



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 264 OF 2016

JOYCE MWENDE MUNGAI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETER MUNGAI MUTHAMI (DECEASED)PLAINTIFF

VERSUS

ISAIAH OTIENO OKONG'O.....1ST DEFENDANT

MARY WANJIRU MUTHINJI.....2ND DEFENDANT

MARY NYAMBURA MBUGUA3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL....4TH DEFENDANT

RULING

(Application for injunction; principles to be applied; suit land registered in the name of plaintiff's late late husband in the year 1992; deceased passing on in the year 2009; suit land somehow transferred to the 1st

and 2nd defendants in the year 2014; same land sold by a different person to the 3rd defendant who moved to take possession; no response filed by the 1st and 2nd defendants to explain how the suit land was transferred to them while the previous registered owner was deceased; no demonstration that the person who sold the land to the 3rd defendant ever had title to the suit land; plaintiff establishing a prima facie case; application for injunction allowed)

1. This suit was commenced on 19 July 2016 by way of plaint. The plaintiff is the legal representative of the estate of Peter MungaiMuthami (deceased). She has pleaded that the late Muthami was the registered owner of the land parcel MitiMingi/Mbaruk Block 3/14 (Barut) having been so registered on 28 January 1992. It is pleaded that Muthami died on 5 June 2009 after which the plaintiff applied for a grant of letters of administration which were issued and confirmed on 18 January 2011. The land parcel MitiMingi/Mbaruk Block 3/14 (Barut) (hereinafter the suit land) was distributed to the beneficiaries of the late Muthami who are John MuthamiMungai, James KibaruMungai , Reuben NjengaMungai and Samuel Ndungu Mungai, in equal shares. The plaintiff has averred that she was however unable to transfer the title of the suit land to the beneficiaries as the records at the Nakuru Land Registry could not be traced. She later learnt that the title has been transferred to the 1st and 2nd defendants and it is her view that this was done fraudulently. She brought this suit when the 3rd defendant moved into it and erected a fence. In the suit, the plaintiff inter alia seeks orders of cancellation of the title issued to the 1st and 2nd defendants and a permanent injunction against the defendants barring them from interference

with the suit land.

2. Together with the plaint, the plaintiff filed an application for injunction seeking to have the defendants restrained from interfering with the suit land pending hearing and determination of this case. It is that application which is the subject of this ruling.

3. In her supporting affidavit, the plaintiff has annexed a copy of the title deed issued to the late Muthami on 28 January 1992. She has deposed that she conducted an official search of the property on 11 February 2015 which showed that the property became registered in the names of the 1st and 2nd defendants on 24 January 2014. She has deposed that she has been cultivating the land but had leased it out three years prior to filing suit to one James Koech. She has stated that it was in April 2016 that the 3rd respondent moved into the land and fenced it.

4. Despite being served, the 1st, 2nd and 4th defendants have not entered appearance nor have they filed anything to oppose this application. The 3rd defendant has however filed a replying affidavit to oppose the motion. She has deposed inter alia that the original proprietor of the suit land was one Anthony Ngetich Seurey who held shares in Kalenjin Enterprises Limited (presumably a land buying company). She has averred that on 20 January 2016, the said Mr. Seurey sold the suit property to her at a consideration of Kshs. 1, 700,000/=. She has deposed that through a letter dated 31 July 1997, the late Muthami acknowledged having wrongfully obtained share certificates belonging to Mr. Seurey. She has annexed a copy of a letter dated 21 June 2012 written by Kalenjin Enterprises Limited said to be affirming this position. She has stated that upon purchase of the land, she took vacant possession of it, fenced it and started cultivating it. She has questioned how the late Muthami, or the 1st and 2nd defendants, could have been issued with title to the suit property. It is her view that the balance of convenience tilts in her favour as she is in possession of the property.

5. At the appointed day for the hearing of the application, only Mr. Mutonyi for the applicant appeared. He made submissions and referred me to various authorities all of which I have considered.

6. What is before me is an application for injunction and the principles upon which an application of this nature is assessed are now well settled. One needs to demonstrate a prima facie case with a probability of success and also show that unless the order is granted, he/she will suffer irreparable loss. If the court is in doubt, it will decide the application on a balance of convenience. These principles were laid down in the case of ***Giella vs Cassman Brown (1973) EA 358***.

7. In this case, the plaintiff has averred that the suit land was registered in the name of her late husband in the year 1992 and she has displayed the title deed that was issued to the late Muthami. She is at a loss as to how the title was transferred to the 1st and 2nd defendant. I do observe that the 1st and 2nd defendants became registered as proprietors on 24 January 2014 at a time when Muthami was deceased. I think the 1st and 2nd defendants need to give an explanation as to how the suit land became registered in their names, and they have not, since they have not filed anything to oppose this motion.

8. The allegation that the suit land is the property of one Antony Seurey is not supported by much evidence. I have nothing to show that Antony Seurey was ever registered as proprietor of the suit land. What the 3rd respondent has displayed are share certificates issued by Kalenjin Enterprises. But these do not demonstrate that the suit land is tied to those share certificates. The 3rd respondent averred that the late Mr. Muthami wrote a letter dated 31 July 1997 affirming that he wrongly obtained share certificates belonging to Antony Seurey. No such letter was annexed to the replying affidavit. The letter dated 21 June 2012 written by Kalenjin Enterprises, stating that the late Muthami ought not to have got title, is to me, merely an opinion of the writer. It cannot by itself be said to prove that there was any fraud by the late Muthami. Most importantly, the 3rd respondent has not shown that Antony Seurey held any title to the suit land.

9. I am of the view that the plaintiff has laid down a prima facie case with a probability of success. It is not clear how the suit land was transferred to the 1st and 2nd respondents and the 3rd respondent has failed to demonstrate that she purchased the suit land from a person who held title to it. If the defendants

are not restrained from the land, they may waste it, or adversely deal with it, which may occasion the applicant irreparable loss.

10. I therefore allow this application for injunction. I issue an order barring the defendants/respondents from entering, being upon, utilizing or in any other way interfering with the possession of the plaintiff of the land parcel MitiMingi/Mbaruk Block 3/ 14 (Barut) until this case is heard and determined. In other words, pending hearing of the suit, the plaintiff be the one in possession of the suit land. I also issue an order of inhibition, stopping the registration of any disposition in the register of the land parcel MitiMingi/Mbaruk Block 3/14 (Barut) pending hearing and determination of this suit.

11. The plaintiff shall also have the costs of this application.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 21ST day of March 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In Presence of : -

Mr. Mutonyi for the plaintiff/applicant

Ms. Kipruto holding brief for Mr. Geoffrey Otieno for the 3rd defendant/respondent

No appearance on the part of the 1st, 2nd & 4th defendants/respondents

Court Assistant: Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU