



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 31 OF 2013

MARY WATIRI KIRUMBA.....PLAINTIFF

VERSUS

ROSE NYOKABI NDUNGU.....DEFENDANT

RULING

The Plaintiff is seeking various orders in an application dated 19th November 2012 brought by way of Notice of Motion as follows:

1. A temporary injunction restraining the Defendant from interfering with the Plaintiff's occupation, possession and quiet enjoyment of her portion of the property known as title No. Loitokiok/Ngama/34. (hereinafter referred to as the suit property), pending the determination of this suit
2. That the Registrar of Lands be directed not to register any transfer, charge or other transaction in respect of the portion of the suit property that is the subject matter of this suit pending further orders of and/or determination of this suit.
3. That the Defendant be required to demolish and remove the timber house and other structures that she has constructed on the portion of the suit property that is currently occupied and owned by the Plaintiff.
4. That the OCPD Loitokitok and/or other Police Officer or Officers be directed to enforce and ensure compliance with any order that this court may issue herein.

The application is supported by the grounds on its face and in the supporting affidavit and supplementary affidavit sworn by the Plaintiff on 19th November 2012 and 16th May 2013 respectively. She states that the Defendant is her sister-in-law, having been married to the Plaintiff's deceased brother Joseph Nganga Kirumba (Deceased). The Plaintiff claims that her father Geoffrey Kirumba Mungai Karigwi (Deceased), was the beneficial owner of a portion of one acre of the property known as the No. Loitokitok/Ngama/34

She claims that her deceased father bought the said portion from the beneficial owner of the land, one Diwan Singh Chatar Singh. Further, that the said 1 acre portion has never been surveyed and subdivided from the said whole Parcel Loitokitok/Ngama/34. The Plaintiff further claims that she, together with her deceased brother and mother were moved in and settled on the said 1 acre portion of land parcel Loitokitok/Ngama/34 by their said deceased father immediately after his purchase of the subject property.

The Plaintiff contends that after their mother's death, it was agreed that she would share the portion equally with her deceased brother, with each of them settling on ½ acre of the said portion. However, that the Defendant now claims that the entire portion of 1 acre belongs to her, and has constructed a timber house on the portion of land that the Plaintiff has been occupying. The Plaintiff attached as evidence

various letters from the local chief confirming that the suit property belonged her deceased father, and was to be shared equally between the Plaintiff and the Defendant's deceased husband.

The Plaintiff also attached a statutory declaration sworn by the said Diwan Singh Chatar Singh on 30th April 2013 to the effect that he sold the portion to the Plaintiff's deceased father, and denies selling the said portion to the Defendant's husband. The Plaintiff and the said Diwan Singh Chatar Singh in their affidavits further claim that the Defendant colluded with one John Babu Chatersingh, one of the sons of the late Makimwai Ene Chatar Singh, who is the registered owner of Loitokitok/Ngama/34, to obtain a certificate of grant and distribute the deceased's estate amongst themselves.

The Defendant opposed the Notice of Motion in a replying affidavit she swore on 22nd March 2013, wherein she stated that she is the registered proprietor of the parcel of land measuring 1 acre known as Loitokitok/Ngama/2513. Further, that the said parcel of land was excised from Loitokitok/Ngama/34 pursuant to a sale agreement dated 29th August 1986 entered into between her deceased husband and one Diwan Singh Chathar Singh, a beneficial owner, in which her deceased husband purchased the said land for Kshs 800/=. The Defendant annexed a copy of her title to Loitokitok/Ngama/2513, and of the said sale agreement.

The Defendant further contends that her husband died before the said property could be transferred and registered in his name, and that the Administrators of the Estate of the late Makimwai Ene Singh Chatasingh in whose name the suit property is registered transferred the share purchased by her husband into her name, being title number Loitokitok/Ngama/2513. Further, that her husband as a purchaser for value was included as one of the beneficiaries in the confirmation of grant of the Estate of late Makimwai Ene Singh Chatasingh issued in Nairobi High Court Succession Cause Number 939 of 1990, a copy of which she attached.

The Defendant also claimed that the Plaintiff moved into the suit property long after the Defendant's husband's death to take care of her ailing mother, and that after her mother's death the Plaintiff refused to move out claiming that the said land belonged to her deceased father. The Defendant admitted issuing a notice to vacate to the Plaintiff, so that she and her children could enjoy their right to ownership of the suit property.

The parties filed written submissions in which they reiterated the above arguments. The Plaintiff's counsel argued in submissions dated 22nd October 2013 that the Plaintiff had shown a *prima facie* case by bringing evidence of her residence on the suit premises since 1968 when her deceased father bought the said portion, and that she would suffer irreparable harm as her portion of ½ acre is the only home she has known.

