



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT ELDORET

E & L CASE NO. 238 OF 2017

WILLIAM KIPKURGAT MELLY.....1ST PLAINTIFF/APPLICANT

WESLEY KIPCHIRCHIR KERING....2ND PLAINTIFF/ APPLICANT

STANLEY KIMELI KOSGEI.....3RD PLAINTIFF/ APPLICANT

NATHAN KIPKOSGEI KOECH.....4TH PLAINTIFF/APPLICANT

VERSUS

SUSAN CHELAGAT BIWOT.....1ST DEFENDANT/RESPONDENT

ALBERT KIPRUTO BUSIENEI.....2ND DEFENDANT/ RESPONDENT

GEORGE KIPNGETICH BIWOTT.....3RD DEFENDANT/ RESPONDENT

PHILIP KIPCHIRCHIR BIWOIT.....4TH DEFENDANT/ RESPONDENT

JOHN KIPTOO BIWOTT.....5TH DEFENDANT/ RESPONDENT

CATHERINE CHEROTICH.....6TH DEFENDANT/ RESPONDENT

RULING

This is the ruling in respect of an application dated 27th June 2017 by the plaintiff/applicant brought by way of a Notice of Motion seeking for the following order:

1. Spent.

2. That pending the hearing and determination of this application inter partes, the respondents by themselves, their agents and/or servants be restrained by an order of a temporary injunction from invading, encroaching, trespassing, subdividing, alienating or dealing in any manner with the plaintiffs' properties known as NANDI/KAPTILDIL/189, the suit land herein.

3. That pending the hearing and determination of this suit, the respondents by themselves, their agents and/or servants be restrained by an order of temporary injunction from invading, encroaching, trespassing, subdividing, alienating or dealing in any manner with the plaintiffs'

properties and interfering with their enjoyment of their rights over those parcels known as NANDI/KAPTILDIL/189, the suit land herein.

4. That this honorable court do issue an inhibition stopping and/or restraining further transactions and subdivision over NANDI/KAPTILDIL/189 pending the hearing of this application inter-parties and the main suit.

5. That costs of this application be borne by the respondents.

This matter was brought under certificate of urgency on 27th June 2017 when the court certified the same as urgent and granted payer No. 4 of the application. The court also ordered that the applicant serve the application for inter- parte hearing within 7 days.

Counsel for the parties agreed to canvass the application by way of written submissions which were filed by 30th October 2017 and a ruling date given by the court.

PLAINTIFF'S COUNSEL'S WRITTEN SUBMISSIONS

The plaintiff/applicants relied on the supporting affidavit of STANLEY KIMELI KOSGEI sworn on 27th June, 2017 and all the annexures thereto. Counsel submitted that it is not in dispute that the plaintiff/applicants are in actual and physical possession of the suit property and have made substantial developments thereto while deriving their livelihoods from the same. He stated that the defendant /respondents' father was initially the registered owner prior to their registration as owners through transmission as demonstrated by respondents' annexure "SCB4". Counsel also submitted that the plaintiff/applicants have annexed a valuation report to demonstrate the extensive developments on the suit land including permanent buildings and agricultural activities that they have undertaken; the said report contains a certificate of official search wherein the respondents are now the registered owners of the suit land. He stated that the applicants shall suffer irreparable and substantial loss unless this application is allowed.

It was Counsel's submission that the applicants herein purchased the suit land from the respondents who are the registered owners of the suit land as demonstrated in the supporting affidavit of STANLEY KIMELI KOSGEI and the valuation report. He further stated that the defendant/ respondents have failed to produce any evidence in support of their allegations that the said agreements are forgeries. Counsel cited the case of **KIPLAGAT KOTUT -VS- ROSE JEBOR KIPNGOK, Eldoret ELC NO. 691 of 2012** where the court was confronted with a similar scenario and held as follows at page 50 & 51 :-

"What is serious and needs to be determined is whether or not the application is a forgery as claimed by the defendant, and whether or not the consent as issued, is also a forgery. It is the defendant who raised the issue of forgery and it follows that the burden of proof is upon her to prove that the documents are forgeries. The plaintiff claimed that she did not sign the application for consent and that what is contained in the application is not her signature. She did not however produce any evidence to support this. She could easily have sought the services of a document examiner to prove that the signature therein is a forgery. There was also no proof that she did not attend the Land Control Board and that the consent produced by the plaintiff is a forgery. She claimed in her evidence that she on the date that the application is said to have been signed, she was undergoing surgery in Nairobi. It would not have been difficult for the defendant to obtain hospital records if she had wanted this allegation to be given serious consideration. Neither did she produce the minutes of the Land Control Board to demonstrate that no meeting was ever held and that the consent is therefore a fraudulent one. In a nutshell, the defendant has failed to prove her allegations that the application and the consent of the Land Control Board are forged documents".

Counsel submitted that the respondents have threatened to trespass and evict the applicants from the suit land and such adverse dealings by the respondents during the pendency of this proceedings shall result into the eviction of the applicants, change the nature of the suit land and render the substratum of the suit

nugatory hence depriving the applicant's the right to be heard. He stated that it is in the interest of justice that the subject of the suit is preserved. He finally submitted that the applicants have established a prima facie case to warrant grant of orders sought.

