REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 460 OF 2013

VERONICA KABUTIE & ANOTHER.....PLAINTIFFS

VS

HELLEN CHERUTO KENDUIYWO & 3 OTHERS..... DEFENDANTS

(Application for injunction; suit seeking declaratory orders that a decision of the land disputes tribunal was made without jurisdiction; tribunal having sat and decided on a matter touching on ownership of and title to land; applicant seeking to have the award of tribunal and subsequent decree not to be executed pending hearing of the suit; prima facie case; whether prima facie case established; application for injunction allowed)

RULING

The application before me is that dated 7 October 2013 filed by the plaintiffs. It is an application for injunction brought under the relevant provisions of the Civil Procedure Act, and Civil Procedure Rules. In this application, the plaintiffs want an injunction restraining the defendants in conjunction with the District Land Registrar and District Land Surveyor, Nandi District, from enforcing the decree in Kapsabet Principal Magistrate's Court LDT Case No. 32 of 2011, or in any other way interfere with the land parcels Nandi/Kiminda/1731 and 1732 pending the hearing and determination of this suit. The application is supported by the affidavit of the 2nd plaintiff who has sworn the same on her own behalf and on behalf of the 1st plaintiff. The application is opposed by the defendants who have filed a replying affidavit.

Probably a little background will shed light as to why the plaintiffs want the injunction sought.

The 1st plaintiff is the registered proprietor of the land parcel Nandi/Kiminda/1731, whereas the 2nd plaintiff is the registered proprietor of the land parcel Nandi/Kiminda/1732 (the suit lands). There is also a land parcel Nandi/Kiminda/1149 which is registered in the name of Jennifer Tongoi, who is not a party to this suit. The defendants herein filed a suit before the Land Disputes Tribunal (probably at Nandi) wherein they claimed that the plaintiffs and Jennifer Tongoi, had sold to them portions of the suit lands. I have been unable to get the precise claim filed before the tribunal for none of the parties have annexed it. But from the affidavits on record, it is not in doubt that the tribunal heard the matter and made an award which was adopted by the Magistrate's Court in Kapsabet and a decree issued. The decree issued is as follows :-

THAT JULIUS KIPYEGO KORIR, do surrender the Original Title Deeds of Nandi/Kiminda/1149, Nandi/Kiminda/1731 and Nandi/Kiminda/1732 to the District Lands Registrar for subdivision to the rightful owners as follows :-

(a) Kipruto Mutai - 0.5 acres of Nandi/Kiminda/1149

(b) Hellen Cheruto Kenduiywa - 1.1 acres of Nandi/Kiminda/1731 and 1 acres (sic) out of Nandi/Kiminda/1149.

(c) Issac Kipkosgei Kering - 1.55 acres out of Nandi/Kiminda/1149.

(d) Linus Kiptoo Chepkwony - 125 acres out of Nandi/Kiminda/1731 and 0.2 acres out of Nandi/Kiminda/1732.

The said beneficiaries of the decree are the defendants in this suit. Julius Kipyego Korir, mentioned in the decree, is a nephew to the applicants. After the decree was issued, the defendants moved to execute it and have the said parcels of land sub-divided so that each beneficiary can get title to his/her share in line with the decree. An appeal was filed in this court, being Eldoret E&L Civil Appeal No. 99/2012 against the decision of the tribunal, but the appeal was struck out as it had been filed way out of time. It is then that the plaintiffs filed this suit.

In their plaint, the plaintiffs want a declaration that the proceedings and award of the tribunal are illegal, null and void ab initio and that they should be recalled and quashed. They also want the contracts between themselves and the defendants declared null and void for want of compliance with the law as no consent of the Land Control Board was issued. The plaintiffs also want the defendants evicted from the suit lands and a permanent injunction restraining them from any further occupation of the same.

As I stated earlier, in this application, the plaintiffs want the process of subdivision and issuance of new titles in line with the decree of the Kapsabet Magistrate's Court stayed pending hearing and determination of this suit.

The defendants upon being served with the suit papers and application, filed a defence and each filed a replying affidavit. Their advocate, Simon Kitur, also swore a replying affidavit. It is their contention that they bought the suit lands from the plaintiffs and portions of the land parcel Nandi/Kiminda/1149 from Jennifer Tongoi (not a party to this suit). They have stated that consents to sub-divide the land parcels were issued and they annexed the same to their affidavits. They have averred that any orders herein ought not to affect the land parcel Nandi/Kiminda/1149 since it is not in issue in this case. In the affidavit of Simon Kitur, it has been stated that this application is similar to one filed in Civil Appeal No. 99 of 2011 and therefore this application is *res judicata*. In the Statement of Defence, it is contended inter alia that declaratory orders cannot be issued as the Land Disputes Tribunal have not been enjoined in this case and that the case does not disclose a cause of action against the defendants. It is also stated that there is an appeal pending before this court arising out of the decree issued in the Kapabet Magistrate's Court.

The plaintiffs filed a supplementary affidavit in which they challenged the consents to sub-divide as being fraudulent since they never appeared before the Land Control Board. It has also been deponed that Jennifer Tongoi has been in Uganda for 4 years and there is no way she could have appeared before the Land Control Board to give consent to sub-divide.

It is with the above facts and pleadings that I need to decide this application. This being an application for injunction, I stand guided by the principles laid down in the case of **Giella vs Cassman Brown (1973) EA 358**. In the said case, it was stated that when faced with an application injunction ,the court needs to be satisfied that the applicant has demonstrated a prima facie case with a probability of success. If in doubt, the court ought to fall back on the balance of convenience and take note that an injunction will not normally be issued unless there is a risk of loss that cannot be compensated by an award of damages.

