



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO 183 OF 2016

RICKEY ANTONEY MULUHYA.....PLAINTIFF/APPLICANT

VERSUS

REBECCA ACHONDO MULUHYA.....1ST DEFENDANT /RESPONDENT

REGISTRAR OF LAND.....2ND DEFENDANT/RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT /RESPONDENT

RULING

This application is dated 19th September 2016 and brought under Section 1A, 3, 3A, 63(e) of the Civil Procedure Act, order 40 of the Civil Procedure Rules seeking the following orders;

1. THAT this application be certified urgent and the same be heard *ex parte* in the first instance.
2. THAT service of summons be dispensed with in the first instance.
3. THAT a temporary injunction do issue restraining the Defendants, their servants, agents or anybody or authority from selling, alienating and or in any other manner whatsoever transferring to third parties parcel of land known as KAKAMEGA/SAVANE/148 pending hearing and final determination of this suit or until further orders of this Honorable Court.
4. THAT the costs of this application be awarded to the Applicant.

The applicant submitted that he is suing on his own behalf, his mother's behalf and on behalf of my entire family. That his father and mother have since separated and they no longer live together as husband and wife. (Annexed herewith and marked RAM2 'a' and 'b' is a copy of, letter dated 26th September, 1980 and Order given on 26th November 1980 attesting as much). His father got married to the 1st Defendant after he separated with his mother. During the subsistence of their marriage his father and mother acquired a parcel of land known as KAKAMEGA/SAVAN/148 measuring 3.6Ha and which land was registered in the name of his father John Muluha Murongole. (Annexed herewith and marked 'RAM 4' is a copy of certified copy of the register, Kakamega Lands attesting as much). That the 1st Defendant has so far managed to transfer the said parcel of land to herself. (Annexed herewith and marked 'RAM 5' is a copy of search dated 13th July, 2016 attesting as much). He since learnt with shock that transfer of the said parcel of land from the name of his father to the name of the 1st Defendant was effected in the month of June 2016. (Annexed herewith and marked 'RAM 6' is a copy of the register, Kakamega Land Registry attesting as much). His father has been suffering from dementia for the last at least ten (10) months and he has an elaborate medical record to that effect. (Annexed herewith and marked 'RAM 7' are copies of medical records attesting as much). The 1st Defendant is now seeking to dispose of the said parcel of land and they have been witnessing people coming every now and then to view it with the aim of purchasing it from the 1st Defendant. That it is very important that the orders of injunction prayed for be granted in order that the subject matter of this suit may be preserved until the suit is heard and finally determined. That his interest in the land devolves in the fact that he is a son and heir to his property at the time of his demise and what the Defendant is doing will simply prejudice his interest in the property.

The 1st respondent submitted that, from the pleadings so far filed in court it is not in dispute that the parcel of land known as Kakamega/Savane/148 is registered in the name of the 1st Respondent. It is also not in dispute that the registration of the suit parcel of land in the name of the 1st Respondent followed a transfer of this land by John Muluha. John Muluha is still alive. The Applicant claims that this transfer was fraudulent. The Applicant, however, does not disclose any particulars of the alleged fraud in the pleadings so far filed in this court. The particulars of the alleged fraud are not stated in the plaint. It is *stare decisis* law that in a claim where fraud is alleged, the particulars of

the alleged fraud have to be specifically pleaded.

Secondly the Applicant claims that John Muluhyia was at the time this property was transferred to the respondent of unsound mind due to his medical condition. However, the medical documents that the Applicant seeks to rely upon are suspect in that the same were sought for purposes of medical insurance and not for production in court as evidence.

Third, a perusal of the plaint and the application by the Applicant one imagines that the Applicant had wanted to bring up this suit on behalf of John Muluhyia based on the alleged unsound mind status. If this were the case the Applicant ought to have been clear. The Applicant's suit is incompetent in that it is not clear as to whether the Applicant has brought up this suit on his own or in representative capacity as representing his mother, MARY MUNIKA and unnamed other members of the family. The applicant's case is made even weaker when the Applicant asserts that his interest in this land subject matter of this suit is based on the fact his mother acquired this land together with his father John Muluhyia. It is clear that the Applicant's father and mother separated in the year 1976 yet this parcel of land was registered in the name of John Muluhyia in the year 1976. It is an uphill task for the Applicant to prove that land was acquired during the subsistence of the marriage of John Muluhyia and his mother. So far there is absolutely no witness who has filed a statement in this file in support of the Applicant's averment on this fact. The Applicant cannot prosecute such a claim on behalf of his mother. His mother, would only have brought up such a claim earlier on and within the divorce cause that ended in 1980. To this extent the Applicant is incapable of proving his case on a balance of probabilities and, therefore, the reliefs sought in this application are not available to the Applicant.

