



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC APPEAL NO. 4 OF 2018

MOSES MEIBAKO NGATUNY.....1ST APPELLANT

KOIYAGI NGATUNY ALIAS KOIYIAKI TOBIKO ATETI.....2ND APPELLANT

SITONY NGATUNY.....3RD APPELLANT

-VERSUS-

PEIPEI OLE MOSOIKO.....RESPONDENT

JUDGEMENT

The Judgment herein is an Appeal from the Interlocutory Ruling of the Kilgoris Principal Magistrate's Court delivered on the 13th day of April, 2018 a temporary order of injunction was issued against the Appellants from burying the remains of **MOSEKA DANIEL NGATUNY** on Land Parcel No. **TRANS MARA/MOITA/488** pending the hearing and determination of a suit that was filed by the Respondent.

The Appellants aggrieved of the decision of the learned Magistrate filed a Memorandum of Appeal having 12 grounds of Appeal. The Appellants faulted the decision of the Magistrate to have erred in fact and law in finding that the Respondent's who claimed and/or alleged to be the registered owners of the suit land had their title to the land nullified and therefore the Respondent's could not establish a prima facie case with a title that was revoked.

Further to the above the Appellants stated the Trial Magistrate erred in law and in fact by establishing the Respondent will suffer irreparable loss and damage when the same was not pleaded in the Application itself and that the said finding of the danger of irreparable loss and damage was premised on speculation and conjuncture that was not proved.

On the above grounds the Appellants being aggrieved filed this instant Appeal seeking that the order made by the Trial Magistrate dated 13/4/18 and delivered on the 18/4/18 be set aside, revised and or quashed.

Mr. Mboya Ogutu learned counsel for the Appellants filed written submissions in support of the grounds of Appeal herein above stated and Mr. Nyambati for the Respondents filed submissions on behalf of the Respondent to counter the said submissions by counsel for the Appellant.

Mr G.M. Nyambati learned counsel for the Respondent in his submissions stated the Respondent obtained title to the land after he purchased the suit and the property registered in his name. He further stated that the Respondent's title was revoked and/or cancelled by connivance between the Appellants and the Officials from the Kilgoris Land Registry and he submitted that the Land Registrar did not have power to cancel or revoke the title to the land.

The Respondent through their counsel further alleged that the deceased had no known interest in the land and therefore he could not be buried on the suit land.

I have considered the Appeal and the submissions made by counsel for both parties and the issue for determination before me is whether the Trial Magistrate had assessed the issues before him for the grant of temporary injunction as set out in the case of **GEILLA –VERSUS-CASSMAN BROWN**. In their submissions before the Trial Court the Appellants alleged that the Respondent had committed acts of fraud and that his title to the suit land **TRANS MARA/MOITA/488** was revoked by the Registrar.

In granting a temporary order of injunction a court must satisfy itself that there exists a prima facie case with probability of success and that can be derived from the pleadings filed and submissions made. In the case before this trial court and with much respect to the court there was no way the court could find and grant an order of temporary injunction where the party seeking it is alleged to have committed fraud this is an issue that required further interrogation at a full trial and I therefore find that the trial court had erred in law and I find out that the

respondent had established a prima facie with a sword of fraud hanging on his neck.

In my view this was a matter that could only be resolved after a full hearing of the case. The Respondent in the Application sought a temporary Application but in effect the Trial Magistrate granted a permanent injunction that conclusively decided the matter before it Maraga J as he then was in the **CIVIL APPEAL NO. 103 OF 2004 HON. KEMBERI PRIMARY SCHOOL AND ANOTHER -VERSUS- PASTRO KEMBERI BAPTIST CHURCH** stated Courts when dealing with Applications for injunction should not decide issues of fact at an interlocutory stage but only after a hearing evidence.

In the Appeal before court the trial court ought not to have granted the injunctive orders where serious allegations of fraud were made and evidence shown that the Respondent's title was revoked the circumstance of the revoking notwithstanding.

In view of the above I will allow the Appeal and accordingly set aside the order of the Senior Resident Magistrate made on 13/4/18 and delivered on 18/4/18.

Each party shall bear their costs to these appeal.

DATED, SIGNED and DELIVERED in open court at NAROK on this 25TH day of MAY, 2018

MOHAMMED NOOR KULLOW

JUDGE

25/5/18

In the presence of:

CA:Chuma

Ms Mireri for the appellant

N/A for the respondent