



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 901 OF 2017

CECILIA MAITHA MUNEE.....PLAINTIFF

VERSUS

LIARIN OLE LEKULEI.....DEFENDANT

RULING

The Application before Court for determination is the Plaintiff's Notice of Motion dated the 18th October, 2017 brought pursuant to Articles 26 & 40 of the Constitution, Section 1A, 1B & 3A of the Civil Procedure Act, Order 40 rules 1, 3, 4 & 63 (c) & (e) and Order 51 rule 1 of the Civil Procedure Rules and all the other enabling provisions of the law.

In the Application, the Plaintiff is seeking injunctive orders against the Defendant over land parcel number KAJIADO/ OLGULULUI – LOLARASH/6122 hereinafter referred to as the 'suit land'. The Application is premised on the following grounds, which in summary is that the Plaintiff is the proprietor of the suit land having acquired it through transmission from her deceased husband who purchased it from the Defendant. The Defendant together with his representatives and agents have without the Plaintiff's consent, authority and without any lawful justification, alienated, invaded, trespassed as well as leased the suit land. The Defendant together with his representatives and agents have threatened to evict the Plaintiff by use of any means necessary including lynching her as well as interfering with her peaceful occupation, quiet enjoyment and possession of the suit land. Further, if the Defendant together with his representatives and agents are not prohibited as well as restrained from continuing their unlawful acts as aforesaid, the Plaintiff stands to lose her life including the suit land.

The application is supported by the affidavit of CECILIA MAITHA MUNEE the Plaintiff herein where she avers that she is the wife of the late JACOB OLE MIARON who purchased the suit land vide a Sale Agreement dated the 20th September, 2009 through his agent one Jacob Partimo Munke. She avers that the Sale Agreement was signed by the seller who is the Defendant herein together with Jacob Partimo Munke, on behalf of her husband, with the execution of the said Sale Agreement being witnessed by Chief Jacob Ole Munke, Saitoti Ole Miaron and Nkarashi Ole Miaron. She avers that her husband took steps to authenticate the ownership of the land by going to its location and confirming its existence. Further, he wrote to the executive secretary of the Olgulului/Ololarashi Ranch inquiring whether the Defendant was the true owner of the suit land and the secretary confirmed that he was indeed its owner. She states that on 27th November, 2009, the Defendant was issued with the title deed to the suit land but he neglected/ refused to transfer the same to her deceased husband, despite him paying all fees in relation to the same and his name appearing in the list of titles to be issued. Further, after the deceased demise on 9th September, 2015, the Defendant started harassing and threatening her, claiming ownership of the suit and has been leasing it to other individuals and yet the said land belongs to her family. She confirms that despite several interventions and meetings in an attempt to settle the matter amicably, the Defendant is adamant and has even blatantly refused to adhere to a warning by the Deputy County Commissioner, Loitoktok Sub County advising him to stop his illegal transactions. She reiterates that she has suffered and will continue to suffer immense loss as well as damage incapable of compensation through monetary terms as she is no longer able to undertake economic activities on the suit land and her rights to a quiet including peaceful enjoyment, occupation plus possession of the said suit land has been curtailed.

The Defendant LIARIN OLE LEKULEI opposed the application and filed a replying affidavit where he deposed that he is the absolute proprietor of the suit land measuring approximately 4.05 hectares wherein he has been farming since he was allocated the same by the Olgulului Group Ranch. He contends that sometimes in the year 2009, he entered into an oral lease agreement with Olongida Miaron for the purposes of cultivating the suit land for a period of 5 years at a rent of Kshs. 4, 000 annually. He confirms that Jacob Miaron cultivated the land from 2009 to 2014, and died just before the lease could elapse. He avers that he approached the family after the expiry of the lease and informed them of the position and that he wanted to be allowed to continue utilizing as well as developing the suit land. Further that since by that time they had already cultivated the land, they orally agreed with the family that they would harvest the crop and afterwards desist from planting as well as cultivating the said suit land. He reiterates that the following seasons and up to the year 2017, the Plaintiff and her agents have continued to cultivate the suit land by use of force, threat, and intimidation with the assistance of the area chief Jacob Ole Munke, and without paying a single cent to him. He states that vide a demand letter dated the 5th October, 2017, through his advocates messrs Tobiko, Njoroge & Co. Advocates, he demanded that one Rotiken Nkarashi and Mpookwa Nkarashi being agents of the Plaintiff as well as the area Chief whose interest in the parcel are unknown, to vacate the suit land in fourteen (14) days or else he would commence legal proceedings against them. He contends that it is after the receipt of the aforementioned demand letter that prompted the Plaintiff to rush to court to ambush him. Further, that it is exceedingly malicious, misleading and false for the Plaintiff to lie to Court that she has a legitimate claim over the suit land and yet she does not have a title to her name. He denies entering into any form of Sale Agreement whether written or oral over

the suit land, with the Plaintiff or her late husband or at all and the annexed Sale Agreement is a forgery. He reiterates that the instant application has no basis and meant to delay the speedy conclusion of this suit, which is clear has no merit. He further insists that as the registered owner, he is vested with all the rights of ownership including possession of the suit land and the Plaintiff has no such right or at all, over it. Further, that the Plaintiff has not established a prima facie case with any probability of success and the balance of convenience is by allowing him continue with possession of the suit land as he will suffer irreparable damage if the orders sought are granted. He further states that it is crystal clear that the Plaintiff is seeking eviction orders at this interlocutory stage and the application is vexatious, frivolous as well as an abuse of the court process.

