REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 294 OF 2016

JEREMIAH ABINA ONGARO……..…..…….1ST PLAINTIFF

PATRICK NYAUNDI OBUTU…….....…....2ND PLAINTIFF

ESTHER MORAA MOSES…….…..…..3RD PLAINTIFF

VERSUS

KIBOS MINING AND HAULAGE LIMITED…..…..…1ST DEFENDANT

COUNTY LAND REGISTRAR, UASIN GISHU…..…2ND DEFENDANT

RULING

Jeremiah Abina Ongaro, Patrick Nyaundi Obutu and Esther Moraa Moses has sued Kibos Mining & Haulage Limited and the County Land Registrar, Uasin Gishu claiming that parcel of land known as Eldoret Municipality Block 14/323 was registered in the names of Lalji Karsan Rabadia and the plaintiffs entered into an agreement for sale of one quarter of an acre $^{1}/_{8}$ and $^{1}/_{8}$ respectively of the suit land for valuable consideration. The plaintiffs took possession and have been in possession since then and have developed their suit property. However, after the demise of Lalji Karsan Rabadia, the 1st defendant illegally, unlawfully, fraudulently transferred the suit land to itself.

The plaintiffs are therefore praying for an order of permanent injunction to be issued against the defendants jointly and severally from, in anyway dealing, trespassing onto, alienating, transacting, wasting, or interfering with the plaintiff's peaceful ownership and occupation of their respective portions on the suit parcel of land known as Eldoret Municipality/Block 14/323 an order for declaration that the plaintiffs are the *bonafide* purchasers for consideration value and subsequently owners of their respective portions on the parcels of land within Eldoret Municipality Block 14/323 and lastly, an order to be issued to the 2nd defendant to forthwith cancel the subsisting title register and documents of Eldoret Municipality Block 14/323 and to rectify and reissue the title document in favour of the plaintiffs in their respective portions accordingly plus costs of this suit.

The plaintiffs have equally filed an application for a temporary injunction against the defendants by themselves from entering, taking possession, alienating, trespassing, transferring, interfering with the plots numbers 53 and 54 with Eldoret Municipality Block 14/323 pending hearing of the suit.

The gist of the supporting affidavit is that the 1st defendant has illegally acquired the suit property and there is immediate danger that the defendant wants to take possession of plots illegally and then alienate.

The 1st defendant, through ***Pharrell Omondi Orwa***, the property Manager for the 1st defendant states that the plaintiffs have neither beneficial nor equitable interests of the property. Moreover, that the plaintiffs have not demonstrated that they are likely to suffer irreparable harm. The 1st defendant is the registered owner of the suit property.

The property was transferred from Lalji Karsan Rabadia in the year 2011. The 1st defendant confessed that he does not reside on the land but has taken a loan using the land as security. It is alleged that the plaintiffs trespassed on the land in the year 2015 and have put the land in their own use. The 1st defendant alleges that the interim orders were obtained fraudulently as the plaintiffs are not the owners of the property.

I have considered the application, supporting affidavit, replying affidavit and the rival submissions and do find that the plaintiffs have relied on a sale agreement which does not supersede the certificate of lease. The plaintiffs have annexed a certificate of lease in the name of Lalji Karsan Rabadia whilst the 1st defendant has annexed a certificate of lease in the name of the 1st defendant.

Though the 1st defendant has annexed the transfer of lease from Lalji Karsan Rabadia to Kibos Mining and Haulage Limited Ltd, there is no extract of title or white card that shows these entries. The last entry in the white card annexed by the plaintiffs indicates that the last transaction was done on 3.5.1991. The above issues can only be properly determined during the hearing of the suit. Therefore, there is doubt and therefore, the matter can only be determined on balance of convenience.

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. ***Prima Facie*** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a ***Prima Facie*** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. This court finds that though the plaintiffs have established that they are the proprietors of the suit property through transmission, it is arguable by the defendant that she has unregistered rights in the property being the widow to the deceased.

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that ***irreparable injury*** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. The defendant has been collecting rent since the year 2005 and therefore the issue of irreparable harm if injunction is not granted should not arise so long as the matter is fast-tracked for hearing.

The court should issue an injunction where the ***balance of convenience*** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of ***balance of convenience*** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the ***balance of inconvenience*** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

In this matter, the plaintiffs are in possession of the property whilst the defendant has title, however, it is not clear how he was registered as proprietor as there is no white card and therefore, on a balance of convenience, it is prudent to maintain *status quo*. The upshot of the above is that the application is allowed in terms of maintaining *status quo*. Costs in the cause.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF JULY, 2017.

A. OMBWAYO

JUDGE