



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET

ELC NO. 53 OF 2017

MONICA JEPWAMBOK RONO.....PLAINTIFF

VERSUS

MARTIN DOUGLAS KIPKOSGEI.....1ST DEFENDANT

JOHN KIPRUTO TOO.....2ND DEFENDANT

LAND SETTLEMENT FUND BOARD OF TRUSTEES...3RD DEFENDANT

COUNTY LAND REGISTRAR, KAPSABET.....4TH DEFENDANT

COUNTY LAND SURVEYOR, KAPSABET.....5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

RULING

INTRODUCTION

This ruling is in respect of an application brought by way of Notice of Motion dated 31st January, 2017 by the Plaintiff/applicant who sought for the following orders:

1. That this application be certified urgent and its service be dispensed with in the first instance.
2. THAT pending the hearing and determination of this application inter partes a temporary do issue restraining the defendants, their servants and or agents or any person whatsoever acting on instructions and authority of the defendants whether express or implied from taking possession, selling, disposing, alienating, charging, advertising for sale, taking possession or in any manner dealing with the property known as title No. NANDI/CHEMELIL SETTLEMENT SCHEME/607.
3. THAT pending the hearing and determination of this suit, a temporary do issue restraining the defendants, their servants and or agents or any person whatsoever acting on instructions and authority of the defendants whether express or implied from taking possession, selling, disposing, alienating, charging, advertising for sale, taking possession or in any manner dealing with the property known as title No. NANDI/CHEMELIL SETTLEMENT SCHEME/607.

4. THAT the Officer Commanding Station, Potopoto Police station be directed to aid in enforcing the order herein.

5. THAT the costs of this application be awarded to the Plaintiff/Applicant.

This matter was brought under certificate of urgency on 15th February 2017 whereby the court granted interim orders of injunction. The court vacated the interim orders for non- attendance but later the same were reinstated upon hearing an application by the plaintiff.

Miss Lungu for the 3rd, 4th, 5th and 6th defendants informed the court that she would not be participating in the application but would respond to the main suit.

Miss Adhiambo for the 2nd defendant also informed the court that they were not opposed to the application for injunction. The parties therefore agreed to canvass the application through written submissions which were filed in court.

PLAINTIFF'S/APPLICANT'S COUNSEL'S SUBMISSIONS.

Counsel relied on the Plaintiff's Supporting Affidavit, and the grounds on the face of the application. Miss Wamalwa submitted that the main issue for determination by this Honorable Court is whether the Plaintiff has laid out sufficient grounds to warrant issuance of an injunction by this Honorable Court. She urged the court to consider the principles for grant of temporary injunction laid down in the case of *GIELLA-Vs- CASSMAN BROWN* (1973) EA 358.

First, an applicant must show a prima facie case with a probability of 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.

She also submitted that the Plaintiff has made out a prima facie case with a probability of success as was set out in the case of *MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS* (2003) KLR 125 where 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."

Counsel further submitted that the Plaintiff has demonstrated how she was allocated the suit property and has been in use and possession of the suit property to date save for a period in which an individual had trespassed on the property and was forcefully evicted by the Court. Counsel also submitted that the 1st Respondent's argument is that he is the Registered owner of the suit Property and that his Registration was not unlawfully and fraudulently obtained, there is however no supporting evidence that has been put forward by the 1st Respondent to support his allegations, it is not enough for the Respondent to only claim that he is the Registered owner, he ought to demonstrate to this Honorable Court how the said Registration was acquired. Counsel allude to Section 26 (1) of the Land Registration Act which states as follows:

"The Certificate of Title issued by the Registrar upon registration . . 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."

Miss Wamalwa therefore submitted that the Title was procured by the 1st Respondent on the grounds of fraud or misrepresentation and was also acquired illegally, unprocedurally or through a corrupt scheme and ought to be cancelled. It was Counsel's submission that the Plaintiff, being in possession of the suit property ought to have been considered when Titles were issued and thus the Plaintiff has established a prima facie case with high chances of success at the hearing of this suit.

Counsel further submitted that the Plaintiff has been in Possession of the suit Property for about Twenty (20) years and has made substantial developments on the suit Property and an award of damages will not suffice the loss to be suffered by the Plaintiff. She cited the Court of Appeal case of Aikman vs. Muchoki (1984) KLR 353 it was held as follows:

"My understanding of the Court of Appeal decision in the Giella case is that the court proceeds to consider the second condition of irreparable harm which cannot be adequately compensated for an award for damages only if it entertains some doubt on the first condition of the probability of success, like when the court thinks that the plaintiff has a fifty/fifty chance of success. However, where, going by the material placed before it at an inter parte hearing of an application for injunction, it appears to the court that the plaintiff has a strong case, like where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall into consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it".

