



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 346 OF 2017

PURITY WANGARI MUTHEE.....APPELLANT

VERSUS

CLEMENT KAMWERU KARIUKI.....1ST RESPONDENT

DAVID LETTING2ND RESPONDENT

RULING

This ruling is in respect of an application dated 20th November 2017 brought by way of notice of motion by the plaintiff/applicant seeking for orders:

1. Spent
2. That the 1st and 2nd respondents their agents, servants, assignees or any other person herein purporting to act on their behalf be restrained by way of a temporary injunction from bringing building materials, sand, stones, ballast, fencing, ploughing, tilling, constructing, and or building houses on the applicant's parcel of land no. ELDORET MUNICIPALITY BLOCK 15/512. Measuring 0.0306 hectares pending the hearing and determination of this application inter partes.
3. Costs of this application be provided for.

This application was brought under certificate of urgency and the court certified the same as urgent and ordered that the applicant serve the application within 7 days for inter partes hearing.

Plaintiff/applicant's Submissions.

The plaintiff/applicant's Counsel relied on the grounds on the face of the application together with the supporting affidavit of the applicant as filed. Counsel stated that the plaintiff has established a prima facie case as the suit land belonged to her late mother.

Mr. Ayieko stated that it was the plaintiff's averment that one Mbatia who is also deceased was to hold the land in trust for them and they do not know how the land was transferred to the 1st defendant. It was therefore his submission that the land was fraudulently transferred in contravention of the provisions of the Land registration Act of 2012 which deals with indefeasibility of title and acquisition of title through fraudulent means.

Counsel further submitted that the suit land is ancestral land which cannot be compensated by way of damages and that the plaintiff will suffer irreparable loss if the injunction is not granted. It was also submitted that the plaintiff has established that she is the administrator of the estate of her late mother and that she has raised triable issues which should be considered. Counsel there urged the court to allow the application as prayed as the balance of convenience tilts in favour of the applicant.

Defendant Respondents Submissions

The defendant's Counsel opposed the application and relied on the replying affidavit as filed herein. He stated that the evidence that has been placed before the court does not show any ownership of the suit land either by one Mbatia or the deceased Regina Nyambura Maina.

Mr. Ngetich submitted that in the absence of ownership documents, the applicant has not established a prima facie case with a probability of success and hence has not met the threshold of grant of injunctions.

Counsel also submitted that the defendant has annexed an allotment letter linking the defendant to the suit land and a title deed showing that

the defendant is the registered owner of the suit land. He stated that they have further annexed a copy of the lease, official search certificate, copy of agreement and photographs showing the developments on the land.

Mr. Ngetich further stated that the applicant has never been in occupation of the land and the person who will suffer irreparably is the defendant who has been carrying out developments. That the applicant has not explained her absence from the suit land since 1986 when the same was allocated to the defendant. Counsel further submitted that the applicant has not established a prima facie case and therefore does not deserve the orders sought. He stated that the value of the land is ascertainable and the plaintiff can be compensated by way of damages. He prayed that the application be dismissed with costs to the defendant.

In response Mr. Ayieko submitted that the plaintiff has annexed a copy of a green card and that their submission was that the title was acquired fraudulently. He prayed that the application be allowed as prayed.

Analysis and Determination

This is an application by the plaintiff applicant for a temporary injunction. The rules for grant of temporary injunction are very clear as per the Giella Casman Brown case. The issue for determination is whether the plaintiff has met the threshold for grant of temporary injunctions.

It is incumbent upon the applicant to establish a prima facie case with a probability of success. The plaintiff has stated her facts which are her words against the defendant's. The fact that she has annexed a copy of the green card does not show the link of ownership of the suit land. The green card as annexed does not have a full history of the previous transactions or owners which can link her to the property.

The applicant is not in occupation and has not explained her absence from the plot when the defendant took possession of the suit land. It would be difficult for the court to ascertain at this interlocutory stage that the plaintiff is the owner of the suit land and that she will suffer irreparable loss if the injunction is not granted. I am not convinced by the evidence before me to warrant a grant of temporary injunction.

The balance of convenience lies in favour of the defendant who has annexed ownership documents at this interlocutory stage. As to whether the same were acquired procedurally or fraudulently, is a case to be determined at the full trial.

I therefore find that from the pleadings and the supporting documentation before me that the plaintiff has failed to establish a prima facie case against the defendant. The upshot is that the application dated 16th August 2017 is hereby dismissed with no orders as to costs.

Parties to comply with order 11 within 30 days from the date of this ruling.

Dated and delivered at Eldoret this 21st day of June 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Kiboi holding brief for Mr. Kigen for defendant and Miss Chesio holding brief for Mr. Kenei for Plaintiff.