



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 150 OF 2015

NTETEI MULA KASIKUA.....PLAINTIFF

(suing as the widow & personal representative of
MULA OLE NKURNE KASIKUA-deceased)

VERSUS

NATIONAL LAND COMMISSION

AND 20 OTHERS DEFENDANTS

RULING

Coming up before me for determination is the Notice of Motion dated 19th May 2015 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from trespassing upon, cultivating, constructing upon, charging, selling, subdividing, disposing off or in any other manner interfering with the parcel of land known as Kajiado/Kisaju/598 and all its subsequent subdivisions namely:

- (a) Kajiado/Kisaju/1597
- (b) Kajiado/Kisaju/1598
- (c) Kajiado/Kisaju/1599
- (d) Kajiado/Kisaju/1600
- (e) Kajiado/Kisaju/1601
- (f) Kajiado/Kisaju/1602
- (g) Kajiado/Kisaju/1603
- (h) Kajiado/Kisaju/1623-1624

(i) Kajiado/Kisaju/2992-2993

(j) Kajiado/Kisaju/1966-1969

(k) Kajiado/Kisaju/3172-3207

(l) Kajiado/Kisaju/2277-2279

(m) Kajiado/Kisaju/5762-5773

(n) Kajiado/Kisaju/9083-9106

(hereinafter referred to as the “suit properties”) pending the hearing and determination of this suit, that the Defendants/Respondents be ordered to deposit in court all the original title deeds to the suit properties and that this court do order that a restriction be placed on all the suit properties prohibiting any further registrations and dealings whatsoever.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Ntetei Mula Kasikua, sworn on 19th May 2015 in which she averred that she has instituted this suit on behalf of the estate of Mula Ole Nkurne Kasikua (deceased) pursuant to a Grant of Letters of Administration confirmed by the Honourable Court at Kajiado on 22nd October 2013 in Succession Cause No. 53 of 2010. She annexed a copy of the Grant. She further averred that at all material times, the deceased was the registered proprietor of Kajiado/Kisaju/598 and was duly issued with a title deed on 31st July 1989. She annexed a copy of the title deed. She averred further that the deceased passed away intestate on 8th September 1993. She added that immediately after his demise, his house was broken into under suspicious circumstances and several crucial documents including the title deed for the said parcel went missing. She stated that in the year 2010 she petitioned for grant of letters of administration and that when she set out to distribute the deceased’s estate, she was shocked to learn from the Land Registry that the deceased’s only property Kajiado/Kisaju/598 had already been fraudulently subdivided and distributed without her knowledge and without any grant of letters of administration. She listed the particulars of fraud on the part of the 4th – 21st Defendants/Respondents as deliberately and fraudulently subdividing the deceased land without letters of administration, forging the deceased’s signature on the purported mutation form 3 years after the death of the deceased, forging the deceased’s signature on the purported transfer forms 3 years after the death of the deceased, forging the deceased’s signature on the purported application for land control board consent 3 years after the death of the deceased, fraudulently coming into possession of the deceased’s original title deed, concealing the same from the rightful beneficiaries and eventually having the same subdivided and fraudulently transferred. She added that the Defendants fraudulently subdivided that parcel of land into the suit properties and had the subdivisions transferred to them thereby disinheriting the rightful beneficiaries. She further stated that the net effect is that the bona fide beneficiaries of the deceased’s estate stand to suffer imminent loss and damage which shall be irrecoverable and/or irreplaceable unless this court intervenes.

The Application is opposed. The 8th Defendant, Gideon Lenana Nakuo, filed his Replying Affidavit sworn on 2nd November 2015 in which he averred that since the early 1990s his main business has been purchasing and selling land in various parts of the Rift Valley and Eastern regions of Kenya. He further averred that on 20th October 1996, a land agent who had been known to him for a long time came to his office in Kitengela Town in the company of three persons who introduced themselves as Samuel Matasha Mula, Daniel Nkiiju Mula and Joseph Rakaro Mula stating that they were brothers and had various parcels of land they wished to sell to him. He averred further that he proceeded with these brothers to see the parcels of land on sale and that he was shown 7 subdivisions of Kajiado/Kisaju/598 being Kajiado/Kisaju/1597, 1598, 1599, 1600, 1601, 1602 and 1603. He added that he was shown these parcels by the three brothers together with their mother, the Plaintiff/Applicant. He stated further that he returned to his office with the three brothers upon which he entered into a written Sale Agreement with them for the purchase of Kajiado/Kisaju/1600-1603. He annexed a copy of the Sale Agreement and confirmed that he paid them the full purchase price for those parcels. He confirmed further that the said vendors obtained

