



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**ELC CAUSE NO. 288 OF 2017**

**ONKWARE OMWENGA.....PLAINTIFF**

**-VERSUS-**

**KONOI SAPAI.....DEFENDANT**

**RULING**

The 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Applicant by a Notice of Motion dated 12<sup>th</sup> March, 2018 brought under order 40 rule 4(3),4, 7 and under order 1 Rule 10 of the Civil Procedure Rules section 24, 25 and 26 of the Land Registration Act and under Article 159 of the Constitution of Kenya sought for orders that pending the hearing and determination of the instant Application an order of stay be granted, staying the implementation and enforcement of an ex parte order of temporary injunction against the 2<sup>nd</sup> Defendant from trespassing or alienating or doing any act on land parcel Number Trans Mara/Meguara/132 and the discharge vary and/or vacate or set aside the ex parte order granted by the court on 14<sup>th</sup> November, 2017 and the court to restore the Notice of Motion dated 9<sup>th</sup> October, 2017 and more particularly prayers 6 and 7 for hearing and determination. The Applicants further sought to have the names of Elizabeth Potishoi Sapai, Daniel Kiptartar Deroni, Salim Sapai and Solomon Konyeyie Sapai sued as first defendants having been improperly enjoined.

The Application was based on the grounds that the 2<sup>nd</sup> Defendant is the lawful and registered owner of Land parcel No. Trans Mara/Meguara/132 hereinafter called the suit property and that and that on 14<sup>th</sup> November, 2017 the honourable court granted an order of temporary injunction against the 2<sup>nd</sup> defendant over the suit property without being heard.

The Applicant further contends that the matter proceed ex parte on the basis of a fraudulent affidavit of service and that they were condemned unheard and that the 1<sup>st</sup> Defendant has not taken out letter of administration in respect of the estate of Korno Ole Sapai who was the original owner. They have not taken out any letters of administration and hence they can't be substituted as legal representatives of his estate and hence they have improperly been joined as Defendants.

The Application was further supported by the Affidavit of David Ondieki Mosorori who contends to have the authority of the other co-defendant and avers that on 6<sup>th</sup> March, 2018 his other co-defendants came to his place of business with court documents which he realized was a temporary injunction against him on his parcel of land which is registered in his name and that by that time he had not been served with any documents and notice to attend court and he states that the orders sought are intended to evict him from his parcel of land and deny him the use, possession and occupation of his land.

He further contended that the other persons named as defendants are improperly enjoined by virtue of them participating in the sale of the property to him and that they have no capacity to sue or being sued as they have not taken out letters of administration in respect of the estate of Korno Ole Sapai who is deceased.

The Applicant in his affidavit also stated that the applicant could not establish a prima facie case against him to warrant the grant of orders of injunction since he is the lawful and registered owner of the suit land.

The Application was opposed by the Plaintiff/Respondent by way of replying affidavit sworn on 5<sup>th</sup> April, 2018 and filed in court on the 6<sup>th</sup> April, 2018. The Respondent maintains that the orders he was granted on 13<sup>th</sup> March, 2018 were properly granted and that he has been and is still in occupation of the suit property since time immemorial. He contends that the suit property contains several acres of tea bushes which were planted by his late father which they continue to harvest and that the Applicants intention was to sale the suit land to a third party.

When the Application came up for hearing Interparties the parties consented to have the same disposed off by way of written submissions and the parties filed their respective submissions accordingly.

The Applicant in his submission stated that he has established a prima facie case for the grant of orders of injunction and to proof the same he annexed to his affidavit a title in his name and a certificate of official search. He contended that a party seeking injunctive orders must establish the grounds laid down in the case of **GIELLA –VERSUS- CASSMAN BROWN** as to establish the existence of a prima facie case

and whether the Applicant will suffer irreparable loss and damages. He further stated that the Respondent claims to have a tenancy agreement with the original owner of the property whereas his claim is one which is based on adverse possession.

The applicant on the discharge and/or vacation of the order of the court issued on 14<sup>th</sup> November, 2017 invited the court to look at the provisions of order 40 Rule 7 which states that an injunction may be discharged and/or varied. He stated that he was not given a fair hearing prior to the grant of the orders sought even though he is the lawful and the registered owner of the suit land and that lack of service of him and grant of order of injunction offends the rules of natural justice and hence asked the court to invoke its untethered discretion to discharge the court order.

