



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 88 OF 2017

(Formerly Machakos ELC Case No. 250 of 2011)

DUNCAN J. MURIUKI.....PLAINTIFF

VERSUS

AGNES KOITANKEI.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

THE LAND REGISTRAR KAJIADO.....3RD DEFENDANT

RULING

What is before Court for determination is the Plaintiff’s Notice of Motion dated the 19th September, 2011 brought pursuant to Order 40 rule 2 of the Civil Procedure Rules. It seeks the following orders:

1. Spent
2. An order of interim injunction be issued prohibiting the 1st and 3rd Defendants from cancelling, transferring or otherwise interfering with land parcels KAJIADO/ KAPUTIEI – NORTH/ 125775, 12776 and 12777 pending the hearing of this application interpartes.
3. An order of temporary injunction be issued prohibiting the 1st and 3rd Defendants from cancelling, transferring or otherwise interfering with land parcels KAJIADO/ KAPUTIEI – NORTH/ 125775, 12776 and 12777 pending the hearing and determination of this suit.
4. Costs of this application be borne by the Defendants/Respondents.

The application is premised on the grounds which in summary is that the 1st Defendant has illegally obtained an order from the Land Disputes Tribunal cancelling the Plaintiff’s title deeds and the Plaintiff stands to lose his land in this process that he was never invited to participate in.

The application is supported by the affidavit of DUNCAN J MURIUKI, the Plaintiff herein where he avers that he is the registered owner of land parcels numbers KAJIADO/ KAPUTIEI – NORTH/ 125775, 12776 and 12777 hereinafter referred to as the ‘ suit lands’ which he purchased from the husband of the Claimant one JAMES SHEKEINE KOIYET who is now deceased. He deposes that sometime in March 2009, he visited the suit lands and noted they had been encroached upon and through his lawyers messrs Muriungi & Company Advocates, they wrote to the District Land Registrar, Kajiado to identify the beacons so as to establish the correct boundaries but he travelled to Rwanda where he is settled. He explains that subsequently a file KAJIADO/ KAPUTIEI – NORTH/ 125775, 12776 Vs 30370, 30371 was opened at the Kajiado Land Registrar’s Office in order to identify the beacons and advise on the way forward. Further, he was advised to conduct searches and obtain copies of the mutation forms in order for the District Land Surveyors to be able to identify the beacons including the boundaries. He states that from the searches that he conducted on the land that was owned by the deceased, he established that the said land had been on various occasions subdivided and sold to different buyers. He claims the Land Registrar had fixed the 19th January, 2010 and 22nd June, 2010, respectively for the site visit but this did not materialize. Further, that on the 22nd June, 2010, the wife of the deceased one Agnes Koitankei showed them a copy of an award by the Kajiado Land Disputes Tribunal and he was shocked that the said proceedings were carried out in his absence. He reiterates that so far there is a pending dispute relating to encroachment of the suit lands and therefore under the law one wonders what authority the Tribunal did exercise its powers. He insists that the correct procedure to establish a tribunal was not correctly adhered to, as the Court ought to have given directions first. He contends that no attempts were made by the complainant nor the tribunal to serve him as he was outside the country as evident in his passport. He states that from the reading of the ruling of the Award, there is a clear indication of biasness by the Tribunal alleging he is a fraud and therefore justice cannot be sought from the Tribunal. He confirms

that since the Award has not been by the Court, he prays the same be set aside and the correct procedure adhered to or the court provides directions. He further reiterates that the Court should direct the District Land Registrar to identify the beacons including the boundaries upon payment of requisite fees if any to facilitate the said process. He reaffirms that everything was lawfully done as he has his title deeds and the plaintiff's husband who was the registered proprietor never raised any objection for eight (8) years, while the Claimant is bringing in a dispute four (4) years after the husband's death after realizing she could have sold part of the suit lands as they are neighbours. Further, that she is the one trying to cover her fraud by encouraging the Tribunal and if the Award is allowed, it will open a Pandora's box for disputes.

The 1st Respondent Agnes Koitankel opposed the application and filed a replying affidavit where she insisted that the Plaintiff committed fraud in being registered as proprietor of the suit lands. She averred that the Land Disputes Tribunal had already issued an award to cancel the titles to the suit lands. She contends that the Plaintiff fraudulently got registered as owner of forty one (41) acres of land and yet he purchased less from her deceased husband.

