



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 21 OF 2017

SERVE IN LOVE AFRICA (SILA) TRUST.....PLAINTIFF

VERSUS

ABRAHAM KIPTARUS KIPTOO.....1ST DEFENDANT

PATRICK KIPKOGEI KIBET.....2ND DEFENDANT

DAVID KIPSANG KIPYEGO.....3RD DEFENDANT

RULING

Serve in Love Africa (SILA) Trust (*hereinafter referred to as the plaintiff*) has come to court against **Abraham Kiptarus Kiptoo, Patrick Kipkoge Kibet, David Kipsang Kipyego (*hereinafter referred to as the defendants*)** claiming that the current registered trustees of the plaintiff are Patrick Kipkosgei Kibet, Professor Ambrose Kiprop, David Chemworem, Moses Kipkulei, Samson Kibii and Erick Kiptum Teimuge. Further, that the 1st and 3rd defendants ceased being trustees of the plaintiff on 5.5.2015 and they are unauthorized to transact any business for and on behalf of the plaintiff. The plaintiff is the registered owner of land reference Kipsinende/Kipsinende Block 3(Mosop “A”) 61.

According to the plaintiff, on or about 19.1.2017, the defendants sold land reference Kipsinende/Kipsinende Block 3(Mosop “A”) 61 to a 3rd party. The defendants entered into the sale agreement on the basis that they are trustees of Serve in Love Africa (SILA) Trust knowing very well that the 1st and 3rd defendants ceased being trustees in May, 2015. That the defendants’ conduct is fraudulent and legally untenable as the 1st and 3rd defendants had ceased being trustees and they could not transact for an on behalf of the trust after 5.5.2015. The 2nd defendant on the other hand could not unilaterally make decisions affecting the Trust.

PARTICULARS OF FRAUD ARE:-

- i. Posing as trustees of the plaintiff knowing they had ceased to be.
- ii. Holding themselves as trustees to the purchaser despite knowing that the contrary was the case.
- iii. Obtaining money by false pretence.
- iv. Acting to the detriment of the trust.
- v. Failing to act in the best interest of the Trust.

vi. Acting unilaterally.

According to the plaintiff, the sale agreement dated 19.1.2017 is null and void by dint of lack of capacity on the part of the 1st and 3rd defendants to transact for and on behalf of the plaintiff.

The plaintiff seeks a declaration that the sale of land reference number Kipsinende/Kipsinende Block 3 (Mosop "A") 61 by the defendants was illegal, null and void ab initio. The plaintiff further seeks a declaration that the 1st and 3rd defendants are not trustees of the plaintiff and they lack capacity to transact business for and on behalf of the plaintiff and the 2nd defendant could only act pursuant to a resolution of the trustees. Last but not least, the plaintiff seeks to have the sale agreement dated 19.1.2017 between the defendants and Albert Kipchirchir Boss on land reference Kipsinende/Kipsinende Block 3(Mosop "A") 61 nullified and/or cancelled and/or declared a nullity.

Accompanying the suit is the application dated 24.1.2017 wherein the plaintiff prays that pending the hearing and determination of the suit there be an order of injunction to restrain the defendants, its agents and or employees or any other person acting on their behalf from selling, transferring, disposing or in any way dealing with land reference number Kipsinende/Kipsinende Block 3 (Mosop "A")/61. Moreover, that the sale proceeds of the agreement dated 19.1.2017 held in account No. ***** at Kenya Commercial Bank and account No. ***** at Sidian Bank be preserved by freezing the accounts.

The application is based on grounds that the plaintiff is the registered owner of the suit land and that the plaintiff runs its affairs through trustees. That the 1st and 3rd defendants are not trustees of the plaintiff and yet they have fraudulently sold land reference Kipsinende/Kipsinende Block 3(Mosop"A")/61 to a third party.

The application is supported by the affidavit of David Chemworem, one of the trustees of Serve Love Africa (SILA) Trust having become trustee on 5.5.2015. According to the deponent, the 1st to 3rd defendants ceased being trustees on 5.5.2015. Despite having ceased being trustees, the 1st and 3rd defendants entered into a sale agreement disposing off the suit land which disposal the plaintiff is challenging in a court of law. That the sale agreement is null and void ab initio as strangers to the Trust have illegally dealt with the land belonging to the Trust. That the defendants' conduct is fraudulent as the 1st and 3rd defendants ceased being trustees in May, 2015 and other trustees were appointed. That the defendants' conduct is calculated at defrauding the plaintiff of its property land reference Kipsinende/Kipsinende Block 3(Mosop"A")/61. That the 2nd defendant cannot act unilaterally in dealing with the plaintiff's assets.

