



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 35 OF 1999

JOSEPH MUTISO MAUKI.....PLAINTIFF/APPLICANT

=VERSUS=

1. DANIEL NZEKI MAUKI

2. DAVID MUSAU MAUKI

3. BEATRICE KITHEI MAUKI.....DEFENDANTS/RESPONDENTS

R U L I N G

Introduction:

1. This Ruling relates to the Plaintiff's Notice of Motion Application dated 10th August 2015 seeking an injunction to restrain the Defendants, "whether by themselves, their servants or agents or otherwise from carrying out any construction works, collecting sand, cutting trees, cultivating by force, making bricks or any other works on the suit property until the final disposal of this suit." The Application is supported by the Plaintiff's Affidavit sworn on 10th August 2015.

Background

2. The dispute in this suit involves members of the same family. The Plaintiff is a son to Beatrice Kithei Mauki, the 3rd Defendant. He is a brother to the 1st and 2nd Defendants, Daniel Nzeki Mauki and David Musau Mauki.

3. The Plaintiff instituted this suit through a Plaint dated 18th January 1999 seeking a declaration that he ought to be the sole registered owner of Title No. Mumbuni/Kasinga/301 (the suit property), rectification of the register and that the names of the Defendants be struck off the register. The Plaintiff also sought a permanent injunction restraining the Defendants from interfering in any way with the suit property.

4. Prior to the land adjudication exercise, the suit property belonged to the late Mauki, husband to the 3rd Defendant and father to the Plaintiff, 1st Defendant and 2nd Defendant. I should mention that the Plaintiff contends that the late Mauki was not the biological father to the 1st and 2nd Defendants.

5. Mauki died in or about 1944 leaving the 3rd Defendant on the suit property. The 3rd Defendant contends that brothers to the late Mauki chased her away thereafter.

6. In 1973, during the land adjudication process, the Plaintiff was recommended by his uncle Kikoi, as the sole owner of the suit property.

7. In 1973, through Land Adjudication Committee Case No KAS/49/73 the 3rd Defendant registered an objection under the provisions of the Land Adjudication Act, seeking to have her and the 2 other Defendants entered as co-owners of the suit property, on the ground that the suit property belonged to her late husband. The Plaintiff contends that he was not served with summons and did not attend the objection proceedings and that the objection was allowed on 17th October 1983 and the Defendants' names were added to the register. The proceedings of the Adjudication Committee however indicate that the Plaintiff was summoned and declined to attend the objection proceedings.

8. The Land Adjudication Committee determined that all the parties to this suit were each entitled to $\frac{1}{4}$ of the suit property and the Adjudication Officer for the Area proceeded to prepare the final adjudication register in accordance with the findings of the Adjudication Committee. By dint of the adjudication exercise carried out under the provisions of the Land Adjudication Act, the parties to this suit are registered as co-owners of the suit property, each owning $\frac{1}{4}$ of the suit property.

9. None of the parties challenged the decision of the Adjudication Committee within the framework stipulated under the Land Adjudication Act.

10. In 1999 the Plaintiff filed this suit at Machakos High Court, seeking to annul the adjudication register and eject his Mother and Brothers from the suit property.

11. On 21/8/2015, the Plaintiff filed the Application on which this Ruling seeks to make a determination. The Plaintiff seeks an injunction against the Defendants who are co-proprietors of the suit property pursuant to the land adjudication exercise carried out before the register was prepared and finalized.

Submissions

12. The Application was canvassed through submissions. The Plaintiff filed submissions dated 20th December 2016 wherein he reiterated the narrative he gave in the Supporting Affidavit. The Plaintiff made reference to Articles 20(2) and 50(2) of the Constitution.

13. The Defendants relied on the witness statements of the 1st Defendant dated 15th February 2017 where the said 1st Defendant contended that he inherited a quarter of the suit property. The Defendant stated that her mother who listed the four names appearing on the title deed was her first witness while the Survey of Kenya who processed the title to the suit property after thorough investigation in accordance with the provisions of the Registered Land Act (now repealed) and the Land Adjudication Act was his 2nd witness. The Defendants relied on a certificate of official search of the suit property dated 21st June 2004.

Determination

14. The issue for determination is whether the Application has satisfied the criteria for grant of an interlocutory injunction. This criteria was laid down in **Giella vs. Cassman Brown & Co. Ltd (1973) E. A 358**. The Plaintiff must establish that he has a prima facie case with a probability of success; that he will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted and; if the court is in doubt, the application is to be determined on a balance of convenience.

15. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** as follows:-

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

16. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 others (2014) eKLR**, the court stated that:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”

17. From the certificate of official search attached to the 1st Defendant’s statement, each of the Defendants is the registered proprietor of a quarter share of the suit property. This registration was procured during the Land Adjudication period. Under Section 24 of the Land Registration Act, the registration of the Defendants as proprietors of a quarter share of the suit property vests upon them absolute ownership of their respective shares with all rights and privileges associated with such ownership. The same was the position under Section 27 of the repealed Registered Land Act. The Defendants’ rights over their respective shares are indefeasible under Section 25(1) and are not liable to be defeated except as provided by the Act. Section 26(1) of the Act provides that a certificate of title is prima facie evidence that the person named in such certificate is the absolute and indefeasible owner of the land in respect to which the certificate has been issued and that such a certificate shall not be liable to challenge except on the ground of fraud or misrepresentation to which the holder is proved to be a party or where the certificate has been acquired illegally, un-procedurally or through corrupt scheme.

18. The Plaintiff made allegations of fraud against the Defendants and averred that they fraudulently conspired with land adjudication officers to have their names added to the register. The allegations were however not substantiated since no evidence of fraud was adduced. It is settled that allegations of fraud must be strictly proved. The standard of proof in fraud cases is higher than a balance of probabilities. See **Koinange & 13 others vs. Koinange (1986) KLR 23** and **Mutsonga –vs- Nyati 1984 (KLR) 425**. The Plaintiff has not demonstrated fraud on part of the Defendants and I am of the view that a prima facie case with probability of success has not been established.

19. While cautious not to delve into the merits of the Plaintiff’s case, I have observed from the Plaintiff and the material attached to the Application that the Plaintiff, in essence, seeks to annul a determination made by the Land Adjudication Committee. Sections 26 and 29 of the Land Adjudication Act provided the Applicant with a forum for appeal against decisions of the Adjudication Committee and Arbitration Board established under the Act. That forum was not utilized. The Plaintiff waited for 16 years and decided to institute this suit at Machakos High court seeking to overturn the land adjudication decision and alter the resultant Land Register.

20. In **Kenya Commercial Finance Co. Ltd vs. Afraha Education Society (2001) Vol. 1 EA 86**, the court held that the three conditions for grant of a temporary injunction are considered sequentially.

21. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 others (2014) eKLR** the court stated that If a *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. In my view, the application dated 10th August 2015 does not disclose a prima facie case. I need not consider the other essential element of a prima facie case.

Orders and Directions

22. The upshot of this Ruling is that the Plaintiff’s Notice of Motion Application dated 10/8/15 lacks

merit and is dismissed.

23. In view of the fact that the suit property is situated in Makueni County, I order that this suit be transferred to Makueni ELC forthwith. Mention at Makueni ELC on 4th May 2017.

Dated, signed and delivered at Nairobi on ...15th....day of March 2017.

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B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court clerk