It will be observed that in this case, the core prayer is for a declaration that the tribunal did not have jurisdiction to hear the case. The plaintiffs also want declarations that the defendants have not bought the suit lands. They want them evicted and permanently restrained from the land. They intend to rely upon the arguments that any sale of the suit lands cannot be sanctioned for want of consent of the Land Control Board. They further assert that the Land Disputes Tribunal lacked jurisdiction in deciding a dispute of this nature. On the other hand, the defendant's core assertion is that there is a pending appeal and that this suit is a non-starter for failing to enjoin the Land Disputes Tribunal.

To determine whether a prima facie case has been established by the plaintiff, it is inevitable that I make a preliminary assessment of the plaintiff's case gauged with the defences raised. It should be put in mind that this pronouncement is not a pronouncement on the case itself, but is only a preliminary assessment, made for the purposes of determining the application for injunction.

It is not contended by the defendants that the tribunal had jurisdiction to try the matter before it yet this is one of the pillars of the case of the plaintiffs. Although I have not seen the proceedings of the tribunal, since no party annexed the same, I can tell from the decree that the tribunal heard a matter relating to ownership of, and title to, land. The jurisdiction of the land disputes tribunals, (which are now defunct owing to the repeal of the Land Disputes Tribunal Act, CAP 303A), was set out in Section 3 (1) of the repealed statute. The same provided as follows :-

S. 3 (1) Subject to this Act, all cases of a civil nature involving a dispute as to—

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land,

shall be heard and determined by a Tribunal established under section 4.

It will be seen from the above that the Land Disputes Tribunal did not have jurisdiction to hear claims touching on ownership or title to land. The claim that was presented before the tribunal by the defendants herein, claiming entitlement to the suit lands and to the land parcel No. 1149, because the same were sold to them, was therefore, prima facie, outside the jurisdiction of the tribunal. If the tribunal had no jurisdiction to hear the claim, then their decision is null and void, and I see no bar to any party filing suit to declare a decision of the tribunal as being null and void.

It has been argued that the Land Disputes Tribunal have not been enjoined to this suit and therefore the suit must fail. That argument sounds attractive, only that there is no longer in existence the Land Disputes Tribunal, and neither is there a successor. As such, the plaintiffs cannot be able to sue the tribunal for the simple reason that it is no longer in existence. I do not see how one can sue a non-existent party and I do not see why the plaintiffs should be prejudiced for not suing a party that no longer exists.

It has been argued by the defendants that there exists an appeal being Civil Appeal No. 99 of 2012. That cannot be correct because that appeal was struck out as having been filed out of time and it no longer exists. I also do not see how this application can be said to be *res judicata* since there has not been a similar suit filed with an application for injunction and considered. The applications referred in the affidavit of Simon Kitur, as being *res judicata*, were applications to stay the decree pending appeal, which applications were dispensed with. No application for injunction has been heard and considered and therefore this application is not *res judicata.*

Part of the plaintiff"s claims relate to the sale transactions which the defendants say entitled them to the suit lands. The plaintiffs want these sale transactions declared null for the reason that no consent of the land control board was obtained. The defendants annexed various consents to sub-divide which have been contested by the plaintiffs as not being genuine. More importantly, no consent to the sale or consent to transfer has been annexed by either defendant. It is therefore probable that no consent of the Land Control Board was ever issued for the sales herein. A consent to sub-divide is not the same as consent to the sale or consent to the transfer. Section 6 of the Land Control Act, CAP 302, provides that consent to the sale needs to be granted within 6 months of the agreements for sale. Since no consent has been displayed, prima facie therefore, the agreements that the defendants rely upon, stand the risk of being nullified and declared void.

I think from the foregoing, I am convinced that the plaintiffs have set out a prima facie case with a probability of success and are entitled to the injunction sought. The respondents argued that no injunction

should issue on the property Nandi/Kiminda/1149 since the proprietor is not a party to this suit. However, I am unable to divide the decree since the ownership of this land is closely tied to the ownership of the suit lands. If I issue a stay of the decree, then it has to be for the whole decree, since if I am to declare the decree null and void, it will be null and void in all respects and it will be absurd for a party to derive benefit from it. In my view, the decree cannot be severed. This of course does not prejudice the defendants from proving in the main suit, that the decree needs to be enforced, even if partially.

From the foregoing, It is my view, that it is best to preserve the suit lands together with the land parcel Nandi/Kiminda/1149 given their close connection.

For the reasons given above, I allow the application for injunction. I stay the decree in Kapsabet Magistrate's Court LDT No. 32 of 2011 and bar the District Lands Registrar and the District Surveyor, Nandi from proceeding to enforce that decree, or from subdividing the suit lands and the land parcel Nandi/Kiminda/1149, based on that decree, until the final disposal of this suit. I also issue an order of inhibition, inhibiting the registration of any entries into the registers of the land parcels Nandi/Kiminda/1731, Nandi/Kiminda/1732, and Nandi/Kiminda/1149. The order of inhibition to remain in force until the conclusion of this case or until the court orders otherwise.

The costs of the application shall be costs in the cause.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF APRIL 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Mr. Kipkosge Choge of M/s Kipkosge Choge & Co Advocates for plaintiffs/applicants.

Mr. C.F. Otieno holding brief for M/s S.K. Kitur & Co Advocates for the defendants/respondents