



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 755 OF 2017

(Formerly Nairobi ELC 1255 of 2015)

SEPEKAAN KOIWASEI KESAIKA

NAITUTAI KOIWASA (Suing as the personal representatives

of the estate of KOINASEI OLE KITAICA (Deceased).....PLAINTIFFS

VERSUS

KASEENCHE OLE LEPOI.....DEFENDANT

RULING

The application before court is the Plaintiffs Notice of Motion dated 8th December 2015 and filed on 9th December, 2015 brought pursuant to Section 1A, 1B, 63(c) and (e) of the Civil Procedure Act, Order 50 Rule 1, Order 40 rules 1 and 4 of the Civil Procedure Rules, Section 68 of the Land Registration Act, 2012, Section 13(2) (d) and (7) of the Environment and Land Court Act and all the other enabling provisions of the Law.

The Application is based on the following grounds which in summary is that pursuant to an Agreement between the Defendant and the Deceased herein, the Defendant agreed to excise 10 acres from his land parcel number 35 in Sajiloni Group Ranch and transfer it to the Deceased. The Deceased performed his obligations under the Agreement. In 2000 the Group Ranch issued the Defendant with his title number KAJIADO/DALALEKUTUK/2952 measuring approximately 14.72 hectares hereinafter referred to as the 'suit land'. The Defendant has failed, refused and neglected to complete the sale agreement and convey the suit parcel to the Deceased's family(Plaintiffs). The Defendant has further subdivided the suit land to two parcels namely KAJIADO/DALALEKUTUK/3891 and KAJIADO/DALALEKUTUK/3892 measuring 10.14 and 4.58 hectares respectively. The Plaintiffs seek for specific performance of the Sale Agreement and are apprehensive Defendant may dispose of the suit land or has disposed of it to other parties at an enhanced price.

The application is supported by the affidavit of SEPEKAAN KOIWASEI KESAIKA and NAITUTAI KOIWASA who are the Plaintiffs herein where they depose that the Deceased entered into a Sale Agreement on 12th September, 1995 with the Defendant, and as per the said Agreement, the Deceased paid to the Defendant a down payment of Kshs. 48,000 upon execution and later paid the balance of the purchase price of Kshs. 17,000 on or before March, 1996. They aver that it was a term of the Agreement that the Title Deed in respect of the 10 acre portion was to be issued in the Deceased's name and not the Defendant's and that the Defendant had authorized the Sajiloni Group Ranch Representatives and District Land Registrar Kajiado to execute all the necessary forms to enable the title deed be issued to the Deceased. They claim the Defendant has never rescinded the Sale Agreement and failed to complete the

transaction or take any steps to convey the parcel of land to the Deceased's estate. They contend that the Defendant undertook the sub division of the suit land to frustrate the contract with the Deceased and may resell, transfer, dispose or any other way deal with the resultant subdivisions to third parties. They reiterate that they are seeking injunctive orders to preserve the subject matter pending the determination of the suit.

The Defendant opposed the application and filed a replying affidavit sworn by KASEENCHE OLE LEIPOI where he deposed that there is no evidence that he intended to subdivide or deal with land parcel number KAJIADO/DALALEKUTUK/3891 and 3892 respectively. He avers that the deceased KOINASEI KITAICA proposed to buy land from him but the deal did not go through as at the time of making the agreement the land had not been transferred to him officially. He claims that the Agreement alluded to was done in 1995 and therefore is null and void since the suit has been brought after time has lapsed and the Plaintiff's application is defective and should be struck out.

Both parties filed their respective written submissions which were highlighted on 20th September, 2017. I have considered the submissions.

Analysis and Determination

Upon perusal of the Notice of Motion dated 8th December 2015 and filed on 9th December, 2015 including the supporting and replying affidavits as well as the annexures therein, I find that the only issue for determination at this juncture is whether the Plaintiffs are entitled to the injunctive orders sought pending the determination of this suit.

It is not in dispute that there was an agreement for Sale of Land between the Deceased and the Defendant in 1995 as evident annexure 'SKK 1' in the supporting affidavit. It is also not in dispute that the Defendant has failed to owner the terms of the said Agreement. The Defendant however claims that at the time of making the agreement the land had not been transferred to him officially and there is no evidence he intended to subdivide or deal with land parcel number KAJIADO/DALALEKUTUK/3891 and 3892 respectively. The Plaintiffs on the other hand seek specific performance as per the said Sale Agreement.

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, the Court will proceed to interrogate whether the Plaintiffs have established a prima facie case with a probability of success at the trial.

In the first instance as to whether the Plaintiffs have demonstrated a prima facie case with probability of success, I note that there a was indeed Sale Agreement dated 12th September, 1995 duly executed between the Deceased and the Defendant, where the Defendant confirmed receiving Kshs. 48,000 as part of the consideration with the balance to be paid on or March, 1996. The Plaintiffs have averred that the balance of Kshs. 17,000 was paid on or before March, 1996 which has not been controverted by the Defendant. It is hence the court's finding that there was indeed a binding contract in accordance with Section 3 of the Law of Contract Act and that the purchase price was paid in full. Clauses (a) and (b) at the Special Conditions section within the Sale Agreement stated as follows:

' a) the title deed in respect of the 10 acres of land shall be issued in the name of the purchaser and not the vendor.

b) The vendor hereby authorises the Group Ranch Representatives of Sajiloni Group Ranch and

District Land Registrar Kajiado to execute all necessary forms to enable the title deed in respect of the 10 acres be issued as stated in (a) above.'

I note the Sale Agreement was even witnessed by the Officials from the Sajiloni Group Ranch. The Plaintiffs contend the Defendant received his title from the Sajiloni Group Ranch in 2010 and proceeded to subdivide the suit land into two parcels namely KAJIADO/DALALEKUTUK/3891 and KAJIADO/DALALEKUTUK/3892 measuring 10.14 and 4.58 hectares respectively. The Defendant insists the suit herein is time barred by virtue of the Law of Limitation as the Sale Agreement was executed in 1995 while the Plaintiffs contends that their claim is not statute barred. The question of specific performance herein is a triable issues which should be heard and determined. In the circumstances, I find that the Plaintiffs' have established a prima facie case.

On the issue as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages. The Plaintiffs have an interest in the suit land as the Deceased purchased it but never obtained title. The Defendant does not deny that there was an agreement and admits failure to adhere to its terms. The resultant subdivisions to the suit land are registered in the names of the Defendant and the Plaintiffs are apprehensive he can dispose of it to third parties. The Defendant has not stated whether he is in a position to pay damages if the Plaintiffs are successful in this suit. In the circumstances I find that it is the Plaintiffs who will suffer injury which cannot be compensated by way of damages if the injunctive orders sought are not granted.

From the evidence presented by the parties, I find that the balance of convenience tilts in favour of the Plaintiffs as I am not in doubt that if the title to the property is not preserved, it may be wasted away.

In the circumstances, I find that the Plaintiffs' Notice of Motion dated 8th December 2015 and filed on 9th December, 2015 is merited but will decline to grant the orders as sought and proceed to make the following order:

An inhibition order be and is hereby registered by the Land Registrar Kajiado as against land parcel number KAJIADO /DALALEKUTUK /3891 and KAJIADO /DALALEKUTUK /3892 which are resultant subdivisions of KAJIADO/ DALALEKUTUK /2952 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 13th day of November, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Faith for Tobiko Njoroge for plaintiff/applicant

No appearance Itaya for respondent

Court Assistant Mpoye