the consent to transfer those parcels to him. He further averred that later on 23rd September 1999, the said brothers again came to his office and offered to sell to him their other parcels of land being Kajaido/Kisaju/1598 and 1599 which he agreed to purchase. He confirmed that he entered into Sale Agreements with them for the purchase and they obtained the relevant consent from the Land Control Board. He stated that the Plaintiff/Applicant was all this time aware what her sons were doing in relation to the land and that this case coming 19 years later a dishonest, belated attempt in collusion with her sons to dispossess and disentitle bona fide purchasers of their property for which they were fully paid. He further stated that after this suit was filed, he instructed his advocates to conduct a search at the Kajiado Lands Registry to obtain information regarding Kajaido/Kisaju/598 upon which he came to learn that the registered owner of that parcel applied and obtained consent from the Land Control Board to subdivide the parcel into 7 subdivisions on 20th August 1996, that the subdivision was carried out to yield the suit properties, that the said registered owner applied for registration of the mutation form and that the same registered owner being the Deceased surrendered his original title deed to the Land Registrar for cancellation. He annexed copies of those documents. He noted that this was long before the three brothers approached him to purchase the subdivisions.

The 20th Defendant, Lucy Murugi Miano, filed her Replying Affidavit sworn on 22nd October 2015 in which she averred that sometime in the year 1993, she was informed by the 8th Defendant, who is a renowned broker, that the parcel of land Kajaido/Kisaju/598 was in the process of being subdivided by the owner and was up for sale. She further added that after a physical inspection of the same she decided to purchase 2 hectares on the said parcel. She further added that she paid the 8th Defendant the sum of Kshs. 350,000/- for onward transmission to the owner and agreed that the 8th Defendant do follow up the subdivision process and registration of a title in her name. She further added that she took possession of the land as she awaited the issuance of a title. She further added that a title deed was indeed issued in her name in the year 1996. She annexed a copy of her title deed. She further added that she had been in quiet possession of the said parcel of land without knowledge of the Plaintiff's claim thereto and that in the year 2012, she received the 21st Defendant's offer to purchase the said parcel of land and that the same was transferred to her sometime in April 2012. She added that she believed that the sale of Kajaido/Kisaju/598 by Mula Ole Nkurne Kasikua was done with the full knowledge and acquiescence of the Plaintiff and all the beneficiaries of the deceased's estate. She further stated that this Application is an afterthought and was made in bad faith as the Plaintiff has been aware of the sale of the suit land way back in the year 1993. She also added that the Plaintiff lives on a portion of the suit land and cannot feign ignorance of the sale of the land and the taking of possession by the subsequent purchasers.

The 21st Defendant/Respondent, Jane Wanja Ndwiga, filed her Replying Affidavit filed on 15th July 2015 in which she averred that the Plaintiff is a stranger to her, that she bought land parcel number Kajaido/Kisaju/1603 from the 20th Defendant/Respondent Lucy Murugi Miano for a sum of Kshs. 13 million. She further added that prior to that, her lawyers carried out due diligence on the property, subsequent to which she paid the entire purchase price and obtained the title deed. She annexed a copy of the title deed. She further averred that she has been in physical possession of the land since March 2012 and has carried out extensive developments thereon. She stated that she is a bona fide purchaser of the suit property for value and without notice of the Plaintiff's purported interest and that her title is indefeasible within the provisions of the Registered Land Act. She further stated that there has been a fragrant prolonged and inordinate delay on the part of the Plaintiff in filing this suit and that the maxim justice delayed is justice denied applies. On those grounds, she sought for the dismissal of this Application.