Further, that the balance of convenience tilted in her favour as her claim to beneficial ownership of the said ½ acre had been corroborated by the local administration and the vendor of the suit property, and from her long period of occupation. The Plaintiff's counsel relied on the decision in **Mrao Ltd vs First American Bank of Kenya Ltd (2003) KLR 125**, and sought to distinguish the judicial authorities relied upon by the Defendant's counsel.

The Defendant's counsel filed written submissions dated 4th November 2013, and argued that the Plaintiff (sic) had shown that she is the registered owner of Loitokitok/Ngama/2513, and that she was the absolute and indefeasible owner of the same, and he urged the court to uphold the sanctity of her title. The counsel relied on section 27 (a) of the repealed Registered Land Act and sections 24 (a), 25(1), and 26(1) of the Land Registration Act, as well as various judicial decisions including in **Sheldon Michilwa vs Micheal Ndarie Nyalienya Nairobi HCCC 642 OF 2000**, and **Nakuru Packers Limited vs Monica Nyambiru Watitu, Nakuru Civil Case No 71 of 2002** in this respect. Further, that they have not sought any prayer for an injunction in their originating summons filed herein dated 14th January 2011.

The counsel further submitted that prayers 4 and 5 of the Plaintiff's Notice of Motion are final in nature and cannot be granted as temporary injunctions, and that she had not proved her ownership of the suit

property.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. There are three main issues before the court for determination. These are firstly, whether the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary prohibitory injunction have been met by the Plaintiff, secondly whether the mandatory injunction sought by the Plaintiff can issue, and lastly whether the orders of inhibition sought can issue against the Registrar of Lands.

On the first issue, the requirement for the grant of a temporary prohibitory injunction 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 therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff's proprietary claim on the suit property is based on her long occupation of the same, and on her deceased's father's beneficial ownership of the property. She has brought evidence of both her occupation and of the sale to her father by the beneficial owner Diwan Singh Chatar Singh. The Plaintiff's occupation is not disputed by the Defendant who has issued a notice to her to vacate.

The Defendant on the other hand has brought evidence of her title to the suit property, which she claims was issued to her arising from her deceased husband's purchase of the suit property. The alleged vendor, Diwan Singh Chatar Singh, however denies that such a sale ever took place, and the Plaintiff alleges that the transfer and issue of title to the Defendant was fraudulent. I am therefore of the view that the prayers for a temporary injunctions can in the circumstances only be decided on the basis of a balance of convenience.

In this regard I find that since the Plaintiff's occupation of the suit property is not disputed and she claims that the suit property is her only home, the balance of convenience tilts in her favour. The Defendant is accordingly hereby restrained from interfering with the Plaintiff's occupation, possession and quiet enjoyment of the portion of the property known as title No. Loitokiok/Ngama/34 and/or Loitokitok/Ngama/2513 that is currently occupied by the Plaintiff, pending the determination of this suit or until further orders.

On the second prayer sought by the Plaintiff, which is the demolition and removal of the timber house constructed on the suit property by the Defendant, this prayer is in the nature of a mandatory injunction. It has been held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** that for a court to grant a mandatory injunction, there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

The Plaintiff herein was not able to establish a *prima facie* case, and as the Defendant has also shown title to the suit property, the issue of who is the rightful owner of the suit property needs to be determined before any final orders as those sought by the Plaintiff can be granted. The prayer that the Defendant be ordered to demolish and remove the timber house and other structures that she has constructed on the portion of the suit property that is currently occupied and owned by the Plaintiff is therefore hereby denied.

The outstanding issue left to be determined therefore is whether an order of inhibition can issue with respect to the suit property. Section 68 of the Land Registration Act of 2012 provides for the issue of inhibition orders as follows:

“1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.

(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.

(3) An inhibition shall not bind or affect the land, lease or charge until it has been registered.”

It is clear from these provisions that the powers granted to the court are discretionary, and are to be exercised when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period. There is no requirement that the applicant must show a *prima facie* case before an inhibition can issue, and the general principle that will apply is that the discretion is exercised judicially by being exercised in good faith, for a proper purpose, taking into account all relevant factors and is reasonable in the circumstances of the case.

I have in this regard taken into account the allegations by the Plaintiff of fraud in the transfer of the suit property to the Defendant, and the fact that this court has already granted temporary injunction orders in her favour. I also note that the portion of the suit property that is the subject of the dispute herein is now more defined and has a separate title against which an order of inhibition can issue. I accordingly find that there are reasonable grounds for the grant of an inhibition with respect to the suit property. I accordingly order the Registrar of Lands not to register any transfer, charge or other transaction in respect of the parcel of land known as Loitokitok/Ngama/2513 pending the determination of this suit and/or further orders.

The Officer Commanding Police Division in Loitokitok and/or equivalent officer is hereby also directed to enforce and ensure compliance with the orders granted by this court herein

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____24th____ day of ____January____, 2014.

P. NYAMWEYA

JUDGE