



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 906 OF 2017

KONE OLE MATIPEI PLAINTIFF

VERSUS

ANDREW MUEMA 1ST DEFENDANT

FRANCIS MUANGE NZIVO 2ND DEFENDANT

MUNYAO MUTUA 3RD DEFENDANT

RULING

The application before me for determination is the Plaintiff's Notice of Motion dated the 31st October, 2017 brought pursuant to Order 40 rules 1, 2 & 4 of the Civil Procedure Rules, Sections 1A, 1B, 3, & 3A of the Civil Procedure Act, Sections 28 and 159 of the Registered Land Act and all other enabling provisions of the law. The Application which seeks injunctive orders against the Defendants, is premised on the following grounds which in summary is that the Plaintiff is the duly and legally registered owner of Land Reference Number KAJIADO / KAPUTIEI – CENTRAL/ 2525 hereinafter referred to as the 'suit land'. The Respondents have encroached upon the suit land without any license or any form of authorization from the Applicant whatsoever. The Respondents have blatantly and without any justification proceeded to till and cultivate the land despite being very aware the Applicant is the registered owner of the suit land. That on 10th October, 2017, through his advocates, the Applicant wrote to the Respondents demanding that they cease their illegal activities upon the suit land but they remained adamant and refused to do so. The Respondents have now started destroying the suit land by their wanton felling of trees, bushes and other vegetation, which they are now using to burn charcoal for economic purposes best known to themselves. The Applicant's title to the suit land is indefeasible and that the Respondents have no rights over it. Further, that the Applicant has reasonable grounds to believe that the Respondents are hatching a corrupt and/or illegal scheme in collusion with each other to eventually deprive him of the suit land.

The application is supported by the affidavit of KONE OLE MATIPEI the Plaintiff herein where he reiterates his claim and avers that he warned the Respondents to stop cultivating the suit land and vacate it but they have declined to do so. He deposes that he will suffer imminent loss and damage which may be irrecoverable and/or irreplaceable.

The application is opposed by the 1st Defendant who filed a replying affidavit sworn by ANDREW MUEMA the 1st Defendant herein where he avers that he purchased a portion of seven (7) acres from the suit land over 15 years ago from the original owner ALLAN MPOTELA KOYAN and he immediately took possession as well as commenced developing it. He deposes that the 3rd Respondent has settled and developed a portion of land measuring five (5) acres that were bought by his mother MUTHEE NZIVO in the year 2001 and finished paying in 2011. He claims the 2nd Respondent purchased four (4) acres of land from ALLAN MPOTELA KOYAN from the original title KAJIADO/ KAPUTIEI CENTRAL / 124. He contends that together with the other Respondents, they have lived as well as developed their respective portions of the land and that the Plaintiff bought the suit land with full knowledge of their existence thereon. He contends that the Plaintiff has concealed information to the court that the suit land had a protracted legal case between himself and the original owner vide Tribunal Case No. 637 of 2011 and a Court Case being Kajiado PMCCC NO. 86 of 2011 as well as appeal case vide Machakos ELC Appeal No. 35 of 2015. He explains that the suit land was a resultant subdivision of KAJIADO / KAPUTIEI CENTRAL / 124 and that before the same was purchased by the Plaintiff, the Defendants had already settled thereon as well developed their respective portions. Further, vide case No. 86 of 2011 he was granted one acre of the suit land. He insists that the Applicant is not in possession of the suit land as alleged and has lied to court, hence not entitled to the orders sought as he has unclean hands. He reiterates that the Applicant herein cannot claim good title over the suit land as his certificate of title was obtained fraudulently, illegally, unprocedurally and through a corrupt scheme. He states that injunction orders should not issue against a person in possession of the land as this will have effect of determining the suit before it is heard on its merits. He contends that failure to be served with the Machakos ELC Appeal No. 35 of 2015 as alleged by the applicant does not mean that there is no appeal. He insists he has developed his 7 acres of land and built a permanent home. Further that the suit land was excised from KAJIADO/ KAPUTIEI CENTRAL / 1241 and included a portion that he purchased from ALLAN MPOTELA. He reiterates that he did not have capacity to drag the applicant to the Land Control Board to effect transfer in his name. He denies signing an agreement before the area chief as alleged by the Applicant and states that he has not tabled any evidence to show possession of the suit land nor the fact that trees and bushes have been cleared. He explains that the alleged one (1) acre that was allegedly given to him was where he had built and he refused it.