The deponent states that the 1st and 3rd defendants have all along been aware that they are not trustees of the plaintiff and have even filed a petition in the High Court challenging their removal as trustee of the Trust. The defendants therefore have no capacity to deal with the land and that the sale agreement dated 19.1.2017 ought to be declared a nullity. That the plaintiff stands to suffer irreparable harm unless its property land reference Kipsinende/Kipsinende Block 3(Mosop"A")/61 is preserved. The plaintiff prays for an order of injunction to restrain the defendants from dealing with land reference Kipsinende/Kipsinende Block 3(Mosop"A")/61 till the suit is heard and determined. That the defendants are dealing with Trust property as if it is their own. That unless the injunctive orders are issued, the defendants shall proceed to transfer the land to 3rd parties and the entire suit will be rendered nugatory. The application is also supported by the affidavits of Moses Kipkulei, Professor Ambrose Kiprop, Erick Kiptum Teimuge and Samson Kibii who claim to be the other trustees of the plaintiff.

The defendants through David Kipsang Kipyego claiming to be one of the registered trustees of the plaintiff, state that the defendants founded Serve in Love Africa (SILA) Trust and registered it as a trust. The investments include Kipsinende/Kipsinende Block 3 (Mosop "A") 61 and a portion of Elso Farm 12357/57 on which they have developed a school. According to the defendants, Professor Ambrose Kiprop, Mr. David Chemworem, Mr. Moses Kipngetuny Kipkulei, Mr. Samson Kipngetich Kibii, Mr. Erick Kiptum Teimuge are fake trustees and that they falsified records as their appointment was unconstitutional. That only one remaining trustee signed the application for the recording of a Certificate

of Appointment of the new trustees. The instrument shows glaring fraud according to the defendants. The defendants have filed a petition against the Registrar of Documents.

The second application is dated 24.1.2017 wherein the defendants seek orders that the temporary order of stay issued on 24.1.2017 freezing the defendants' account at Kenya Commercial Bank being account No. ***** and Sidian Bank Account No. ***** be vacated or set aside. The defendants further pray that this court does issue an injunction restraining 3rd parties from trespassing on, wasting, constructing on, cultivating, remaining on, alienating, or otherwise interfering or dealing with the parcels of land pending hearing and determination of the suit. The facts are the same and therefore, I will not reiterate the affidavits.

I have considered both applications and do find that the suit property Kipsinende/Kipsinende Block 3(Mosop "A") 61 is registered in the names of Serve in Love Africa (SILA) Trust. There are two factions before court claiming to be trustees of the Serve in Love Africa Trust. One faction is led by Professor Ambrose Kiprop and includes Mr. David Chemworem, Moses Kipngetuny Kipkulei, Samson Kipngetch Kibii, Erick Kiptum Teimuge. The other faction is led by David Kipsang Kipyego and includes Abraham Kiptarus Kiptoo and Patrick Kipkosgei Kibet. The main issue is the management of Serve in Love Trust (SILA), incorporated as a trust on 8.7.2009 by the Registrar of Documents, and determination as to who is the registered owner of the suit property.

At the time of registration, the trustees were the defendants, however, there was an application for the recording of a Certificate of Appointment of new trustees upon which Mr. Patrick Kipkosgei Kibet, a trustee of Serve in Love Africa (SILA) Trust requested the Principal Registrar of Documents to record the appointment of new trustees. It is important to note the application was not signed by the other trustees. It is only signed by Mr. Kibet. The same is not signed by the Registrar as required by law.

The power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

- 1. whether the applicant has demonstrated a prima facie case with a probability of success.***
- 2. Whether the applicant is likely to suffer irreparable harm if injunction is not granted.***
- 3. Where the balance of convenience tilts if the court is in doubt.***

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 favour. 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. On the issue of prima facie case with a likelihood of success, I do find that the plaintiff has demonstrated that the Lands Office received the application for recording of a Certificate of Appointment of new trustees by one of the remaining trustees. The same was signed by the said trustee and therefore there is a likelihood that the plaintiff will succeed that he has appointed the new trustees.

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. I do find that the subject matter is land that is registered in the name of (SILA). If the sale is allowed to complete, the plaintiff will suffer irreparable harm as the property would be put out of reach of the plaintiff.

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 On irreparable harm that cannot be compensated by way of damages. On the issue of balance of convenience, I do find that it tilts towards maintaining the property in the name of (SILA) until the suit is heard and determined. Ultimately, the application dated 24.1.2017 is allowed in terms that pending the hearing and determination of the suit all parties are restrained from selling, transferring, disposing or in any way dealing with land reference number Kipsinende/Kipsinende Block 3 (Mosop "A")/61. Moreover, that the sale proceeds of the agreement dated 19.1.2017 held in account No. ***** at Kenya Commercial Bank and account No. ***** at Sidian Bank be preserved by freezing the accounts. The defendants' applications dated 24.1.2017 and 15.2.2017 are disallowed. Costs of all applications in the cause.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF OCTOBER, 2017.

A. OMBWAYO

JUDGE