



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE No. 627 OF 2017**

**(Formerly Nairobi ELC No. 885 of 2016)**

**REUBEN NJARO BALOSI.....PLAINTIFF**

**VERSUS**

**SERA MWERU KANGARI.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR KAJIADO COUNTY.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

The application before Court is a Notice of Motion dated the 22<sup>nd</sup> July, 2016 and filed on 28<sup>th</sup> July, 2016 brought pursuant to Section 3A of the Civil Procedure Act, Order 40 Rules 1, 2 and 4, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

The application is premised on the grounds, which in summary are that the Plaintiff is the registered proprietor of all that property known as KIMANA/TIKONDO/181 hereinafter referred to as the suit land. That upon an impromptu search conducted at the Lands registry he discovered that the suit property had been transferred to unknown parties. The Plaintiff is vulnerable and exposed to suffer irreparable loss not compensable by any award of damages.

The application is supported by the affidavit of REUBEN NJARO BALOSI the Plaintiff herein where he deposes that in 1972 land adjudication was conducted in KIMANA TIKONDO Group Ranch and his late father SAMUEL BALOSI KULALE gave out his name for allocation of a parcel of land. He avers that he was allocated the suit land and is a registered member number 181 in the Group Ranch list. He claims he conducted an impromptu search at the Land Registry and discovered new entries numbers 4, 6, 7 and 8 had been entered by the Land Registrar Kajiado County effecting transfer to unknown parties which transfers are illegal and fraudulent as he never sold the suit land nor caused a transfer to anyone. He states that he never processed his title deed until recently when he instructed his advocates to do so and on learning of the events pertaining to his parcel of land, he reported the fraud to the CID office Loitoktok Police Station where he was issued with an OB Number 20/05/07/2016 which matter is pending investigation. He avers that the instant application will not prejudice the Defendants as he is only seeking to have status quo maintained until the suit is heard and determined.

The application is opposed by the 1st Defendant who filed Grounds of Opposition dated 12<sup>th</sup> August, 2016 where she stated that the motion herein is totally misconceived, frivolous, scandalous, vexatious and an abuse of the Court's process. Further that the basis of the motion is incurably defective having been

filed 35 years after the cause of action allegedly arose contrary to the provisions of Section 7 of the Limitation of Actions Act and without leave of court. That the suit by the Plaintiff does not disclose any cause of action against her as a bona fide purchaser of value without notice of defect in title. She states that her title to the suit land is indefeasible having been issued with a Certificate of title dated 30<sup>th</sup> January, 1981 and the Applicant is guilty of laches and there is no reason for the inordinate delay in bringing up the application. Further that the Applicant has no right, claim and /or interest over the suit land as no evidence has been placed before court showing she acquired the title fraudulently.

The Plaintiff and 1<sup>st</sup> Defendant filed written submissions that were highlighted on 28<sup>th</sup> September, 2017, which I have considered.

### **Analysis and Determination**

Upon perusing the application, the supporting affidavit, Grounds of Opposition and the written submissions filed herein, the Court finds that the only issue for determination is:

#### **Whether the Plaintiff is entitled to the interlocutory injunction sought.**

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 Plaintiff/Applicant have made out a prima facie case with a probability of success at the trial.

I note that the Plaintiff/Applicant alleges he was allocated the suit land in 1972 during the Land Adjudication process but he had never processed the title deed to that effect. From the Green Card marked as annexure 'RNB 2', I note the Plaintiff was indeed registered as the first owner of the suit land on 17<sup>th</sup> January, 1972 but this was changed on 23<sup>rd</sup> July, 1973 when one MUMIRA KAMAU got registered and later on 30<sup>th</sup> January, 1981 JOSEPH KANGARI MUHU and SERA MWERA KANGARI were duly registered as owners of the suit land. The 1<sup>st</sup> Defendant claims to have obtained her title deed in 1981 and has resided on the suit land from 1981 to date. She claims she was a purchaser for value having bought the land from MUMIRA KAMAU. The Plaintiff contends that he discovered the fraud in 2016 when he asked his advocate to process the title in his name and realized it has been registered in the names of the unknown parties. The 1<sup>st</sup> Defendant insists the Plaintiff's claim is statute barred by the provisions of Section 7 of the Limitation of Actions Act.

Section 26 of Limitation of Actions Act provides that: **'Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it: Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which— (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the**

**mistake had been made.'**

In relying on these provisions, I find that the Plaintiff's claim is not statute barred as he discovered the fraud that third parties had been registered on the suit land in 2016.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** where the court held that: '*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.*'

The records in the Green Card support the Plaintiff's claim but the 1<sup>st</sup> Defendant currently holds a title to the suit land and claims she purchased it for value without notice. The Plaintiff admits he had not applied for the title deed and when he went to do so, he found the land already transferred to third parties.

Section 26 of the Land Registration Act provides as follows: '**(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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 Plaintiff denies selling the suit land or transferring it to any third party and insists the title to the unknown parties was obtained through fraud. The Plaintiff alleges fraud and claims he reported this issue to the CID Loitoktok which matter is still pending investigations. In relation to the allegations of fraud, I am persuaded by the case of **UCB Vs Mukoome Agencies (1982) HCB22** '*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 Plaintiff and the 1<sup>st</sup> 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 Plaintiff has 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 1<sup>st</sup> Defendant claim ownership over the suit land. The Plaintiff alleges that the 1<sup>st</sup> Defendant is currently undertaking activities on the suit land which have a negative impact on it. The 1<sup>st</sup> Defendant who holds title to the suit land has not indicated whether she is able to compensate the Plaintiff in damages for any losses incurred. The Plaintiff's allegations are further not controverted by the 1<sup>st</sup> Defendant. 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 property is not preserved, it may be wasted away.

Since both the Plaintiff and the 1<sup>st</sup> Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and the 1<sup>st</sup> Defendant who was an innocent purchaser and 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 is hereby registered by the Land Registrar Kajiado as against land parcel number KIMANA/TIKONDO/181 measuring approximately 16.0 hectares, 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 21<sup>st</sup> day of November, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**

**REPRESENTATION**

Court Assistant Mpoye

No appearance for defendant

Ndeda for plaintiff