The 2nd Defendant FRANCIS MUANGE NZIVO opposed the application and filed a replying affidavit where he deposed that he purchased a portion of land measuring 4 acres from ALLAN MPOTELA in his original KAJIADO / KAPUTIEI – CENTRAL / 124 in the year 2004, which land is now comprised in the suit land and took possession immediately. He claims the said ALLAN MPOTELA failed to transfer the 4 acres to him, despite several requests and proceeded to resell the portion of land to the applicant. He confirms he has since settled on the said 4 acres and developed it and denies trespassing on the suit land as the Applicant purchased it when he was already thereon. He denies signing an agreement before the area chief and claims the title held by the Applicant is not indefeasible as the same was obtained fraudulently, illegally or through a corrupt scheme. He reiterates that injunction orders should not issue against him as he is in possession of the land as this will have effect of determining the suit before it is heard. He insists that the Applicant is guilty of laches as if it true he purchased the suit land in 2011, as alleged, he has all along acquiesced on his presence on the suit land and injunctive orders should hence not issue.

The 3rd Defendant MUNYAO MUTUA opposed the application and filed a replying affidavit where he averred that his mother purchased a portion of land measuring 5 acres from ALLAN MPOTELA in his original land parcel number KAJIADO / KAPUTIEI – CENTRAL / 124 in the year 2007 and which is now comprised in the suit land, and took possession immediately. He deposes that his mother authorized him to take possession of the portion of the land and which he did since the year 2007 and developed it. He claims the said ALLAN MPOTELA failed and or refused to transfer the 5 acres into his mother's name despite several requests and he proceeded to re sell the portion to the applicant herein. He denies signing an agreement before the area chief as alleged by the Applicant. He insists the title held by the Applicant is not indefeasible as the same was obtained fraudulently, illegally or through a corrupt scheme. He reiterates that an injunction cannot issue against them as they are already in possession and this will have the effect of having them evicted out of the land before the suit is heard. He states that applicant is guilty of laches as if it true he purchased the suit land in 2011, as alleged, he has all along acquiesced the 3rd Respondent's presence on the suit land and injunctive orders should hence not issue.

The Plaintiff filed a rejoinder where he reiterated his claim and averred that he was not privy to any sale agreements between the Respondents and one ALLAN MPOTELA KUYAN. He insists the 1st Respondent should pursue his claim against ALLAN MPOTELA vide KAJIADO PMCCC NO. 86 of 2012, which he is not a party to. He denies being aware of any appeal lodged against the ruling as he has not been served with any pleadings. He contends that the 2nd and 3rd Defendants are not parties to the proceedings in KAJIADO PMCC LDT No. 86 of 2012 and that the Court should thwart their attempts to ride on the back of the 1st Respondent and the decree passed in favour of the 1st Respondent; and should initiate their own claim against ALLAN MPOTELA if any exists. He avers that the Sale Agreements exhibited by the 1st and 3rd Respondents do not make any reference to a parcel of land and hence their acreages could not have been excised from the suit land. Further that the said agreements have expired as no consent of the land control board was obtained within six (6) months of the said agreements. He insists that in KAJIADO PMCCC No. 86 of 2012, the land in dispute is KAJIADO/ KAPUTIEI CENTRAL/ 1241 and not the suit land. He reaffirms that he is the duly registered owner of the suit land and insists the 1st Respondent's claim that his seven (7) acres should be excised from the said suit land is causing him mental anguish and torture. He denies that the Respondents were not in occupation of the suit land at the time he purchased it, but claims they only moved in once he had done so to execute the decree. Further that the Respondents reneged on an agreement which they voluntarily executed in the presence of the area chief including village elders to the effect that they would relocate from the suit land to the one (1) acre already excised to them by ALLAN MPOTELA KUYAN and in addition refund Kshs. 15, 000 being survey fees. He reiterates that he is an innocent 3rd Party purchaser for value, having entered into an agreement with ALLAN MPOTELA on 17th September, 2011 for the purchase of 25 acres, which was subdivided from land parcel number KAJIADO/ KAPUTIEI – CENTRAL / 124 and he received his title deed. He explains that after he received his title and went to take actual possession is when he realized there were people who had just moved into the suit land and constructed temporary structures thereon and he was informed by the vendor about the case between him and the 1st Respondent.

The Plaintiff and the Defendants filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 31st October, 2017 including the affidavits filed herein as well as the parties respective submissions, the only issue for determination at this juncture is where the Plaintiff is entitled to the temporary injunctive orders sought pending the outcome of the suit.

