



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 793 OF 2017

(Formerly NAIROBI ELC CASE NO. 524 OF 2014)

DANIEL MILAKEN NDILAI.....1ST PLAINTIFF

JEREMIAH NTIMASAS OLE OLOKUNYINYI.....2ND PLAINTIFF

VERSUS

SHENIA ENE NKIRRRUMU.....1ST DEFENDANT

NAISENKE ENE NTILAI.....2ND DEFENDANT

RULING

The application before Court is the Plaintiff's Notice of Motion dated 2nd May, 2014 brought pursuant to Section 3A of the Civil Procedure Act and Order 40 Rules 1 & 2 and Order 50 Rule 1 of the Civil Procedure Act and all the other enabling provisions of the Law.

The application is premised on the following grounds, which in summary is that the suit land belonged to the late NKIRRRUMU NDILAI alias OLE KUNYINYI who was the Plaintiffs' father. The Defendants have unlawfully created titles therefrom in their own names. The 2nd Plaintiff who resides on the suit land has been informed that the Defendants want to sell a portion thereof and share proceeds to the exclusion of the Plaintiffs. The Defendants have never applied for grant of probate in respect to the estate of NDILAI OLE NKIRRRUMU alias OLE KUNYINYI who had three legal wives. The suit land needs to be sub divided into three portions according to the deceased's wives. If the order sought is not granted, the Defendants may disinherit the Plaintiffs by selling land to third parties.

The application is supported by the affidavit of the Plaintiffs DANIEL MILAKEN NDILAI and JEREMIAH NTIMASAS OLE OLOKUNYINYI where they depose that their father who had three wives SIMAMOI ENE NKIRRRUMU, SHENIA ENE NKIRRRUM and NAISENKE ENE NDILAI died intestate in 1989. They claim to be the sons of the 1st wife SIMAMOI ENE NKIRRRUMU NDILAI who died in 1976 and left seven children that includes four sons and three daughters. They aver that after the death of their mother, they were left under the care of their step mothers and their late father was owner of land reference number KAJIADO/LOODARIAK/319 which has been subdivided to KAJIADO/LOODARIAK/8388 and KAJIADO/LOODARIAK/8389 respectively.

They state that the Defendants have irregularly and unlawfully registered the suit land into their names while the 2nd Plaintiff has been residing thereon for a period of twenty years with the said Defendants. They have learnt that the Defendants' intend to sell a portion of the suit land and share the sale proceeds

to their exclusion and they have reported the matter to the County Commissioner as well as registered a caution at the Kajiado Land Registry. They state that they were shocked to discover that the Defendants had subdivided the subject land into two portions despite registering a caution and fear they might dispose of the said land to innocent third parties if they are not restrained by the court.

The Defendants opposed the application and filed a replying affidavit sworn by SHENIA ENE NKIRRUMU and NAISENKE ENE NTILAL where they depose that land reference number KAJIADO/LOODARIAK/319 (suit land) was originally part of LOODARIAK Group Ranch which consisted of 1064 members of which they were members and the same did not belong to their late husband NDILAI OLE NKIRRUMU alias OLE KUNYINYI as alleged by the Plaintiffs. They state that the Committee of LOODARIAK Group Ranch met and resolved that 700 members of whom both them and the Plaintiffs were part of, be allocated 9,609 hectares.

Further that the probe committee allocated both the Plaintiffs and themselves including other members their respective parcels of land. They confirm the 1st Plaintiff was allocated parcel number KAJIADO/LOODARIAK/259 while the 2nd Plaintiff was allocated KAJIADO/LOODARIAK/118, which the Plaintiffs applied for their respective title deeds to their parcels of land. They contend that in line with the Committee's recommendations, they were allocated the suit land which they later subdivided and applied for title deeds in their respective names. They reiterate that the Plaintiffs are not being candid as the suit land did not belong to the deceased but to LOODARIAK Group Ranch and annexure 'DJ -1' which are alleged ownership records from the Kajiado Land Registry are a sham. They insist they own their respective parcels of land and have a discretion to do as they please but deny planning to sell them. They affirm that it is the Plaintiffs' who have sold their respective parcels of land, now targeting theirs but the sanctity of title ought to be respected and the Applicants have not come to court with clean hands. They claim the Plaintiffs have not produced any evidence to prove their allegations of fraud in the allocations but are seeking to be mischievously allocated part of the Defendants' property through the back door.

