



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 615 OF 2015

JAMES C.O. OKELLO.....PLAINTIFF/APPLICANT

VERSUS

PETER PARSALIE OLE KIPAA.....1ST DEFENDANT/RESPONDENT

THE REGISTRAR OF LANDS NGONG.....2ND DEFENDANT/RESPONDENT

RULING

This is an application dated **30th June 2015**, filed by the Plaintiff/Applicant seeking an order that a temporary injunction be issued restraining the 1st Defendant, his agents, servants and/or employees or whomsoever from trespassing into, transferring, encumbering, taking possession, leasing, fencing and/or otherwise interfering with the parcel of land known as **Ngong/Ngong/12121**. The Plaintiff also seeks that the 2nd Defendant be directed to place a restriction over the parcel until the matter is heard and determined. The application is premised on grounds outlined thereunder and supported by an affidavit sworn by the Plaintiff. He also swore a Further Affidavit in response to the 1st Defendant's Replying Affidavit.

The Plaintiff's case is that sometime in **1997**, he purchased the suit property from **Melton Mooke Ole Ncharo** who was a beneficiary of the estate of **Dedan Maina Pertet**. Upon payment of the purchase price, the vendor handed him various documents including the Original Title Deed in the name of **Dedan Maina Pertet**, and a registered transfer in his name. However, before the suit property was transferred to him, the vendor died and the transfer process stalled. Nevertheless, that he had been in possession of the property upon purchase until the 1st Defendant trespassed thereon and on investigation he learnt that the 1st Defendant had fraudulently caused the registration of the property in his name.

The 1st Defendant swore a Replying Affidavit on **30th July 2015** and Supplementary Affidavit on **15th March 2016**. The 1st Defendant deposes that he is one of the administrators of the estate of **Dedan Maina Pertet**. It was his deposition that as at the date the letters of administration was granted on **11th December 1996** and subsequent letters of the administration issued after the amendment and substitution of the earlier administrators following the order of the Court on **3rd September 2010**, the suit property was part of the estate of **Dedan Maina Pertet**. Further, an official search carried out on **7th June 2013** revealed that the property was still part of the said estate.

The 1st Defendant contended that the Plaintiff had not demonstrated any entitlement to the suit property

and cannot claim ownership for reasons that: there is no sale agreement availed evidencing that there was a sale transaction as well as land control board consent showing that the sale transaction was authorized. Further, there was no transfer from the estate to **Melton Mooke Ole Ncharo** to validate the Plaintiff's claim. The 1st Defendant referred to the two transfer forms annexed to the Plaintiff's affidavit indicating that the administrators of the estate of **Dedan Maina Pertet** had transferred the property to **Melton Mooke Ole Ncharo**. He deposed that the said transfer forms were not properly dated and bear different dates of transfer, that is, **RL1 1996 and RL7 1997**. Additionally, the said forms were attested by different advocates and the Plaintiff had offered no explanation for the disparities.

This application was further canvassed by way of written submissions which I have carefully read and considered the authorities and sections of the law cited. The issue for determination at this point is whether the Plaintiff has met the threshold for the grant of temporary orders of injunction based on the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff claims ownership of the suit property by virtue of purchase from **Melton Mooke Ole Ncharo**. However, the said transaction has been challenged by the 1st Defendant who deposes that there is no evidence showing a sale transaction, and that the said vendor had no capacity to dispose off the property. It is not in dispute that the vendor was an administrator of the estate of **Dedan Maina Pertet** prior to the Court order in **Misc. Civil Application No. 1345 of 2004**. However, there is nothing to show that **Ole Ncharo** was the beneficiary of the suit property. The transfer documents availed by the Plaintiff indicating a transfer from the administrators of the estate to **Ole Ncharo** is not registered. Subsequently, the order of the Court in **Misc. Civil Application No. 1345 of 2004** vested in the 1st Defendant and his co-applicants the properties of the estate of **Dedan Maina Pertet** in place of **Ole Ncharo** and his co-administrators. There is nothing before this Court to show that **Ole Ncharo** had an interest over the suit property. The Plaintiff also failed to annex a sale agreement executed by either the vendor or the previous administrators of the estate, this being a requirement for the disposition of land as stipulated under **Section 38 of the Land Act**.

For the reasons stated hereinabove, I am of the considered view, and I do so find, that *prima facie* the Plaintiffs have not established acquisition of the suit property through purchase. Having found so, I will not consider the two other principles- **irreparable loss** and **balance of convenience**, for reasons that the three conditions of an injunction are sequential to be applied as separate distinct and logical hurdles, a point well-articulated in the case of **Nguruman Limited v Jan Bonde Nielsen & Others [2014]eKLR** thus:

“It is established that all the above three conditions and stages are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially...if prima facie case is not established, then irreparable injury and balance of convenience need no consideration...”

The upshot of the foregoing is that the Plaintiff's application is not merited and the same is dismissed and the status quo order granted on **16th July 2015** is discharged. Costs of this application shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this **26th** day of **September, 2016**.

L. GACHERU

JUDGE

In the Presence of:-

Mr Chango holding brief M/s Rumalas for the Plaintiff/Applicant

M/s Makonga holding brief Mr Maina for the 1st Defendant/Respondent

None attendance for the 2nd Defendant/Respondent

Hilda : Court Clerk

L.GACHERU

JUDGE

Court:

Ruling Read in open Court in the presence of the above stated advocates.

L.GACHERU

JUDGE