 23rd August, 2016 resulting into four parcels namely KAJIADO / KITENGELA / 91795; 91796; 91797; and 91798 respectively that are all registered in his name. He insists that the land measuring 68.5 hectares is lawfully his after his family was allocated the same by the OLOOLOITIKOSHI – KITENGELA GROUP RANCH in 1987 and he has resided thereon for a continuous period of 30 years peaceably and uninterrupted. He states that sometime in 1990s, he approached one SIMON KIMANI NJAU and requested for a loan to subdivide land parcel number KAJIADO/ KITENGELA / 2015 in which he was to sell part of it on his behalf, and the said land was subdivided into KAJIADO/ KITENGELA/ 2488; 2489; 2490; 2491 respectively. He confirms that he sold the first two portions, retained the latter two portions and is currently residing on KAJIADO/KITENGELA/2490 which he subdivided on 23rd August, 2016 resulting into land parcels number KAJIADO/ KITENGELA/91795; 91796; 91797 and 91798 respectively that are registered in his sole name as he intends to share it with his children. He denies ever meeting or selling the land to the deceased BENJAMIN NGANGA KARIUKI and the 2nd Plaintiff herein. He insists the deponent has not attached any travel documentation to prove she had relocated to the USA. He claims it is the Plaintiffs who are strangers that have been seen trespassing on her land. He reiterates that if at all the subdivision were done in respect of his land parcel number KAJIADO/KITENGELA/ 2490, the same was fraudulently done by the Plaintiffs and one SIMON KIMANI NJAU whom he had earlier on entrusted to undertake subdivision on his behalf but instead purportedly as well as fraudulently did so into KAJIADO/KITENGELA/ 6109 and KAJIADO/KITENGELA/6108 respectively. He further denied the allegations of fraud levelled against him by the Plaintiffs and insists it is the Plaintiffs and SIMON KIMANI NJAU who purportedly unlawfully undertook the illegal subdivisions of his land number KAJIADO/ KITENGELA/2490 into 6109 and 6108 respectively after which the same was sold and transferred without his consent. He contends that he will institute a counterclaim against the Plaintiffs and the suit herein is brought in bad faith.

Both the Plaintiffs and the Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 12th July, 2017 including the supporting and replying affidavits, as well as the annexures thereon plus the submissions, I find that the only issue in contention at this juncture is whether the Plaintiffs are entitled to interim injunction pending the outcome of the suit.

The Plaintiffs main contention in the suit is that the 1st Plaintiff's husband Benjamin Nganga Kariuki purchased a parcel of land known as KAJIADO /KITENGELA /6109 from the Defendant measuring approximately 2.02 hectares (5 acres) being a portion divided from the Defendant's larger parcel of land known as KAJIADO / KITENGELA / 2490 and later in 1992, the 2nd Plaintiff jointly purchased another five (5) acres of land with the deceased, Benjamin Nganga Kariuki from the Defendant being parcel number KAJIADO / KITENGELA / 6108 which property was registered jointly in both her name and her co – owner (deceased) names and the title deed issued in 1996. The Defendant has used the original title number KAJIADO / KITENGELA / 2490 and subdivided it into four other parcels, which he has sold to third parties without the Plaintiff's knowledge. The Defendant has blocked all attempts made by the Plaintiffs attempt to enter into the suit lands and continue to threaten them.

The Plaintiffs have relied on the following authorities to support their claim: **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358 ; Mrao Vs First American Bank Ltd & 2 Others (2003) KLR and Hellen Kamau Njeri V Mohammed Ahmed and Anor (2015) eKLR** while the Defendant relied on the cases of: **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358; Malindi Court of Appeal Civil Appeal No. 4 of 2015 Lucy Wangui Gachara V Minudi Okemba Lore (2015) eKLR; and East African Court of Justice Application No. 3 of 2010; Mary Ariviza Vs AG of Kenya & Another.**

The principles for granting an injunction are well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** where the Court 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 Plaintiffs have established a prima facie case with a probability of success, I note the Plaintiffs have their title deeds to the land parcels number KAJIADO/ KITENGELA/ 6108 and KAJIADO/ KITENGELA/ 6109 that was a resultant subdivision of 2490, which titles they obtained in 1992 and 1996 respectively. I further note that the Defendant subdivided the said land parcel number KAJIADO / KITENGELA /2490 in August 2016 into numbers KAJIADO / KITENGELA/ 91795; KAJIADO / KITENGELA/ 91796; KAJIADO/ KITENGELA / 91797; and KAJIADO/ KITENGELA/ 91798 respectively. The Defendant insists that he never sold the land to the Plaintiffs and blames them including one SIMON KIMANI NJAU for defrauding him of his land. What is curious is that the Defendant admits knowing SIMON KIMANI NJAU whom he had instructed to subdivide land on his behalf and sell a portion. What the Defendant does not divulge is which parcel SIMON KIMANI NJAU sold on his behalf. Further, the Defendant claims to have subdivided the suit land in 2016 when the same has already been subdivided. He has not provided evidence on the process he adhered to and yet the mother title had already been subdivided. He blames the Plaintiffs and SIMON KIMANI NJAU for fraud and challenge them for not producing the consent of the land control board to transfer, as well as the Sale Agreements. These issues can only be determined after a full hearing and not at this stage.

Section 24 (a) of the Land Registration Act stipulates that **'Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

Further in the case of Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR Justice J.M. Mutungi stated that **' the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law'**.

In relying on the above provisions and this judicial authority, I find that since the Defendant has not indicated whether the Plaintiffs' titles were cancelled, they have indeed established a prima facie case with a probability of success.

On the second limb as to whether the Plaintiffs' can suffer irreparable injury, which would not adequately be compensated by an award of damages. I note the Plaintiffs have title deeds to their parcels of land. Further, the Defendant has proceeded to subdivide the said parcel of land and denied them entry on it as well as threatened them.

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. ‘

I note the Plaintiffs have intimated that the Defendant has already sold one of the resultant subdivisions to a third party. I find that the Plaintiffs injuries are not speculative and their fear is real since the titles to the suit land has already changed. In relying on the circumstances at hand and authority above, I find that the Plaintiffs’ 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 property is not preserved, it may be wasted away.

Since both the Plaintiffs and the Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and the Defendant having sold one portion to a third party, 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. An inhibition order be and is hereby registered by the Land Registrar Kajiado as against land parcel number KAJIADO /KITENGELA /2490 with the resultant subdivisions of land parcels number KAJIADO/ KITENGELA /91795; KAJIADO /KITENGELA /91796; KAJIADO /KITENGELA /91797 and KAJIADO /KITENGELA /91798 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 Ngong this 16th day of April, 2018.

CHRISTINE OCHIENG

JUDGE