DEFENDANT/RESPONDENTS' COUNSEL'S WRITTEN SUBMISSIONS.

The plaintiff/applicants' application was opposed and Counsel submitted that Defendant/Respondents have never jointly disposed of the suit land to the Applicants herein and the 1st Defendant/Respondent being the administrator of the estate of the deceased Cheboo Keiyo has the right to distribute the said property as per the orders and Certificate of confirmation of grant in Eldoret High Court Succession Cause no. 219 of 2011. Counsel further submitted that it is not in contention that the Court did distribute the said property amongst the beneficiaries a process of which the 1st Defendant/Respondent was conducting diligently.

Counsel referred the court to the principles for granting an injunction as laid down in the decision of Giella versus Cassman Brown Co Ltd. Further that injunctions are equitable remedies and that a man who seeks the aid of the Court must be able to show a good prima-facie legal title to the right which he asserts". See Kerr on injunctions, sixth edition PEP 410.

It was counsel's further submission that the Applicants never enjoined themselves as Objectors in the Succession Cause that gave rise to the instant title hence their application being devoid of merit. He stated that the Applicants have not demonstrated how they would be prejudiced by the mode of distribution adopted by the succession Court. It is further not disputed that the Applicants cannot be classified as liabilities to the estate of the deceased having purchased land after the death of the deceased from a few beneficiaries to the said estate.

Counsel submitted that the Applicants having purchased land from a few beneficiaries after the death of the deceased were infact intermeddling with the estate of the deceased hence deserve no right of an injunction. He stated that the instant suit and application are premature as the applicants who are claiming purchasers' interest should await the final administration of the deceased estate and thereafter pursue their claims specifically against the person who sold them land but not merely seeking to restrain the entire title.

It was Counsel's submission that there is no evidence tendered before the Honourable Court to demonstrate that the Respondents have in any way sought to evict the applicants rendering the entire suit and application speculative and allowing this application will delay the administration of the deceased's estate. He stated that the applicants should thus be estopped from restraining all the beneficiaries from obtaining their titles as they can bring their suits independently after the process of subdivision having purchased land forming part of the estate of the deceased. Counsel also submitted that the Applicants lack capacity to prefer such suits at this instant hence their application should be dismissed with costs to the respondents.

Analysis and determination.

This is an application for a temporary injunction to restrain the defendant/respondents from interfering in any way with the suit land. The principles for grant of an injunction are well settled in the Giella Casman Brown case. I need not reinvent anything. Apart from the principles the court is under a duty to look at the case in its entirety and its own merit. I am also alive of the fact that article 159 obliges the court to do substantive justice.

It is not in dispute that the plaintiff/applicants are purchasers of part of the suit land. This is in deed admitted in the submissions of the defendant/respondent's counsel. The only dispute as per the submissions is that the applicants should pursue individual beneficiaries who sold the land to them.

Counsel for the defendant/respondents submitted that the respondents have not in any way threatened to evict the applicants. If this is the position then the grant of this injunction will not prejudice the

respondents in any way. The court has powers to preserve the substratum of the suit as if the same is not done there might be nothing to litigate as the grounds may have shifted.

The task at hand is to establish whether the applicants have a prima facie case with a probability of success against the defendant/respondents. The plaintiff/applicants case is that they are bona fide purchasers for value which is not disputed by the defendants. They have annexed sale agreements for their various portions and a valuation report to show the developments that they have undertaken. The plaintiffs have shown that they have proprietary interest in the suit land. I find that they have established a prima facie case to warrant this court to grant them a temporary injunction.

The defendants' counsel's submission is to the effect that the applicants should pursue the individual beneficiaries who sold the land to them. In principle he is admitting that the applicants have a claim against the defendants but he wants them to be allowed to administer the estate of the deceased via a succession cause which is pending. He correctly stated that the applicant could not be listed in the section of liabilities in the succession cause. Where else would they ventilate their grievances. The court has jurisdiction to hear and determine their grievances. Counsel's submissions are contradictory in respect to the interest that the applicants have on the suit land. In one breathe he states that the applicants purchased the suit land after the owner of the land had died therefore terming them intermeddlers of the estate of the deceased. Was there any application to stop the intermeddling with the estate? Who would be the actual intermeddlers? Would it be some of the beneficiaries who are the respondents herein or strangers to the estate who might be anybody including the applicants. I am of the view that if it is true that there was any intermeddling then it would be the respondents.

I also find that the applicants would suffer irreparable damage which cannot be compensated by way of damages as they are in occupation and have carried out developments as per the attached valuation report.

I have considered the pleadings and the submissions of both counsel and find that the application has merit. The upshot is that the application dated 27th June 2017 is hereby allowed with costs to the applicants.

Parties to comply with order 11 within 30 days and fix the matter for hearing.

Dated and delivered at Eldoret on this 14th day of December, 2017.

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Keter holding brief for Mr. Kibii for Plaintiff/Applicant.

Mr. Koech – Court Assistant

Mr. Otsyola – absent for the Defendant/Respondent