



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC. MACHAKOS CASE NO. 196 OF 2015

PASCHALL MUTWETUMO KYULE.....1ST PLAINTIFF

JOHN MUMO KYULE.....2ND PLAINTIFF

(SUING AS ADMINISTRATORS OF THE ESTATE OF LATE KYULE MUMO DECEASED)

VERSUS

MICHAEL WAMBUA MUSYOKA.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR MACHAKOS.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 18th August 2015 in which the Plaintiffs/Applicants seek for an order of temporary injunction restraining the Defendants from trespassing, transferring, alienating, developing and or in any other way interfering with the parcel of land known as Athi River/Athi River Block 5/259 (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit. They also seek an order of permanent injunction as well as cancellation of the title deed in respect of the suit property in the name of the 1st Defendant and an order that a new title deed be issued in the name of the 1st Plaintiff.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Plaintiff/Applicant, Paschall Mutwetumo Kyule, sworn on 18th August 2015 in which he averred that he is one of the sons of the late Kyule Mumo (the “Deceased”) and one of the administrators of his estate. He averred that the Deceased died on 8th November 1999. He further averred that the Deceased is the lawful owner of the suit property which was allocated to him as Member Number 111 in Drumvale Farmers Co-operative Society Ltd. He then averred that the suit property was illegally transferred to the 1st Defendant by the 2nd Defendant and that the 1st Defendant is now in the process of subdividing the suit property. He confirmed that he carried out an official search on the suit property on 20th July 2015 which confirmed that indeed the 1st Defendant is registered as the proprietor thereof and a titled deed was issued to him on 22nd July 2013. He sought for this Application to be allowed to prevent the Defendants from having any further dealings with the suit property pending the hearing and determination of this suit.

The Application is contested. The 1st Defendant/Respondent, Michael Wambua Musyoka, filed his Replying Affidavit sworn on 8th September 2015 in which he averred that he is a grandson of Moses Mitaa Walamu and Kiloko Mitaa (both deceased) who were members of Drumvale Farmers Co-operative Society Limited as Member No. 402. He further averred that his late grandmother Kiloko Mitaa was allocated by the said Society the suit property as confirmed by a letter dated 7th May 2013, a copy of which he annexed. He averred further that his late father Joseph Musyoka Mitaa was entitled to inherit the suit property from his grandparents of several parcels of land including the suit property but this did not happen. He further averred that his family members allowed him to proceed and ensure he became the registered proprietor of the suit property which he did. He confirmed that he is now the registered proprietor of the suit property and sought that this Application be dismissed.

The issue that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiffs/Applicants. I shall also determine whether or not to issue an order of permanent injunction and cancellation of the title deed held by the 1st Defendant and order the issuance of a title in the 1st Plaintiff's name. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”East Africa. First, an applicant must show a prima facie case with a probability of

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”

Do the Plaintiffs/Applicants have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must point out to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

With that background laid down, I turn to assessing whether or not the Plaintiffs/Applicants have met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiffs have established a prima facie case with a probability of success at the main trial. The 1st Plaintiff/Applicant claims to be the owner of the suit property by virtue of being the son of the Deceased. The evidence of ownership that he has produced to this court is a letter dated February 2015 on the letterhead of Drumvale Farmers Co-operative Society Limited which is stated to be in liquidation. It is noteworthy that the letter does not indicate the day it was written and further it is not written by the liquidator of the society. Further, the letter is not an allotment letter as alleged. the 1st Defendant has on his part laid claim on the suit property, stating that he is the duly registered proprietor thereof. This position is not disputed by the Plaintiffs/Applicants who themselves annexed a Certificate of Official Search dated 20th July 2015 which indicates that the registered owner of the suit property is the 1st Defendant who was issued with a title deed on 22nd July 2013. The Plaintiffs/Applicants are the ones who are seeking to prove that they are the

owners of the suit property. To that assertion, I will be guided by **Section 107** of the **Evidence Act Cap 80** which provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

I must state that up until this point, the Plaintiffs/Applicants’ claim on the suit property remains a weak claim. Their claim is based on a letter whose authorship is suspect and they are coming up against the 1st Defendant who holds a title deed over the suit property. The position of the holder of a title deed over a parcel of land is well stated in **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... 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.”

The Plaintiffs/Applicants have not been able to challenge the validity of the title deed held by the 1st Defendant on any of the grounds set out above. This being the position, I arrive at the finding that the Plaintiffs/Applicants have failed to demonstrate that they have a “genuine and arguable” case and therefore a prima facie case with a probability of success at the main trial.

Since the Plaintiffs/Applicants have failed to prove the first ground in the grounds set down in the celebrated case of *Giella versus Cassman Brown*, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of granting an interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury: and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

Also, in the case of *Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR*, the Court of Appeal had this to say:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

The prayer for a permanent injunction cannot be issued for similar reasons as why the temporary injunction has been denied and the prayer for cancellation of the title deed held by the 1st Defendant and issuance of a new title deed in the name of the 1st Plaintiff cannot be issued at this interlocutory stage of the proceedings.

In light of the foregoing, I hereby dismiss this Application with costs to the 1st Defendant.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE