



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC.NO.316 OF 2014

JORGE ALESANCO RODRIGUEZ DEL CASTILLO...1ST PLAINTIFF/APPLICANT

MARIA DE LA O LIBERAL..... 2ND PLAINTIFF/APPLICANT

-VERSUS-

NKINGIS KESEMEL..... 1ST DEFENDANT/RESPONDENT

CHIEF REGISTRAR OF LANDS..... 2ND DEFENDANT/RESPONDENT

KITALAI OLE NTUTU..... 1ST DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiffs’/Applicants’ **Notice of Motion** application dated **14th March 2014**, brought under Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya.

The Plaintiffs/Applicants have sought for the following orders:-

i. Spent

ii. Spent

iii. That pending the hearing and determination of this suit, the Defendants whether by themselves, agents, servants or otherwise howsoever be restrained by an order of injunction from wasting, damaging, alienating, entering, selling, charging, further sub-dividing and/or in any manner whatsoever dealing with the suit property.

iv. Spent.

v. Any other orders that the Court deems fit.

vi. Costs of this application to be borne by the Respondents.

The application is based on the grounds stated on the face of the application and on the **Supporting**

Affidavit of **Jorge Alesance Rodriguez Del Castillo**, the 1st Plaintiff/Applicant herein. These grounds are:-

a) **The Plaintiffs are the registered owners of the leasehold interest registered against the land comprised of Title No.CIS/Mara/Koiyaki/**

Dagurugurueti/79 for a term of 50 years with effect from 1st April 2008, upon which the terms are set out in a lease dated 13th June 2008 between themselves and the 1st Defendant.

b) **The 1st Defendant in concert with the 2nd Defendant has caused the suit property to be sub-divided and a part of thereof charged to a third party.**

c) **It is imperative that temporary injunction orders sought be urgently granted by this Honourable Court to prevent further fraudulent dealings.**

d) **The Plaintiff has a prima facie case with an overwhelming chance of success.**

e) **The Plaintiff stands to suffer irreparable loss unless the orders sought are granted.**

The Plaintiffs/Applicants case is that through a lease dated **13th June 2008**, between the Plaintiffs and the 1st Defendant, they became the registered owners of the leasehold interest registered against the land comprised of Title **No.CIS/Mara/Koiyaki/Dagurugurueti/79**, for a term of **50 years** with effect from **1st April 2008**. The Plaintiffs averred that they kept all the covenants set out in the lease and that through the **Cheetah Foundation**, which they run, they have promoted conservation of the environment. The Plaintiffs/Applicants claims that the 1st and 2nd Defendants in breach of the lease covenants caused the suit property to be sub-divided thus creating a new parcels **CIS/Mara/Koiyaki/**

Daguruguruet/3181-3184. Applicants further claimed that no notice to terminate was issued to them. It was pointed out that there is a real imminent danger that the suit property could be wasted, damaged or alienated by the 1st Defendant. The Applicants urged the Court to grant the orders sought.

The application is opposed by all Defendants/Respondents. The 1st Defendant/Respondent, **Nkingis Kesemei**, filed a **Replying Affidavit** on the **22nd April 2014**. He denied the allegations set out in the Supporting Affidavit sworn by the 1st Plaintiff/Applicant. He averred that there was no legally enforceable agreement between him and the Plaintiffs/Applicants. He claimed that while they were still negotiating the agreement, the Plaintiffs/Applicants offered to pay **150,000/=** in order for him to reserve the suit property and not lease it to another lessee. He then continued that the Plaintiffs/Applicants asked him to sign a document which they misrepresented to him as an agreement to reserve the suit property. He further claimed that this was the Lease Agreement, but he was not aware of this as he is illiterate. He also claimed that the Plaintiffs/Applicants fraudulently proceeded to register this Lease agreement creating a leasehold interest over the suit property. The 1st Defendant/Respondent averred that it was not until he tried to sub-divide the suit property that he realized a fraudulent lease had been created over the suit property. He therefore contended that the lease is void ab initio on account of **fraud, misrepresentation, collusion** and **fraudulent concealment** by the Plaintiffs/Applicants. He also contended that an injunction would prejudice him. He asked the Court to dismiss the application and nullify the lease.

