



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT KAJIADO

ELC CASE NO. 1 OF 2017

DEBORAH ANN KLING ROONEY.....1st PLAINTIFF

BOARD OF MANAGEMENT OF

TEMBEA ACADEMY.....2nd PLAINTIFF

VERSUS

RUKIA NJERI KADIDI.....DEFENDANT

RULING

The application before court is a Notice of Motion dated 17th January, 2017 brought pursuant to Order 40 rule 1 & 2 and Order 51 of the Civil Procedure Rules, Section 1B and 3A of the Civil Procedure Act and all the other enabling provisions of the Law.

The application is based on the grounds which in summary are that the 1st Plaintiff bought land parcel numbers KAJIADO/KAPUTIEI - NORTH/21082 and KAJIADO/KAPUTIEI- NORTH/40782 hereinafter referred to as the suit lands, through the Defendant. The purchase of the suit land through the Defendant was on the understanding and trust that the Defendant would transfer the said properties to the 2nd Plaintiff once it was fully registered and gained legal status. The 2nd Plaintiff is a school that was found by the 1st Plaintiff through the BEADS for Education Inc. 2013, being an organization committed to a just cause of educating the Kenyan girl child that began its operation in Kenya in 1993. Further that on 25th June, 2014 the 2nd Plaintiff was fully formed and registered in Kenya vide Registration No. PR/S/1/2696/14. The Defendant has refused, ignored and neglected to release the titles for the properties for transfer in the name of the 2nd Plaintiff. The Plaintiffs are apprehensive that the Defendant will proceed to offer the said property to other third parties without either honouring her part of the agreement and to complete transfer of the suit land to the 2nd Plaintiff.

The application is supported by the affidavit of DEBORAH ANN KLING ROONEY the 1st Plaintiff herein where she deposes that she is the co - founder of BEADS for Education Inc. She avers that she met the Defendant in 1993 through her mother who at that time worked as a housekeeper for a close friend and when the Defendant turned 18years, she offered to sponsor her after she has finished her secondary education and they commenced working together developing the BEADS for Education sponsorship program in Kenya. Further the defendant worked for Beads for Education Inc. from 1998 until 2016. She states that through BEADs for Education sponsorship program, she sent the Defendant to Tangaza University in 2002 where she obtained a diploma and in 2011 they decided to open the 2nd Plaintiff. She claims that she wanted to purchase land for building the 2nd Plaintiff but the Defendant advised her that

since she was not a Kenyan Citizen she could not own land designated as agricultural. She confirms that in 2012 she purchased the suit lands for value through the Defendant on the understanding and trust that the said land would revert to the 2nd Plaintiff once it was duly registered. Further that the 2nd Plaintiff now sits on the suit land which is registered in the Defendant's name and ID Number 22529557. She affirms that the Defendant is holding the title in trust for the 2nd Plaintiff as the suit lands were purchased before it was duly registered and the Defendant was at that time the manager running the affairs of the 2nd Plaintiff as she was one of the pioneer girls who benefited through the BEADS Education sponsorship program.

She states that on 25th June, 2016 the 2nd Plaintiff was fully registered as a secondary school in Isinya, Kajiado County, and in 2012 when they bought the suit land and began planning for building the high school, the Defendant's work became suspicious as she would not provide proper documentation among other issues. Further, on a few occasions when she inquired about the title deed to the suit lands, the Defendant informed her that the same was stolen but never issued her with a police report. She further deposes that the Defendant has retained the 2nd Plaintiff original registration certificate which she does not want to produce and misappropriated food supplies and school items. She is unable to get the Defendant since her emails and calls go unanswered. She reiterates that she has suffered loss and damage by Defendant's acts of misappropriation and the 2nd Plaintiff is being denied the use of the suit lands as its rightful owner. Further that the Defendant has no right to continue enjoying rights in the suit lands as she did not acquire it for her individual benefits the same was purchased through her Defendant in the hope and understanding that it was for the benefit of the BEADS for Education Inc and the said title would revert back to schools sponsored under the program. She reaffirms that she desires for suit lands to be held in the name of the 2nd Defendant.

The Defendant was served through substituted service but never entered appearance nor filed a reply to the Plaintiff's Motion. The Plaintiff filed written submissions dated the 25th July, 2017 which I have considered.

Analysis and Determination

Upon perusal of the application together with the supporting affidavit and submission, at this juncture the only issue for determination is whether the interim injunction sought by the Plaintiff ought to be granted pending the hearing and determination of the main suit.

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' has made out 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, it is the 1st Plaintiff's contention that she bought the suit lands through the Defendant who had advised her that as a non Kenya, she could not purchase agricultural land in her name. Further at that time the 2nd Plaintiff had not been duly registered in Kenya. She contends that the Defendant was holding the suit lands in trust for the 2nd Plaintiff and also for the BEADS Education Program. She claims the Defendant has declined and or neglected to transfer the suit lands to the 2nd Plaintiff and has since disappeared. The 1st Plaintiff avers that the 2nd Plaintiff is now duly registered in Kenya and they are running a secondary school at Isinya, Kajiado County which sits on the suit lands. The Plaintiffs' claim were not controverted by the Defendant who failed to enter appearance nor file a replying affidavit.

Section 26 (1) of the **Land Registration Act** provides that: *'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.'

Based on facts above and in relying on the provisions of Section 26 of the Land Registration Act, I find that the Plaintiffs have established a prima facie case with a probability of suit which cannot be compensated by way of damages.

On the issue as to whether the Plaintiffs will suffer irreparable harm, An excerpt below from the **Halsbury's Laws of England** is instructive: *'.....first that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot be possibly be repaired and the fact that the Plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.'*

I note the 1st Plaintiff paid for the suit lands to be used by 2nd Plaintiff which is a school. The Defendant is currently registered proprietor of the suit lands. I note the 1st Plaintiff on inquiring on the whereabouts of the title deeds from the Defendant, stated that it was stolen but no police report was produced. The Defendant has both titles including the 2nd Plaintiff's registration in her custody which she has failed to surrender to the 1st Plaintiff. I note the 1st Plaintiff is apprehensive that the Defendant may sell the suit lands, to a third party, yet that is where the 2nd Plaintiff is situated. I further note that the defendant was an employee of the 2nd plaintiff until 2016 and it is not demonstrated whether she can pay damages should the suit be settled against her. It is my finding that the Plaintiffs will indeed suffer irreparable harm which cannot be compensated by way of damages, if the orders sought are not granted.

On applying the balance of convenience test, I find that the Plaintiffs will suffer more inconvenience if the injunction sought is not granted as opposed to the Defendant.

The upshot of the matter is that the Plaintiffs application dated the 17th January, 2017 is merited and allow it as prayed.

I further make the following order:

An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcels number LR No. KAJIADO/KAPUTIEI NORTH/40782 and KAJIADO/KAPUTIEI NORTH/21082 of any dealings, lease or charge pending the hearing and determination of the suit.

Dated signed and delivered in open court at Kajiado this 6th day of November, 2017.

CHRISTINE OCHIENG

JUDGE