The Plaintiff filed a further affidavit where he reiterated his claim and insisted the 1st Respondent was not a party to the Sale Agreement regarding purchase of the suit lands. He affirmed that the Land Disputes Tribunal did not have power to cancel titles and that he only purchased twenty eight (28) acres and not forty one (41) acres as alleged.

Both parties filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 19th September, 2011 including the affidavits as well as the submissions filed herein, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.

First and foremost I note that the application has been pending for seven years and it is not clear as to whether the titles to the suit lands have been cancelled or not. Be that as it may, the Plaintiff is seeking intervention of the Court to issue an order of temporary injunction prohibiting the 1st and 3rd Defendants from cancelling, transferring or otherwise interfering with land parcels KAJIADO/ KAPUTIEI – NORTH/ 125775, 12776 and 12777(suit lands) pending the hearing and determination of this suit.

In the case of **Giella Vs Casman Brown (1973) E.A 358** the Court clearly established the principles for granting an injunction. As to whether the Plaintiff has established a prima facie case with a probability of success, I wish to refer to 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** where the Court of Appeal 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”.

I note the Plaintiff is the registered proprietor of the suit lands having purchased the same from the 1st Respondent's husband. I note the Plaintiff has title deeds to that effect. I further note that there was a boundary dispute pending before the Land Registrar which was yet to be determined, which fact is not disputed by the Defendants. The Plaintiff contends that he was not in the country when the Land Disputes Tribunal proceedings were taking place. He has furnished the Court with his passport which indeed confirms the position. The 1st Respondent contends that the Plaintiff fraudulently got registered on forty one (41) acres of the suit land, which the Plaintiff disputes. On perusal of the Sale Agreement which is annexure 'DJM 2', I note the Sale Agreement was made on 20th April, 2001 between one James Shekene Koiyiet and the Plaintiff, for the purchase of land reference number Kajiado/ Kaputiei – North/ 4078 measuring 28 acres. I further note from the said parcel was later subdivided to 12777 and 12778 respectively on 3rd July, 2002 as per the Mutation Form annexed as 'DJM 4' in the supporting affidavit. Further, that the Land Disputes Tribunal proceeded and made an award in respect of the suit lands without the Plaintiff's participation in the proceedings. Since there is no evidence presented to prove the title deeds to the suit lands have been cancelled and in relying on section 24 (a) of the Land Registration Act which provides:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

Further, being persuaded by the case of **Eldoret ELC NO. 65/2013, Christopher Kitur Kipwambok-vs- Vipulratil Dodhia & 3 ORS;** where Justice Sila Munyao J held that Certificate of Lease just as a Certificate of Title was conclusive evidence of proprietorship, I find that the Plaintiff being the registered proprietor of the suit lands, has indeed established a prima facie case to warrant the temporary injunctive orders sought pending the outcome of the suit.

On the second principle as to whether the Plaintiff stands to suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and 1st Defendant claim ownership of the suit lands. The 1st Defendant claims the Plaintiff was fraudulently registered on forty one (41) acres of land and yet he purchased less acreage from the deceased. From the title deeds annexed to the Plaintiff's supporting affidavit, it is clear he only got registered in twenty eight (28) acres of land and not forty one (41) acres as alleged by the 1st Defendant. Further, it is clear he has been the registered proprietor of the suit lands for twelve (12) years and the 1st Defendant only proceeded to lodge a complaint with the Land Disputes Tribunal four years after her husband's demise and the said Tribunal made an Award to cancel the Plaintiff's title which is the fulcrum of this suit. 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 he has demonstrated the harm he continues to 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 since the substratum of the suit revolves around title to land, it is pertinent for the said titles to be preserved pending the outcome of the suit.

Since both the Plaintiff and the 1st Defendant are staking claim over the suit lands, and it is not disputed that the Plaintiff already obtained title to the suit lands, I find that these are issues best determined at a full trial, I find the application dated the 19th September, 2011 merited and will proceed to allow it in the following terms:

1. An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel number KAJIADO/ KAPUTIEI – NORTH/ 125775, 12776 and 12777, of any dealings, lease or charge pending the hearing and determination of the suit.
2. The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 25th day of September, 2018.

CHRISTINE OCHIENG

JUDGE