In response thereto, the Plaintiff/Applicant filed her Supplementary Affidavit sworn on 28th October 2015 in which she averred that the mutation form referred to by the 8th Defendant is dated 18th October 1996 which is 3 years after the demise of the registered owner. She further added that the letter of consent produced by them indicated that the Land Control Board meeting approving the subdivision was held on 20th August 1996 and that the registered owner having died 3 years earlier could not have attended this meeting as alleged. She asserted that no transfer of the suit properties could have been legally done prior to obtaining letters of administration in respect of the registered owner's estate, which was done in the

year 2010. It was her position that all the dealings with the suit properties prior to then are all fraudulent, illegal and of no effect.

The issue I am to determine is whether or not to grant the sought after order of temporary injunction. In deciding whether to grant the temporary injunction sought after by the Plaintiff, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It 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.”

Before I can go any further to set out my deductions herein, I must warn the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

Looking at the facts of this case, it is plain to see that the Plaintiff claims that the suit properties belong to the estate of her late husband, Mula Ole Nkurne Kasikwa. She maintains that the Deceased died on 8th September 1993 and she annexed his Death Certificate to attest to this fact. She maintains that the parcel of land in this suit which is Kajiado/Kisaju/598 was still in the name of her late husband at the time of his demise. It is her case that this being the position, no dealings with that parcel of land could be conducted legally prior to issuance by the court of letters of administration. In fact, she did demonstrate to the court that she was named the administratrix of the estate of her late husband in **Kajiado Succession Case No. 53 of 2010**. She annexed a copy of the Certificate of Confirmation of Grant dated 22nd October 2013 to attest to this fact. It is therefore her position that prior to this date, 22nd October 2013, the said parcel of land could not be subdivided or transferred to anyone in a legal way. She therefore maintains that all the dealings conducted by the Defendants/Respondents in respect of that parcel of land, including subdivision and transfer were all done fraudulently. She maintains further that the documents produced by the Defendants/Respondents including the mutation form and application for consent purportedly signed by her late husband are all forgeries.

The 8th Defendant/Respondent appears to have been the first one to deal with the subdivisions of the said parcel of land. He alleges that he came into the picture after the subdivision of the said parcel had already been effect. He claims to have purchased 6 of the 7 subdivisions from the sons of the Deceased with the knowledge and consent of the Plaintiff/Applicant. The other Defendants/Respondents claim to have purchased their subdivisions from the 8th Defendant. The 8th Defendant was not able to explain how he purchased the subdivisions in 1996 and 1999 yet the registered owner died in 1993. The mutation form and other documents produced by him were dated 1996, 3 years after the demise of the registered owner.

It was not clear how the Deceased could have signed those documents and attended the land control board meeting when he was deceased. This of course raises many questions as to the validity of the documents relied on primarily by the 8th Defendant and by extension the other Defendants. The Plaintiff's claim that the documents produced by the Defendants are forgeries appears to me to be plausible. The Plaintiff/Applicant has in the circumstances succeeded in establishing that she has a prima facie case with a probability of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's right of possession over the suit property pending the hearing and determination of this suit.

In whose favour does the balance of convenience tilt? In the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the court had this to say:

“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted.”

I have observed in this case that the inaction on the part of the Plaintiff/Applicant for over 17 years resulted in many suspicious dealings on the suit property. Various Defendants purchased portions thereof and have invested large sums of money. Some appear to be in possession of the subdivisions. I consider it fair that the Plaintiff/Applicant be the one to suffer the inconvenience of the status quo prior to the full and final determination of this suit. I therefore find that the balance of convenience tilts in favour of the Defendants/Respondents. They shall remain in possession of the suit properties pending the hearing and determination of this suit. It is upon the Plaintiff/Applicant to expedite the hearing of this suit so that a final determination can be arrived at.

In light of the foregoing and as the Plaintiff/Applicant has not satisfied all the 3 conditions for grant of the temporary injunction, this Application is hereby dismissed. Costs in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF MARCH 2017.

MARY M. GITUMBI

JUDGE