



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 187 OF 2016

LOYCE JEROP CHELAGATTPLAINTIFF

VERSUS

HERMAN MARINE NDERI & 8 OTHERS.....DEFENDANTS

RULING

(Application for injunction; principles to be applied; plaintiff claiming to have purchased certain land and claiming that the defendants fraudulently acquired title to the same; defendants alleging that it is the plaintiff who has forged documents; competing claims over the same land; best to determine the application on a balance of convenience; balance of convenience in favour of the respondents; pending hearing of the suit, respondents to remain in possession; orders barring any dispositions issued pending hearing of the suit)

1. This suit was commenced by way of a plaint which was filed on 31 May 2016. It is the case of the plaintiff that she is the owner of the land parcel Lenginet Settlement Scheme/637. She has pleaded that she purchased this land from one Rachel Njoki Ndung'u vide a sale agreement dated 17 September 1999. She has pleaded that Rachel Njoki Ndung'u had been allotted this land by the Director of Land Adjudication and Settlement and that the land was originally identified as Lenginet Settlement Scheme/674 but it was later changed to bear the parcel No. 637. She has averred that she completed the requisite payments to the Scheme and on 14 March 2016, the Director of Land Adjudication and Settlement, issued a discharge of charge and transfer to her. The plaintiff has however averred that she has discovered that on 10 August 2004, the 1st defendant obtained a title to the suit land and subdivided it into the land parcels Lenginet Settlement Scheme Nos. 1368 to 1403. These subdivisions were then transferred to various persons who comprise the other defendants in this suit. It is the case of the plaintiff that the title of the 1st defendant was procured fraudulently and so too the subsequent subdivisions. Through this suit she now inter alia wants the nullification and cancellation of the land parcels Lenginet Settlement Scheme Nos. 1368-1403 (hereinafter the suit properties).

2. Contemporaneously with the plaint, the plaintiff filed an application for injunction, seeking to restrain the defendants from entering, developing, erecting fences or dealing with the suit properties. It is that application which is the subject of this ruling. In her supporting affidavit, she has inter alia deposed that she has been in possession of the land since she purchased it in the year 1999 and has been farming on it while residing in the land parcel No. 634 which borders the disputed land. She has annexed copies of Charge entered into by Rachel Njoki Ndung'u, the sale agreement, payment receipts to the Settlement Fund Trustees, Land Control Board consent, letter of change of plot numbers and other documents to

support her claim to the suit properties. She has averred that when she went to have a title deed issued to her on 18 March 2016, she was advised that a title deed had already been issued in the year 2004 to the 1st defendant.

3. The application is opposed by the 1st to 8th respondents.

4. In his replying affidavit, the 1st respondent has deposed inter alia that he is the owner of the land parcel No. 637 Lenginet Settlement Scheme. He has deposed that on 14 November 1978 the property was charged to the Settlement Fund Trustees (SFT) and that he finalized payment of the loan on 29 June 1986. On 13 June 2003, the SFT discharged the property and on the same day the property was transferred to him. He has deposed that all along he was in physical possession of the property and that the land could not have been subdivided and sold while the plaintiff was in occupation as she has claimed. It is his view that the alleged ownership of the land parcel No. 637 by the plaintiff is a fraud.

5. The 2nd to 8th respondents have responded to the application by filing a replying affidavit sworn by the 8th respondent. He has deposed inter alia that the 2nd to 8th respondents are members of an investment club known as Dodeka Investment Club. In the year 2015, they were looking for land to buy and the 1st respondent offered to sell 3.7 hectares out of the land parcel No. 637. They did a search which confirmed that the land was in the name of the 1st respondent. They also made a physical inspection of the property and they established that it was vacant. On 27 November 2015, they entered into a sale agreement with the 1st respondent. The land was then subdivided and they got titles to the portions that they purchased. He has pointed out that the agreement attached by the plaintiff bears the parcel No. 674 and not No. 637. He has also annexed a map of the area and correspondences showing that the two land parcels are distinct. It is his view that the applicant in conspiracy with officers in the Settlement Department unlawfully and casually changed references of the parcel No. 674 to bear the number 637. They have denied that the plaintiff resides on the suit properties.

6. The plaintiff filed a supplementary affidavit to support her application. She has averred that upon receipt of the documents of the defendants, she forwarded the same for authentication to the office of Land Adjudication and Settlement. She annexed the reply that she received which seems to suggest that it is the plaintiff who is the proper owner of the land parcel No. 637.

7. I invited counsels to file submissions which they did and I have considered them in my ruling.

8. The main issue that will be up for determination is whether or not the land parcel Lenginet Settlement Scheme No. 674 is the same as the land parcel Lenginet Settlement Scheme No. 637. The plaintiff contends that the parcel No. 637 is what was formally described as parcel No. 674 whereas it is the position of the 1st -8th defendants that the two land parcels are separate and distinct. It is apparent that there are two competing claims for the same land and each party appears to have some documentation in their favour. I would not wish at this stage of the proceedings, to determine who appears to me to have a better case than the other. It is my view, considering the heavily contested issues raised, that the same is best left for determination after a full hearing on merits. It is after hearing the suit that the court will make a decision on whether or not it is the plaintiff's documents which are genuine or whether it is those tendered by the 1st- 8th defendants.

9. My own view is that this application is best determined by considering the balance of convenience. In my opinion, the balance of convenience, with regard to possession of the suit properties, tilts in favour of the 1st - 8th respondents. They currently do hold titles to the land in question. I have my doubts as to whether the plaintiff was in possession of the land prior to this suit being filed, for the reason that in order to have the land in dispute subdivided, surveyors must have come to the ground must have done quite some work on it. I also believe that the 2nd - 8th respondents must have visited the ground before purchase. It is therefore my considered opinion that while this case is pending determination, possession of the disputed properties ought to be with the 1st - 8th respondents. However, the 1st - 8th respondents are barred from making any developments on the suit properties, save probably for farming activities which will not go to change the character of the land in dispute. So that there is no change of proprietorship, I also deem fit to issue an order of inhibition, inhibiting the registration of any disposition

in the land parcels Lenginet Settlement Scheme 1368 to 1403, until this case is heard and determined. The parties are also barred from entering into any dispositions pending hearing of the case.

10. On costs, the same shall be in the cause.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22ND day of February 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :

Mr. Kisilah holding brief for Mrs. Kairu for the plaintiffs

Mr. Leparmai holding brief for Ms. Omwenyo for 2nd - 8th defendants

Mr. Kirui of the State Law Office present for the 9th defendant

No appearance on the part of M/s Hari Gakinya & Co. Advocates for the 1st defendant

Court Assistant: Janepher Nelima