That the 1st Respondent is very candid as to how she obtained registration for the suit parcel of land. It was clear, regular and lawful. The 1st Respondent has deposed that she stays on this land and the extent to which she has developed it. All these have not been disputed by the Applicant. On the contrary it is clear that the Applicant has had absolutely nothing to do with this land in terms of use, cultivation or occupation. The Applicant's mother had nothing to do with this land either. To grant the orders sought would be tantamount to restricting the enjoyment by the Respondent the rights of a proprietor.

The 2nd and 3rd respondents submitted that, the Applicant herein does not have a prima facie case with a probability of success to warrant the grant of the orders of temporary Injunction as sought in the application. A prima facie case was defined in the case of *Mrao vs. First American Bank of Kenya & 2 others (2CX)3* KLR as relied on in *Panari Enterprises Limited vs. Lijoodi & 2 others [2014] eKLR* whereby prima facie case was described as follows;

“A prima facie case in a civil application include but is not confined to a genuine and arguable case, it 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”.

The Applicant herein does not have an arguable case before this Honourable for the reasons that the suit parcel of land KAKAMEGA /SAVANE /148 was initially registered in the names of John Muluhyia Murongole who freely and without coercion or through fraud transferred the said parcel of land to 1st defendant who happens to be the wife of the said John Muluhyia Murongole the original owner of the suit parcel of land.

The Applicant has not disclosed any fraud on the process of transfer of the suit parcel of land to the 1st defendant and has not shown that the said parcel of land was matrimonial property so as to require the consent of his mother who is not even a party to the suit and who has to date not sworn an affidavit to that effect. The Applicant has indeed admitted in his pleadings that his mother and the original owner of the suit parcel of land separated long time ago and neither has the applicant shown that the said suit parcel of land was jointly acquired by the said John Muluhyia Murongole and his mother.

The Applicant will not suffer any harm considering that the Applicant is not in occupation of the suit parcel of land and also considering the suit parcel of land is now registered in the names of 1st defendant who is the wife of the initial owner of the suit parcel of land, the land has not been transferred to a stranger and there are no indications nor evidence that have been put forward to show that the land might be transferred to third parties other than the defendant herein.

The balance of convenience in this instant case, in the stand point of the 2nd and 3rd Respondent tilts in the favour of the maintaining of the status quo in the suit parcel of land as the land at the moment has already been transferred to the 1st defendant and hence the orders being sought by the applicant has been overtaken by events. The granting of the injunctive orders will not be the appropriate orders at the moment. The reality is that the suit property is now registered in the names of the 1st defendant and on whether the said John Muluhyia Murongole freely transferred the suit parcel of land to the 1st Defendant are issues to be determined at the main hearing of the case.

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. 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 be 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 based on the following grounds that the Plaintiff/Applicant is the son of one John Muluhya Murongole and the said John Muluhya Murongole is the husband of the 1st defendant. That the said John Muluhya Murongole is the rightful owner of parcel of land known as KAKAMEGA/SAVANE/148. That the 1st Defendant has since transferred the said parcel of land to herself without the consent of the said John Muluhya Murongole and or without even asking any of the family members whose interest may be affected. That the 1st Defendant is now seeking to sell the said parcel to third parties who have been frequenting the parcel to view it with the aim of purchasing it from the 1st Defendant. That the 1st Defendant never followed the right procedure to acquire the said parcel of land. That the Plaintiff’s/Applicant’s interest lies in the fact that his mother also was the wife of the said John Muluhya Murongole and for that matter the Plaintiff/Applicant’s mother together with the said John Muluhya Murongole acquired the said parcel when they were still living together as husband and wife. That the 1st Defendant got married to John Muluhya Murongole much later and she is now seeking to extinguish the Plaintiff’s/Applicant’s right to the said parcel of land. That at the moment the said John Muluhya Murongole is of unsound mind and he suffers from dementia and for that matter he is incapable of making a decision on any family issue whatever it may be. That the said John Muluhya Murongole has been so suffering for the last at least ten (10) months and there are medical records to that effect. That the Plaintiff/Applicant is badly prejudiced and disadvantaged by the actions of the Defendants/Respondents which openly denies him a right to the suit premises. That the Plaintiff/Applicant will suffer irreparable loss and damage if orders prayed for are not granted.

It is not in dispute that the parcel of land known as Kakamega/Savane/148 is registered in the name of the 1st Respondent. It is also not in dispute that the registration of the suit parcel of land in the name of the 1st Respondent followed a transfer of this land by John Muluhya. John Muluhya is still alive. The Applicant claims that this transfer was fraudulent. The Applicant, however, does not disclose any particulars of the alleged fraud in the pleadings so far filed in this court. The particulars of the alleged fraud are not stated in the plaint. The applicant’s locus to institute this suit is also not clear as there is no power of attorney on record but a letter and medical report. I find that the applicant has failed to establish a prima facie case with a probability of success. Secondly the applicant has not shown that he might otherwise suffer irreparable injury if an injunction is not granted, which would not adequately be compensated by an award of damages. The balance of convenience tilts in favour of the 1st respondent as she is currently in possession of the said property. I find this application has no merit and I dismiss the same with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22ND DAY OF MAY 2018.

N.A. MATHEKA

JUDGE