



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

CIVIL SUIT NO. 241 OF 2017

(formerly Machakos ELC Suit No 212 of 2016)

JULIUS MATERIAN KISOSO.....PLAINTIFF

VERSUS

WISH LIFE INVESTMENT LIMITED.....1ST DEFENDANT

THE COUNTY LAND REGISTRAR KAJIADO COUNTY.....2ND DEFENDANT

RULING

The application before this Court is the Plaintiff's Notice of Motion dated 5th December, 2016 brought pursuant to Order 40 Rule 1 (a), 2& 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The application is based on the following grounds which in summary are that the Plaintiff is the registered owner of land parcel number KAJIADO/KITENGELA/5477 hereinafter referred to as 'the suit land'. The 2nd Defendant fraudulently issued another title deed to the 1st Defendant purportedly for the same suit property. The 1st Defendant has no interest in the suit land and the title it holds was fraudulently obtained. The 2nd Defendant has threatened to cancel the Plaintiff's title while the 1st Defendant has started claiming the suit land. The Plaintiff is apprehensive that the 1st Defendant may sell and transfer the suit land to other parties using the fraudulently obtained title.

The application is supported by the affidavit of JULIUS MATERIAN KISOSO the Plaintiff herein where he deposes that the suit land which measures 10.12 hectares is a resultant sub division of land parcel number KAJIADO/KITENGELA/ 4076 which was registered in his name. He avers that land parcel number KAJIADO/KITENGELA/4076 was subdivided on 8th July, 1994 and title deed was closed after land parcels number KAJIADO/KITENGELA/5476 and KAJIADO/KITENGELA/5477 respectively were created after the said subdivision. He states that he was issued with the two title deeds after the subdivision and took possession of the suit land, fenced it off and put up permanent structures thereon. He further deposes that sometime in September 2015 he lost/misplaced the title deed to the suit land and reported the matter to the Kajiado Police Station vide OB No. 39/18/09/2015 which issued him with a Police Abstract. He further states that he reported the matter to the 2nd Defendant and discovered the Green Card to the suit land was missing from the registry and the 2nd Defendant referred the matter to the Police for investigation vide letter dated 18th September, 2015. The investigation confirmed he was owner of the suit land and a report dated 5th October, 2015 made to that effect. Further that the lost title deed and Green Card were duly advertised in the Daily Nation Newspaper on 15th October, 2015, gazetted vide Notice No. 8139 dated 30th October, 2015 after which he was issued with another title deed on 14th January, 2016. He further avers that in March 2016 he was summoned by the Directorate of Criminal Investigations who informed him that the 2nd Defendant vide a letter dated 3rd March, 2016 advised them that the suit land belonged to the 1st Defendant but title deed was mistakenly issued to him. He states that he saw a copy of the 1st Defendant's title deed which indicates he was issued with it on 8th

July, 1994 as entry number 2 but does not show entry number 1 with an endorsement on the said title abstract that it was reconstructed on 28th August, 2011. He further states that he never sold nor transferred suit land to the 1st Defendant nor to any other person. Further that the 2nd Defendant has summoned him severally to his office to surrender his title deed and is threatening to cancel it alleging the 1st Defendant is the rightful owner of the suit parcel.

The application is opposed by the interested parties herein who filed a replying affidavit sworn by LUCY WANGARI AKWEYU where she deposes that she is one of the interested parties and represents the interest of the LATE PURITY WANJIRU MWANGI who was the majority shareholder in the 1st Defendant Company. She avers that the LATE PURITY WANJIRU MWANGI passed away on 11th January, 2002 long after the 1st Defendant had purchased the suit land. She states that together with IBRAHIM MWANGI vide succession cause No. 2256 of 2002 they obtained Certificate of Confirmation of Grant over the deceased estate. She deposes that in 1996 the deceased while alive took her to Kajiado and showed her the suit land which they had bought as a Company (1st Defendant). Further through the co director of 1st Defendant's affidavit filed vide Civil Case No. 301 of 2004 she came to know the identity of the suit land and conducted an official search on 2nd September, 2004 which confirmed suit land belonged to 1st Defendant. She further avers that the suit land was registered in the 1st Defendant's name way back on 8th July, 1994.

The Plaintiff filed a further affidavit dated 18th April, 2017 where he reiterated his claim over the suit land and refuted claims that the suit land belonged to the 1st Defendant.

The Plaintiff and Interested parties filed their respective written submissions that were highlighted on 14th June, 2017 which I have considered.

Issues and determination

The issue for determination is whether the Plaintiff is 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.

The Plaintiff claims that the suit land belongs to him and it was created as a resultant subdivision of KAJIADO/KITENGELA/4076 which land also belonged to him. The Plaintiff has produced various documents to prove his claim. The interested parties claim the suit land belongs to the 1st Defendant who purchased it for valuable consideration in 1994 and was registered as its owner. They have also produced various documents to prove their claim. The Court notes that the 1st Defendant however did not file a Defence nor replying affidavit. The 2nd Defendant insists the suit land belongs to the 1st Defendant. From the documents annexed to the respective affidavits and the evidence presented, it is evident that the claim laid by the Plaintiff over the suit land is not baseless although it is intriguing as to how the Plaintiff and the 1st Defendant both came to be registered as proprietors of the suit land on the same day.

On the question as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. The Plaintiff and Interested Parties who are administrators of the estate of one of the directors of the 1st Defendant company stake ownership over the suit land. Both parties allege fraud and admit that the issue of the two titles was handled by the Kajiado Criminal Investigation Department and the 2nd Defendant. I am persuaded by the case of **UCB Vs Mukoome Agencies (1982) HCB22** where it was held that: *'that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'*.

In the instant case, in so far as the Plaintiff has established a prima facie case, I find that it is important for both the Plaintiff and the Interested parties to be granted an opportunity to be heard to enable the court make a determination on the ownership of the suit land.

On the question on balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the property is not preserved, it may be wasted away.

Since two parties are staking claim over title to the suit land and with the sanctity of title being in question, I will allow the Plaintiff's application dated 5th December, 2016 in the following terms:

'An inhibition order be and is hereby registered by the Land Registrar Kajiado as against land parcel number KAJIADO/KITENGELA/5477 measuring approximately 10.12 hectares, of any dealings including disposing of, transferring , leasing or charging pending the hearing and determination of the suit.'

The costs will be in the cause.

Dated signed and delivered in Open Court at Kajiado this 21st day of September, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Nyaode holding brief for M/s Nyamolo for plaintiff/ applicant

Kinyua for interested party

Mpoye –Court Assistant