She submitted that the Plaintiff being in possession and occupation of the Suit property the balance of convenience should tilt in her favour. She therefore urged the court to grant the orders as prayed.

1ST DEFENDANT'S COUNSEL'S SUBMISSIONS

The application was opposed the 1st defendant and Counsel relied on the replying affidavit filed in court. Counsel submitted that the Plaintiff averred that suit land Nandi/Chemelil Scheme/607 is registered in the 1st defendant's name and with a title to that effect therefore the Plaintiff cannot lose what is not hers.

Mr Choge submitted that both titles were obtained on 1st Registration of each claimant there being no previous title deeds and that both parties were Allotees from the Government. It was further submitted by Counsel that the Plaintiff and the 1st Defendant were allocated as Squatters and both were deemed by the government as deserving of their allocations and therefore were eventually issued with their respective titles.

Counsel submitted that the Applicant does not have a prima facie case with a probability of success. He further stated that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable ground to do so, an absent thing in this case. Mr. Choge submitted that the Applicant has not discharged that onus and therefore "it is not enough for the Applicant to merely state that she will suffer irreparably; she must prove specific details and particulars to the satisfaction of the court". Counsel relied on the case of Machira C/a Machira & Co. Advocates vs East African Standard (no. 2) (2002) KLR 63

It was his submission that the plaintiff and the Defendant's titles were issued at the same time so are other thousands of titles and that the process of acquisition of the titles were all complied with. Counsel also submitted that the Respondent being a holder of a title on 1st Registration is entitled to rely on the indefeasibility conferred by Statue to protect his right to property. He cited several authorities on indefeasibility of title and the Registered Land Act (Now repealed) to support this position. He further submitted that the effect of Section 26 (1) of the Land Registration Act no. 3 of 2012 is that the title document of the Defendant is conclusive proof of ownership and the owner thereof is entitled to exercise and enjoy all the incidents that ownership confers.

Counsel further cited Article 40 of the Constitution that states that the rights under this Article do not extend to any property that has been found to have been unlawfully acquired. And even where property is

acquired contemplated art. 40 (6) must be through a legally established process. He therefore urged the court to dismiss the application as the plaintiff had not established a prima facie case with a probability of success.

ISSUES AND DETERMINATION

This is an application for temporary injunction and the principles for granting such injunctions are well laid down in the Giella case as cited by both counsels. I have looked at the pleadings, the application together with the supporting documentation and notice that a lot has happened in respect of the suit land. The plaintiff applicant at one point had gotten an eviction order dated 21st February 2012 against the 1st defendant in a Kapsabet court Cr No 777 of 2009. The plaintiff has also annexed a copy of a title deed which is prima facie evidence that she is the owner of the suit land. The plaintiff further annexed a Registry Index map together with photos of a residential house and mature sugar cane. The plaintiff's also in occupation and possession of the suit land.

This is a case where fraud is pleaded in respect of the issuance of title to the 1st defendant. Section 24, 25, and 26 of Registration of Land Act 2012 is very clear on indefeasibility of title. It is also very clear that when a title is alleged to have been issued by way of fraud of misrepresentation then the same can be cancelled. The 1st defendant did not attach any documentation in reply to the application to explain the allegation of fraud. He relied on the issue of indefeasibility of title and Article 40 of the Constitution which somehow supports the plaintiff's case by affirming that the rights under this Article do not extend to any property that has been found to have been unlawfully acquired. And even where property is acquired contemplated art. 40 (6) must be through a legally established process.

I have considered the pleadings, supporting documentation together with the submissions of both counsels and the relevant authorities, I find that the plaintiff has established a prima facie case with a probability of success. The plaintiff being in occupation will also suffer irreparable injury if the orders are not granted. It would be in the interest of justice to grant the orders so that the issue of fraud and misrepresentation is clarified during the full hearing of the suit.

The rest of the defendants were not opposed to the grant of temporary injunction as earlier stated.

The upshot is that the application dated 31st January 2017 is hereby allowed with costs to the plaintiff.

Parties to comply with order 11 within 30 days.

Dated and delivered at Eldoret on this 5th day of October, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Miss Wamalwa for the Plaintiff

Mr. Choge for the 1st defendant.

Mr. Koech – Court Assistant