The 1st Defendant/Respondent then filed a further affidavit on the **20th May 2014**. He averred that the suit property **CIS/Mara/Koiyaki/Dagurugurueti/**

79, had been subdivided into four portions being plots nos.**3181-3184**, on or around **3rd February 2011**. He further stated that Portion **No.3181** was further subdivided into **No.3859** and transferred to the **Kitilai Ole Ntutu** (who at the time had not been enjoined in the Suit) on or around **18th September 2013**. He also

claimed that the portion where the Plaintiff resides is **Nos.3859** and **3860**, which are not in the 1st Defendants name and that he has been wrongfully sued.

The 2nd Defendant/Respondent entered appearance by a Memorandum of Appearance dated **31st March 2014**. It further filed grounds for opposition claiming that the application was brought mala fides, is frivolous, vexatious and abuse of the Court process and that it is fatally defective. It urged the Court to dismiss the application with costs.

The 3rd Defendant/Respondent, **Kitilai Ole Ntutu**, filed a **Replying Affidavit** on the **28th May 2014**. He averred that he is the beneficial owner of **CIS/Mara/Koiyaki/Dagurugurueti/3182**, having paid the purchase price and taken possession of the property and that all he was awaiting is completion of the transfer process. He stated that prior to the sale, he conducted due diligence and noted that there were no encumbrances. He claimed that he was a *bona fide* purchaser for value without notice of the Plaintiff's interest in the land. He noted that the Plaintiffs have no cause of action against him and therefore, he should not have been brought into the suit. He urged the Court to dismiss the application and declare the lease *void ab initio*.

The 1st Plaintiff/Applicant herein filed a supplementary affidavit dated **8th December 2014**, and averred that the 1st Defendant's claim that he was illiterate was false and he cited the fact that the 1st Defendant had appended signatures on both the Replying and further Affidavit as proof. He further claimed that the 1st Defendant is the one who negotiated the terms of the lease and set the annual rent at **200,000/=**. He argued that if the intention was not to create a lease, then it did not make sense for the 1st Defendant to continue receiving and accepting payments annually. He further pointed out that he had been paying an additional annual sum of **150,000/= gratis** to the 1st Defendant. He argued that the 1st Defendant's denial of a lease contracts is contradicted by his own demand notice dated **5th April 2012**, where inter alia the 1st Defendant claimed that the Plaintiffs were going against the agreed purpose of the lease. He concluded that the 1st Defendant was acting in bad faith and had perjured himself and the Court should punish him for that.

The application was *canvassed* by way of **Written Submissions** which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. The Court will make the following findings;

The Plaintiffs/Applicants have sought for injunctive relief which is an equitable relief granted at the discretion of the Court. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554**, where the Court held that:-

“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised. It must be based on common sense and legal principles.”

Secondly, at this juncture, the Court will warn itself that it is not supposed to make conclusive findings of facts and law based on affidavits evidence. The Court is only supposed to determine whether the applicants have met the criteria for grant on injunctive orders based on usual standard. See the case of **Nahendra Chaganlal Solanki...Vs...Neepe Auto Spares Ltd, Kisumu HCCC**

No.90 of 2003, where the Court held that:-

“In an interlocutory application for injunction, the Court must warn itself of the danger of making conclusive findings that may prejudice the interest of the parties at the hearing of the suit and should as far as possible exercise cautionary steps”.

See also the case of **Edwin Kamau Muniu ...Vs...Barclays Bank of Kenya, Nairobi HCCC No.1118 of 2002**, where the Court also held that:-

“In an interlocutory application, the Court is not required to determine the very issues which will be

canvassed at the trial with finality. All the Court is entitled at this stage is whether the Applicant is entitled to injunction sought on the usual criteria.”

The criteria to be used in determining whether the Applicants are deserving of the orders sought was set in the case of ***Giella...Vs...Cassman Brown Co. Ltd 1973 EA 358***. These conditions are:

- a) The Applicant must establish that he has a prima facie case with probability of success.***
- b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c) When the Court is in doubt, to decide the case on a balance of convenience.***

The Plaintiffs/Applicants therefore had a duty to establish the above stated conditions and satisfy the Court that they are deserving of the orders sought.

Firstly, the Plaintiffs/Applicants needed to establish that they have a *prima-facie* case with probability of success. In the case of ***MraoVs....First American Bank of Kenya Ltd & Another(2003 KLR***, the Court describe *prima-*

facie case to mean:-

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 as to call for an explanation or rebuttal from the latter”.