The Plaintiffs filed a supplementary affidavit sworn by DANIEL MILAKEN NDILAI and JEREMIAH NTIMASAS OLE OLOKUNYINYI where they confirm the suit land belonged to LOODARIAK Group Ranch and that the original members of the said Group Ranch were 700 with their late father being one of the original members. They deny being uncandid and insist their father was the original owner of the suit land and his name was irregularly substituted by the Defendants' names who might not have given the Kajiado Land Adjudication Board and or Land Registrar clear information. They claim that the original members of the ranch settled on the land when the Plaintiffs were children in 1960s. Further that the adjudication process commenced in 1980s and at that time, they had become adults hence they constituted part of the ranch. They reiterate that the Defendants and themselves became members of the LOODARIAK Group Ranch because of their late father and confirm that they independently applied for personal shares in the ranch land, with some portion of land being awarded to them. They contend that the fact that they applied for their personal shares in the ranch does not disqualify them from benefitting from their father's land. They reaffirm that the Defendants' inherited their father's share and it is only fair they also get it. They deny having sold their personal lands and insist they want to inherit their mother's share of their father's land.

Both parties filed their respective written submissions that were highlighted on 17th October, 2017, which I have considered.

Analysis and Determination

The court has considered the materials presented and arguments canvassed by the respective parties in respect to the Notice of Motion dated 2nd May, 2014 and analyzed that the only issue for determination is:

- whether the Plaintiffs are entitled to temporary injunction pending the hearing and determination of the suit.

From the Plaintiffs' opening and closing arguments, it is not in dispute that Defendants were their stepmothers and they reside on the suit land. What is in dispute is that the Defendants subdivided the suit land and each got their respective title deeds to their portion which the Plaintiffs are also claiming a share stating that it was their late father's land. They are seeking for a temporary injunction claiming that the Defendants intend to sell their respective shares of the suit land and do not plan to share proceeds therefrom with them. The 2nd Plaintiff further claims he resides on the suit land. The Defendants deny that the suit land belonged to their late husband but insist the same was allocated to them by the Group Ranch, which also allocated the Plaintiffs with their respective parcels that they have since sold. The Plaintiffs on the other hand insist they are entitled to their mother's share of the suit land even if they received their own land from the Group Ranch.

The principles for granting of temporary injunctions were 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."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the Plaintiffs/Applicants' have made out a prima facie case with a probability of success at the trial.

The question we need to ask is whether the defendants have title to the suit land. From the annexures within the Defendants' replying affidavit the answer is in the affirmative. The Land Registration Act at Section 26 (1) states as follows: **'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 Plaintiffs claim the Defendants unprocedurally obtained title to the suit land and thereafter subdivided it. However I note from annexure 'SN-NT -1' which are minutes of the Probe Committee of Loodariak Group Ranch, the 1st Plaintiff who is indicated as member no. 120 was allocated land parcel number 118 measuring 64 hectares of land; 2nd Plaintiff indicated as member number 101 allocated land parcel number 259 measuring 42 hectares while the Defendants' were together indicated as members number 148 and allocated land parcel number 319 measuring 32 hectares. Within the said annexures there is no indication that the Defendants were allocated the suit land fraudulently. I note from annexure 'DJ 1' at item number 255, the Land Adjudication Officer made a decision to change ownership of suit land from former owner NKIRUMU OLE NDILAI KOIKE (deceased) to his two wives on 17th July, 1989. There is no indication that this decision was appealed from. I note the Defendants' all acquired their title deeds and from the Certificate of Official Search marked as annexures 'SN-NT -36' and 'SN-NT -38' there is also no evidence that the suit land initially belonged to the deceased. I note that annexure 'DJ 4' which is the Certificate of Official Search of the original suit land KAJIADO/LOODARIAK/319 before subdivision, the said Search reveals that the Defendants were the first original registered owners of the suit land on 3rd May, 1990. In the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J. M. Mutungi stated that **'the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/**

Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law'.

Section 24 (a) of the Land Registration Act stipulates as follows: 'subject to this Act, the registration of a person as a proprietor of a land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'

These provisions make it clear that the Defendants by virtue of being registered as absolute owners of the suit land in 1990 are vested with the rights and privileges belonging to it. It is against the foregoing that I find that the Plaintiffs have failed to establish a prima facie case to warrant the grant of orders for temporary injunction.

On the second limb as to whether the Plaintiffs will suffer irreparable loss which cannot be compensated by way of damages. I note that the Plaintiffs have not provided any proof of ownership over the suit land. Further as per the evidence presented, both the Plaintiffs and Defendants were allocated land at the same time by the Group Ranch. It is the Defendants who are the registered proprietors of the suit land. I hence find that the Plaintiffs will not suffer any irreparable harm that cannot be compensated by way of damages.

On a balance of convenience, from the facts and materials presented, I find that the Defendants are likely to suffer more inconvenience if the injunction is allowed than what the Plaintiffs will suffer if the injunction is disallowed.

From the above, it is clear that Plaintiffs' have not established a prima facie case to meet the threshold for the grant of orders of interlocutory injunction. I consequently dismiss the Plaintiffs' Notice of Motion dated 2nd May, 2014 with costs.

Dated, signed and delivered in open court at Kajiado this 4th day of December, 2017.

CHRISTINE OCHIENG

JUDGE