The Plaintiff claims the Defendants have trespassed on the suit land and yet he is its registered owner, having purchased it for value from one ALLAN MPOTELA. The Defendants insist the Plaintiff purchased the suit land after they had settled thereon, having acquired their respective parcels of land earlier on, from the same ALLAN MPOTELA who however never transferred their parcels to them, despite their various requests.

From the Plaintiff, the Plaintiff has sought to evict the Defendants from the suit land while the Defendants have filed a counterclaim and sought for orders of adverse possession claiming to have resided thereon for more than 12 years.

The Plaintiff has submitted that he has established a prima facie case to warrant the grant of orders of injunction sought and relied on the cases of **Giella Vs Cassman Brown (1973) EA 358** and **Machakos High Court Succession Cause No. 564 of 2010 – Estate of Mututua Sirinket Sapokenya (deceased)**.

The Defendants have cited various judicial authorities including **Nganda Kalandi Vs. Timothy Mutinda Nzioka (2012) eKLR: Giella Vs Cassman Brown (1973) EA 358; Mohammed K. Abdulaziz & 2 others Vs. The Commissioner of Lands being sued through the Attorney General & 2 Others** to oppose the Plaintiff's application.

In the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**, the principles for granting injunction were well stipulated therein, 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, the Court of Appeal in the case of MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125 described prima facie case as follows:

".... is a case 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".

I note the Plaintiff is the registered proprietor of the suit land, which was a resultant subdivision of land parcel number KAJIADO/KAPUTIEI CENTRAL/124 that was owned by one ALLAN MPOTELA who is alleged to have sold land to the Defendants, and hence protected by section 24 and 25 of the Land Registration Act. I however note there is a pending appeal involving a dispute over land parcel number KAJIADO / KAPUTIEI CENTRAL/ 124 between the 1st Defendant and ALLAN MPOTELA. It is not disputed that the said ALLAN MPOTELA sold land to the Plaintiff and the Defendants. The Defendants have exhibited copies agreements they entered into on diverse dates with the said ALLAN MPOTELA. Further, all the Defendants insist they took occupation of their respective portions of land and constructed permanent structures thereon. They even exhibited photos of their homes, which were not controverted by the Plaintiff. The Plaintiff further confirmed that after he bought his land in 2011, when he went to take possession he realized there were people who had moved thereon, and on confronting the vendor ALLAN MPOTELA, he confirmed that the said persons had moved thereon as a result of a court decree. I note the Plaintiff was issued with a title deed on 2nd May, 2012 and I note that the Defendants entered into various agreements with the vendor ranging from 25th June, 1998 upto 2008. The 1st Defendant claims to have taken possession of the land he purchased in 1998, the 2nd Defendant in 2004 while the 3rd Defendant in 2007. I note the Plaintiff has not enjoined the vendor ALLAN MPOTELA in this suit and yet he confirmed to him about the Defendants presence on the suit land.

In the case of **Simon Kimemia Muthondu v Moses Mugo Maringa [2017] eKLR**, Justice Olao held as follows:

'As indicated above, the defendant's occupation of the suit land is not really in doubt. If an order for temporary injunction is granted, it will have the effect of evicting the defendant from the suit land where he has lived and developed since 1973. It is not the policy of the Court to issue such orders at an interlocutory stage. Guided by the principle laid down in the FILMS ROVER INTERNATIONAL CASE (supra), it is my finding that the lower risk of injustice demands that I decline to issue the order of temporary injunction. After all, though he is the registered proprietor of the suit land, the plaintiff, un-like the defendant, has not been in occupation of the land. It would therefore be in the interest of justice that the status quo now obtaining on the suit land remains until this case is heard and final orders issued. The prayer for a temporary injunction is therefore not appropriate in the circumstances of this case and must be rejected.'

In relying on the above case and in the current scenario, I find that in so far as the Plaintiff is the registered owner of the suit land from the year 2012, the fact that there is a pending appeal touching on the land parcel number KAJIADO / KAPUTIEI CENTRAL/ 234 where the suit land was excised from and that the Defendants have been in actual possession as demonstrated by the pictures annexed to their respective replying affidavit. I would hesitate to grant an order of injunction as against the Defendants at this juncture as the issues raised in the application can only be determined once oral evidence is adduced.

It is against those circumstances that I will decline to grant the orders as sought for in the Notice of Motion dated the 31st October, 2017 and order as follows:

'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 22nd day of May, 2018.

CHRISTINE OCHIENG

JUDGE