On the issue of whether the defendant in cluster one of the Defendants are properly enjoined the applicant in his submissions stated that the 1<sup>st</sup> defendant/applicant are the beneficiaries of the estate of one Korno Ole Sapai who died on 8<sup>th</sup> June, 2016 and the Respondent filed the suit and Notice of Motion dated 9<sup>th</sup> October, 2017 on 10<sup>th</sup> October, 2017 in which the Respondent sought for lease to substitute Korno Ole Sapai who is deceased with Elizabeth Potishoi Sapai, Daniel Kiptartar Deroni, Salim Sapai and Solomon Konyeyie. The Applicant argues that the said persons have not taken out any letters of administration for the estate of the deceased who was the original owner and hence they cannot be perceived to be representatives of the estate of the late Kono Ole Sapai as they have no locus standi to be sued thereof and hence he has invited the court to invoke the provisions of order 1 Rule 10(2) to strike out the names of the defendants.

The plaintiff/respondent in his submissions contended that he is in occupation of the suit land and has since time immemorial been filing and plucking tea leaves from the land which he sales to Kiamokama Tea Factory. He says there was conspiracy on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to have the suit property in the name of the 3<sup>rd</sup> Defendant despite the existence of a court order and the fact that he is in occupation of the suit property. He further wonders why the Applicant wishes to overtake or vary an order of the court that wants to preserve the suit land pending the hearing and determination of the suit.

The Respondent insists that the orders of the court were properly granted and obtained by him and that the allegations that the affidavit of service was fraudulent is not true and that the Applicants have not sought to have the process server summoned and be cross-examined by the Applicant.

He further contends that the court had substituted the wives and daughters of the deceased and co-defendant since they participated in the sale of the land and hence they have been properly sued.

Lastly the Respondent contends that the issues raised by the Applicant can properly be determined at the main hearing of the suit and he prays that the application be dismissed.

I have read the application herein, the supporting affidavit and the replying affidavit and the rival submissions which were filed by the parties herein and the issues for determination before me is whether there was proper service on the part of the Applicant with the application by the Defendant/Respondent even though the Applicant alleges that the affidavit of service was fraudulent he does not state what that fraud constitutes he did not challenge the affidavit nor even call for the cross-examination of the process server to establish the veracity of the affidavit of service and in view of the above I do find that the application was properly served.

On whether the Applicants have established a prima facie case with a probability of success I find that the Applicant is the registered owner of the suit land. However the Respondent contends that he has been in actual possession of the suit land since time immemorial and has tea bushes on the land that he plucks and sales. Even though the applicant's title may be proper, that itself may not be proof more where the title is being challenged. What constitutes as a prima facie case is already settled and in the instant case I find that the mere fact that the Applicant has title but faced with a Respondent in actual possession and occupation fails the test of want for establishment of a prima facie case with a probability of success. I find that the conflicting position can only be ventilated during a full hearing.

On whether the other Defendants are properly enjoined in the suit I have seen the agreement of sale of the suit land dated 14<sup>th</sup> July, 2015 and I find that Elizabeth Potishoi Sapai apprehended her signature on the said agreement as a vendor together with Konyeyie Sapai and I thus find that the said Elizabeth Potishoi Sapai as properly sued. However, I find that Daniel Deroni, Salim Sapai and Solomon Konyeyie Sapai were only mere witnesses to the said sale and hence have been sued improperly and I order that their names be struck out as defendants.

In view of the foregoing therefore I find that the Applicant has not established a prima facie case with a probability of success to either vary/set aside and/or discharge the order of the court made or to grant an order of injunction against the Respondent. I further find that Elizabeth Potishoi Sapai is properly sued as defendant but the names of Daniel Deroni, Salim Sapai Solomon Konyeyie Sapia have been improperly sued and I order that their names be struck out.

The cost of the application be in the cause.

Orders accordingly.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 13<sup>th</sup> day of July, 2018**

**MOHAMMED NOOR KULLOW**

**JUDGE**

**13/7/18**

In the presence of:-

N/A for advocates and parties

CA:Chuma