Having now considered the above description of a *prima-facie*, it is evident that it means more than an arguable case. It means that the evidence presented to Court must show an infringement of a right and the probability of success of the Applicant’s case at the trial.

So what constitutes probability of success? In the case of ***Habib Bank A.G Zurich...Vs... Eugene Marion Yakub, Civil Application No.43 of 1982***, the Court of Appeal held that:-

“probability of success means the Court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at that stage since proof is only required at the hearing stage”.

This Court will now comb through the available evidence in order to determine whether the Plaintiffs/Applicants are deserving of the orders sought.

The Plaintiffs/Applicants have asked the court to restrain the Defendants/Respondents from interfering with the suit property ***CIS/Mara/ Koiyaki/Dagurugurueti/79***, pending the hearing and determination of this suit. The Plaintiffs/Applicants have alleged that they entered into a lease agreement dated ***13th June 2008***, with the 1st Defendant/Respondent wherein the 1st Defendant/Respondent, ***Nkingis Kisemei*** granted the Plaintiffs leasehold interest in the suit property for a period of ***50 years***. It was their allegations that the annual rent was ***Kshs.200,000/=*** and after the signing of the lease documents, the Plaintiffs/Applicants were issued with Certificate of Lease dated ***24th June 2008***. Indeed the lease document is marked as ***JA1***. The Certificate of Lease is also attached to the Plaintiffs’ application.

The 1st Defendant/Respondent has denied ever entering into any lease agreement with the Plaintiffs herein. He alleged that the Plaintiffs/Applicants took advantage of his illiteracy to make him sign a certain document which ended up being a lease document. He further stated that he subdivided his initial land ***CIS/Mara/Koiyaki/Dagurugurueti/79***, into various parcels of land and he sold a number of them to the 3rd Defendant who is the registered owner of the new subdivisions. 1st Defendant/Respondent told the Court that indeed ***CIS/Mara/Koiyaki/Dagurugurueti/79***, is no longer in existence and the Court should not issue orders in vain.

The Court has considered the available documents and exhibits and it is indeed correct that on **13th June 2008**, the Plaintiffs herein and **Nkingis Kisemei** entered into a Lease agreement for **CIS/Mara/Koiyaki/Dagurugurueti/79**. It is also evident that a Certificate of Lease was issued to the Plaintiffs/Applicants on **24th June 2008**. The 1st Defendant alleges that he did not lease the suit land to the Plaintiffs herein. However, the Plaintiffs/Applicants in the Supplementary Affidavit have attached various documents showing that the Plaintiffs effected various payments to the 1st Defendant over lease of the suit property. Further, in the further affidavit sworn by the 1st Defendant, he attached a document referred to as **Mutual Agreement for Revocation of Lease**. The said document showed that there was lease in existence between the Plaintiffs herein and the 1st Defendant over the suit property, **CIS/Mara/Koiyaki/Dagurugurueti/79**.

From the above documents mentioned above, it is evident that the 1st Defendant is not truthful about his knowledge of the existence of the lease. The Court finds and holds that indeed there existed a lease between the Plaintiffs and the 1st Defendant. On whether the 1st Defendant was misled by the Plaintiffs to enter into that lease is not a matter to be decided at this stage. That is an issue to be decided after calling of evidence.

There is also no doubt that the Plaintiffs herein are in possession of a Certificate of Lease issued on **24th June 2008**. The said Certificate of Lease was issued under the Registered Land Act, Cap 300 (now repealed). Section 27(b) of the said Cap 300 (now repealed) stated that:-

“The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and express rights and privileges belonging or appurtenant thereto and subject to all implied and express agreements, liabilities and incidents of the Lease.”

This position of law has been replicated in Section 24(b) of the Land Registration Act 2012.

From the above provisions of law, it is evident that after **24th June 2008**, the Plaintiffs were vested with leasehold interest on the suit property.

From the Replying affidavits of the 1st and 3rd Defendants, it is evident that the 1st Defendant subdivided the suit property **CIS/Mara/Koiyaki/Dagurugurueti/79** in the **year 2011**, and sold the subdivisions to the 3rd Defendant in the **year 2014**. That was done during the existence of the Plaintiffs leasehold. Though at this juncture, the Court is not supposed to delve into the substantive evidence, the Court finds that the referred subdivisions were effected before the Plaintiffs leasehold had been revoked. That action of the 1st Defendant breached the Plaintiffs right of leaseholders.

