



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 343 OF 2017
(formerly Machakos HCCC No. 59 of 2013)

JULIUS WANJOHI MWANGI.....1ST PLAINTIFF

FAITH N. MWANGI.....2ND PLAINTIFF

VERSUS

MARGARET NDUTA.....1ST DEFENDANT

MALACK ANDIKA.....2ND DEFENDANT

RULING

The application before Court is the Plaintiffs' Notice of Motion dated 7th August, 2013 brought pursuant to Section 3 A of the Civil Procedure Act and Order 51 rule 1, 3 and 4 of the Civil Procedure Rules.

It is premised on the grounds that the Plaintiffs are owners of all that parcel of land known as KAJIADO/KITENGELA/30314 ('hereinafter referred to as the suit land') and they have sued the Respondents to restrain them from interfering with their quiet possession as they stand to suffer irreparable injury which cannot be compensated by way of damages.

Application is supported by the affidavit of JULIUS WANJOHI MWANGI the 1st Plaintiff herein where he deposes that together with the 2nd Plaintiff they are joint registered proprietors of the suit land. He claims the Respondents have on various occasions threatened to take possession of the suit land claiming ownership over the same and on or around March 2012 they trespassed on it where they partly uprooted the fence placed by the Plaintiff and put their own fence in an attempt to take the suit property. He states that he has made substantial financial investment in acquiring, fencing and developing the suit land for construction of a permanent residence which financing he obtained through a loan facility that he is still repaying. He reiterates that the main suit has a high probability of success and he cannot be compensated by way of damages. He confirms that he has recorded a statement with the Police regarding the activities of the Defendants' and they are currently in occupation and possession of suit land.

The 1st Defendant opposed the application and filed a replying affidavit sworn by MARGARET NDUTA where she deposes that the suit land is registered in favour of her late husband STEPHEN FLAVIEN MWANGI. She states that the suit land has always been in their possession as a family and they fenced off the said land and built structures thereon and it is the Plaintiffs' trying to encroach on it. She claims the Plaintiffs have not developed the suit land in any manner and any loss or damage occasioned to them

is their own making as they are the ones attempting to use the court process to legalize a fraudulent transfer to pilfer her of the family land. She insists the only remedy available to the Plaintiffs' is damages against the vendor who sold them the suit land. She reiterates that the Police are fully aware of the fraud involved in illegally acquiring her family's land and it is the Plaintiffs who are guilty of non disclosure of material facts and seek to evict her from her family land.

Both parties filed their written submissions which I have considered.

Analysis and Determination

Upon consideration of the materials presented and arguments canvassed by the Plaintiffs'/Applicants' in respect to the Notice of Motion dated 7th August, 2013 the Court has analyzed that the following is the issue for determination:

- Whether the Plaintiffs' are entitled to the injunctive orders sought pending the determination of the suit.

It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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."

In line with this principle, I wish to interrogate whether the Plaintiffs'/Applicants' have made out a prima facie case with a probability of success at the trial.

I note that the Plaintiffs' are registered owners of land parcel number KAJIADO/KITENGELA/30314 while the Defendants claims ownership of land parcel number KAJIADO/ KITENGELA/123 which are distinct and separate titles. The Plaintiffs claim the Defendants have trespassed on their parcel of land, uprooted the fence and intend to put their own fence. The 1st Defendant on the other hand alleges fraud on the part of the Plaintiffs' and avers that they are seeking to take over her family land and evict her and the Police are fully aware of the fraud, and it is the Plaintiffs who are guilty of non disclosure of material facts.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** where the court held that: *' a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case in 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 other.'*

Further, in the case of **UCB Vs Mukoome Agencies (1982) HCB22** the Court held as follows: *'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 I find that it would be pertinent if both the Plaintiffs and the 1st Defendant are granted an opportunity to be heard to enable the court make a determination on the ownership of the suit land. In relying on the evidence presented, legal provisions and the case law above, I find that the Plaintiffs have indeed established a prima facie case with a probability of success.

On the second principle as to whether the Plaintiff/Applicant stands to suffer irreparable loss which cannot be compensated by way of damages. Both the Plaintiff and 1st Defendant claim ownership over the suit land. The suit land has two distinct titles. The Plaintiffs state that they have heavily invested on

the suit land by fencing it and preparing to build a family home. They have further obtained a loan from a financier to put up the said home. The 1st Defendant insists the only remedy available to the Plaintiffs' is damages against the vendor who sold them the suit land. It is against the foregoing that I find that if the injunctive orders are not granted, the Plaintiff will suffer irreparable loss and damage, which cannot be compensated by way of damages.

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

Since both the Plaintiffs and the 1st Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and the 1st Defendant is currently in possession of the suit land, the Court finds that these are issues best determined at a full trial, I will decline to grant the orders as sought but will proceed to make the following order:

An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcels number KAJIADO/KITENGELA/30314 and KAJIADO/KITENGELA/123 of any dealings, lease or charge pending the hearing and determination of the suit.

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 22nd day of November, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

No appearance for plaintiff and defendant

Court Assistant Mpoye