On 21st November, 2017, the Counsels for the Plaintiff and Defendant submitted on the application where they each reiterated their respective claims. The Plaintiff's Counsel averred that they had established a prima facie case. The Defendant's Counsel submitted that the Plaintiff was seeking orders of injunction, which are an equitable remedy, which can only be granted where damages are proved not to be sufficient. He relied on the principles set out in the celebrated case of **Giella Vs Cassman Brown** to support his arguments and contended that the Applicant had failed to satisfy any of the said principles. He referred to section 25(1) of the Land Registration Act and insisted the Defendant had all the rights to the suit land. He stated that the Plaintiff had contested the veracity of the attached documents and claimed the suit land was vacant as it is the Defendant who had planted crops thereon. Further, that the Plaintiff had failed to show the harm she will suffer and that the balance of convenience tilted in favour of the Defendant as he holds the title to the suit land. The Plaintiff's Counsel reiterated that the Defendant's Counsel misled the Court as there is a house on the suit land and that the Plaintiff including her family has been cultivating the suit land from 2009 and it was only three weeks ago when the Defendant forcefully entered the suit land and commenced tilting it. Further, that the Plaintiff is at a loss as she has invested heavily on the suit land which is their source of livelihood.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 18th October, 2017 together with the supporting and replying affidavits including the parties' submissions, the only issue for determination at this juncture, is whether the interim injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

Both the Plaintiff and the Defendant are staking claim over the suit land. The Plaintiff insists her deceased husband purchased the suit land on 20th September, 2009 and thereafter they took possession until early November, 2017 when the Defendant forcefully entered into it and commenced tilting it. Further, that the deceased paid for the full purchase price including fees for transfer but the Defendant has declined to transfer the suit land to her, and commenced harassing them from it, after her husband's demise. The Defendant on the other hand insists he is the registered proprietor of the suit land having been issued with a title deed. The Defendant denies selling the suit land but insists he only leased it to the Plaintiff's family which lease expired and contends that it is the Plaintiff including her agents who are unlawfully on it. He disputes the documents annexed to the supporting affidavit and states that the Sale Agreement is a forgery. He reiterates that it is the local chief who is harassing him over the suit land.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the celebrated case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In line with this principle, I will proceed to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I note the Plaintiff's family have been in possession of the suit land for about nine (9) years but were yet to be given a title deed to it. On perusal of the annexures within the supporting affidavit, I note there is a Sale Agreement dated the 20th September, 2009; letter from officials of Ololarashi/ Olgulului Group Ranch dated the 23rd October, 2008 confirming the Defendant owned 10 acres of land; Minutes of a meeting held to resolve dispute over the suit land; and a letter from the Deputy County Commissioner Loitoktok SubCounty summoning the Defendant and warning him not to lease the land before he clarifies certain information. From a perusal of the aforementioned minutes, it is evident there was a transaction between the Defendant and the deceased who is the Plaintiff's husband. I note the Group Ranch officials were even offering to give the Plaintiff's family alternative land as they were aware of the transaction over the suit land which they referred to as land in Namelok.. The Defendant stated that he only leased the land to the Plaintiff's husband but did not annex a Lease Agreement. He submitted that he is entitled to protection of the law as enshrined in section 24(b) of the Land Registration Act and relied on the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** to oppose the application.

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** the Court described a 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”.

Looking at the documents presented by the Plaintiff which I have alluded to above, it is clear that her claim over the suit land is not baseless. The Defendant did not furnish the court with a copy of the lease agreement nor did he controvert the contents of the minutes of the meeting held on 1st October, 2017. I note the demand letter from the Defendant's lawyers directing the Plaintiff to move out of the suit land was sent out after the meeting held on 1st October, 2017. The Defendant submitted that he had been tilting the suit land ever since he was allocated the same by the aforementioned Group Ranch, yet the averments contained in his lawyer's demand letter indicates contrary. The Defendant disputed the Sale Agreement and insists he did not sell the suit land. He however does not explain why he did not evict the Plaintiff and family immediately the lease expired and took almost three (3) years to commence his actions. It is against the foregoing that I find that the Plaintiff has indeed established a prima facie case with a probability success.

On the second principle as to whether the Applicant will suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and Defendant claim ownership of the suit land and it is not in dispute that the Plaintiff and her family has been in actual possession

and tilting the same upto November, 2017. The Plaintiff alleges the deceased purchased the suit land while the Defendant insists it was a lease. From a perusal of the demand letter dated the 5th October, 2017 that was sent by messrs Tobiko, Njoroge & Co. Advocates on behalf of the Defendant, it is clear that as at October, 2017, the Plaintiff was still cultivating the suit land. 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.’

In relying on the case above and based on the circumstances at hand, I find that the Plaintiff’s alleged injuries are not speculative as she has demonstrated the harm she will suffer if the injunctive orders are denied.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the substratum of the suit is not preserved, it may be wasted away.

Since both the Plaintiff and the Defendant are staking claim over the suit land, with the Defendant being the registered proprietor and the Plaintiff claiming to be a purchaser and having been in occupation thereon from 2009 upto 2017, I find 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 hereby registered by the Land Registrar Kajiado as against land parcel number KAJIADO/OLGULULUI – LOLARASH/6122, of any dealings, lease or charge pending the hearing and determination of the suit.
2. Prevailing Status Quo be maintained pending the outcome of the Suit.
3. The costs will be in the cause.

Dated signed and delivered in open court at Ngong this 23rd day of July, 2018.

CHRISTINE OCHIENG

JUDGE