



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC NO. 501 OF 2017

(Formerly Nairobi HCCC No. 1138 of 2015)

FRANCIS MBUGUA KAMAU

JOHN KIOI KAMAU (Suing as the legal representative of the estate of

KAMAU NJOROGE - Deceased).....PLAINTIFF

VERSUS

SAIKIMBA OLE LEKISHAPUI.....DEFENDANT

RULING

The Plaintiffs' have filed a Notice of Motion dated 10th November, 2015 brought pursuant to order 40 Rule 1, 2 and 3, Order 51 Rule 1 of the Civil Procedure Rules of 2010, Section 1A, 1B and 3 A of the Civil Procedure Act, Cap 21 of the Laws of Kenya and all the other enabling provisions of the law.

The application is based on the following grounds which in summary are that on or about the year 1974 the deceased KAMAU NJOROGE purchased land parcel number LTK/KIMANA - TIKONDO /584 measuring 9.6 acres which was a resultant subdivision of land parcel number LTK/KIMANA - TIKONDO/ 46 and obtained the necessary Consent from the Land Control Board on 16th August, 1977. The deceased together with some members of his family, took possession of the suit land, constructed a semi permanent structure and commenced cultivation thereon. KAMAU NJOROGE died in 1987 before the suit land had been transferred in his favour.

The Defendant evicted the deceased family including the Plaintiffs' from the suit land, threatening them with a spear, proceeded to demolish the semi permanent house they had constructed and is now in the process of the selling the suit land to third parties.

The Defendant has also fraudulently and in collusion with land officers caused all the records relating to the subdivision of land parcel No. LTK/KIMANA - TIKONDO/46 into parcels LTK/KIMANA - TIKONDO/584 and LTK/KIMANA - TIKONDO/583 to disappear and the only remaining record is LTK/KIMANA - TIKONDO/46.

The application is supported by the affidavit of FRANCIS MBUGUA KAMAU who is one of the administrators of the estate of KAMAU NJOROGE. He deposes that they have been residing on the suit property undertaking farming and vacated the land due to threats from the Defendant.

The Defendant opposed the application and filed a replying affidavit sworn by SAIKIMA OLE LEKISHAPUI where he deposes that he gave the deceased KAMAU NJOROGE who was his friend a

portion measuring 2 acres in his parcel of land known as LTK/KIMANA - TIKONDO/46 to farm. He rented him a furrow water for 12 months at a cost of Kshs. 500 per annum, which he used for irrigation. Further, he allowed him to put a mud house thereon as he did not have a house around. He avers that he had rumours that the deceased was claiming he bought part of his land, and in 1980 the matter was referred to the Tribunal where the deceased KAMAU NJOROGE failed to produce evidence that he had bought suit land from the Defendant, with the Tribunal ruling in the Defendant's favour with the Court at Kajiado making an order affirming this position. He states that he subdivided the land in 2002 among his family members and on 27th September, 2002 his advocates discovered one JOHN KIOI KAMAU had lodged a caution thereon claiming that he was a beneficiary in trust. On 14th July, 2015 vide a Miscellaneous Civil Suit No. 23 of 2015 the Court ordered for the removal of the said Caution registered by JOHN KIOI KAMAU. He states that he thereafter subdivided the suit land to his family members who sold their shares to third parties, but as a family they had agreed that he signs and obtains the consent of the land control board for the sale and transfer of the seven (7) parcels of land arising from the sub division on their behalf. The Defendant denies that the deceased bought the said parcel of land from him in 1974 nor constructed a semi permanent house thereon. He deposes that he had never seen the Plaintiffs and only know their father who was his friend.

The Defendant further avers that he never colluded with the Registrar or any other person to fraudulently transfer or deal with the property but claims the deceased is the one who tried to collude with the Lands Registry in 1977 and 1979 by stealing his title and purportedly presenting an illegally obtained boundary certificate by taking advantage of his illiteracy. He claims he could not understand what he was signing at that time and the stolen title was never found. On 28th June, 2002 after petitioning the registrar to re issue title, a notice was published in the Kenya Gazette Vol. CIV - No. 43/4000 at page 1481. He denies that he never intended to transfer any parcel of land to the deceased and states that there is no land by the reference or registration alluded to by the Plaintiff as the land had been sold in 2011 and consent for transfer given in September, 2015 with the purchasers having new titles.

The Plaintiffs' FRANCIS MBUGUA KAMAU and JOHN KIOI KAMAU filed a supplementary affidavit where they reiterated that their late father was not given 2 acres of land for farming but bought 9.6 acres from the Defendant. Further that after the Surveyors prepared the mutation forms, barriers were placed on the ground with both their late father and the Defendant signing the Boundary Identity Certificate. The Registry Index Map was also amended to reflect the said sub division.

Both parties filed their written submissions which were highlighted on 20th June, 2017 that I have considered.

Issues and determination

The issue for determination is whether the Plaintiffs are entitled to the orders of injunction sought.

The principles of granting interlocutory injunction were settled in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** where the court held inter alia that for an injunctive order to be granted the Applicant has to demonstrate it has prima facie case with a probability of success, and it stands to suffer irreparable loss or injury which cannot adequately be compensated in damages. If the court is in doubt, it should decide the application on a balance of convenience. In line with the said principles, I wish to interrogate the evidence presented as to whether the Plaintiff has established a prima facie case with probability of success.

On the first issue as to whether the Plaintiffs' have established a prima facie case, they claim their late father bought 9.6 acres of land from the Defendant in 1974 which was to be hived off LTK/KIMANA - TIKONDO/46. The Plaintiffs have not furnished court with evidentiary proof including any Sale Agreement to prove their claim and demonstrate that land parcel number LTK/KIMANA - TIKONDO/46 was to be sub divided into LTK/KIMANA - TIKONDO/583 and LTK/KIMANA - TIKONDO/584 respectively . Further, the Court notes that the Defendant signed the Mutation form and Boundary Certificate as per the subdivision. However, the Boundary Certificate indicate two dates 24th August, 1977 and 24th May, 1979 while the Mutation form is dated 14th September, 1977. These discrepancies

are not explained and neither are these documents certified by the Director of Survey as required by Law. The Plaintiffs' did not avail a copy of an extract of the Green Card to prove their claim. The Plaintiffs' claim a consent from the land control board was already obtained in 1977 but however failed to annex a copy of the same in their supporting affidavit. What is curious is why the Plaintiffs took so long to register the titles in their names and further to institute the suit herein. The Court notes that there was a Miscellaneous Cause where the caution was removed and further the Tribunal proceedings which were adopted by the court, the Plaintiffs do not explain whether they were part of these proceedings and why they did not lodge any appeals to the same. The Plaintiffs' claim when they demanded from the Defendant to register the suit land in their names, he refused and stated that he only recognized the deceased father.

The court notes that the Plaintiffs are not in possession of the suit land which has already been subdivided and sold to third parties who have title. The Court further notes that the order of status quo was granted on 8th February, 2016, when the title deeds to the resultant subdivisions had already been issued on 19th January, 2016 to third parties.

It is the Court's finding that title number LTK/KIMANA - TIKONDO/46 is no longer in existence, and the orders sought might be in vain. The Plaintiffs' have not established a prima facie case with a probability of success.

In the circumstances I disallow the Plaintiffs' application dated 10th November, 2015.

The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 25th day of September, 2017.

CHRISTINE OCHIENG

JUDGE