The Defendants have alleged that the land being referred to by the Plaintiffs does not exist and therefore the orders sought by the Plaintiffs cannot hold. Further, that the 3rd Defendant is the registered owner of the new subdivisions and his right is absolute and indefeasible as stated by Section 26(1) of the Land Registration Act which provides:-

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party: or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This Court finds that though Section 26 (1) above provides that a certificate of title held by a proprietor is a conclusive evidence of proprietorship, it further provides that the said Certificate of title can be challenged on grounds of fraud, misrepresentation or if the said Certificate was **acquired illegally** or **unprocedurally**.

As the Court had found and held that by the time of subdivision, of the initial parcel of land, the Plaintiffs held a Certificate of Lease over the suit property. The circumstances under which such subdivision was done can only be brought out during the main hearing. However, on the face of it, it would appear irregular or unprocedural for the suit land to have been subdivided while there existed a valid Certificate of Lease and the Plaintiffs were leaseholders and their leasehold interests had not been terminated.

Therefore this Court finds that the 3rd Defendant's Certificates of title can be challenged under Section 26(1) (a) (b) of the said Land Registration Act. However before the said challenge of the 3rd Defendant's Certificates of title, which would only be done through calling of evidence, the suit property needs to be preserved.

As has been held by the Court severally, the purpose of seeking injunction is to protect the rights of the Plaintiff from violation or threatened violation of an act he cannot be compensated by an award of damages. See the case of **Stephen Juma & Another...Vs...Executive Committee Sugar Growers Association, Kisumu HCCC No.5 of 2004**. Further in the case of **Noormohammed Janmohammed... Vs...Kassam Ali Virji Madham (1953) 20 LRK 8**, the Court held that:-

“The purpose of temporary injunction is to preserve the status quo.”

This Court finds that the Plaintiffs herein had entered into a Lease Agreement with the 1st Defendant. They had even obtained a Certificate of Lease and held leasehold interest over **CIS/Mara/Dagurugurueti/79**. However, before the lease could come to an end, the 1st Defendant subdivided the land and sold it to the 3rd Defendant. With the acquisition of the Certificate of Lease, the Plaintiffs rights were protected as they acquired a leasehold interest. Such right could only be defeated by operation of law. See Section 25 (1) of the Land Registration Act:-

25.(1) The rights of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

a) to the leased, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and

b) to such liabilities, rights and interests as affect the same and are declared by Section 28 and to require noting on the register, unless the contrary is expressed in the register.

This Court having considered the available evidence finds that the Plaintiffs have established that they have a prima-facie case with probability of success

On the second limb of irreparable damage, the Court finds that the Plaintiffs have been using the suit land for **Cheetah Breeding and Conservation and Tented Camp**. If the Plaintiffs are evicted by the Defendants before the disputed issues are resolved, then the Plaintiffs will indeed suffer irreparable loss which cannot be compensated by an award of damages. See the case of **Stephen Juma & Another... Vs...Executive committee, Kenya Sugar Growers Association(Supra)**, where the Court held that:-

“The injunction is to protect an immediate threatened or contravened right which if no injunction is granted, the Applicant would suffer irreparable loss and the hearing of the matter would be an exercise in futility”.

On the balance of convenience, the Court finds that the same would tilt in favor of preserving the status quo and the *status quo* herein is what existed before the 1st Defendant subdivided the suit property and sold it to the 3rd Defendant.

Having now carefully considered the *Notice of Motion* dated **14th March 2014**, the Court finds it *merited* and consequently, the said application is ***allowed entirely in terms of prayer No.3***

Further the Court directs that the parties herein to comply with Order 11 of the Civil Procedure Rules within the next 45 days from the date of this Ruling. Thereafter, parties to take a date for Pre-trial Conference before the Deputy Registrar, so that the matter can be set down for hearing expeditiously. The suit property herein ***falls under the Jurisdiction of Narok Environment and Land Court***. This file to be ***transferred to Narok, Environment and Land Court*** forthwith for final hearing and determination.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this **31st** day of **August, 2017**.

L. GACHERU

JUDGE

In the presence of

Mr. Masika for Plaintiff/Applicant

M/S Savini holding brief for Mr. Koceyo for 1st & 3rd Defendants/Respondents

No appearance for 2nd Defendants/Respondents

Catherine - Court clerk.