



**REPUBLIC OF KENYA**

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

**E&L NO. 62 OF 2014**

**MARTHA CHELAL.....1ST PLAINTIFF**

**MICAH KIPYEGOMEN.....2ND PLAINTIFF**

*(Suing as representatives of the estate of*

**KIPYEGOMEN CHELAL alias (KIPIAKOMEN CHELAL)**

**VS**

**ELIJAH KIPKEMOI BOIYWO.....1ST DEFENDANT**

**JONAH KURGAT.....2ND DEFENDANT**

**THE DISTRICT LAND REGISTRAR UASIN GISHU.....3RD DEFENDANT**

***(Application for injunction; principles to be applied; plaintiff alleging title of defendants to have been acquired fraudulently; counterclaim by defendant; prima facie case established by plaintiff; whether defendant must have possession because he has title; application for injunction allowed).***

**RULING**

The plaintiffs are the children and legal representatives of the estate of one Kipyegomen Chelal (deceased). Through a plaint filed on 27 February 2014 they have averred that the deceased was a member of Tugen Estate Ltd, a land buying company and was entitled to the land parcel Moiben/Moiben Block 4 (Tugen)/115. They have averred that they used to pay land rates and land rent until the year 2012 when they discovered that the land had mysteriously changed hands and registered in the name of the 1st defendant. They state that they raised issue with the title, and the 3rd defendant, the District Land Registrar Uasin Gishu, resolved that the title be returned by the 1st defendant for verification which the 1st defendant refused to do. They have contended that they have been in occupation of the suit land since the year 1986 and have fenced the same. However the 2nd defendant has now attempted to take possession of the said land. It is the contention of the plaintiffs that the title of the 1st defendant was obtained by way of fraud and they want his registration cancelled. They contend inter alia that the 1st defendant was never cleared by the directors of Tugen Estate Ltd and that he got registered as proprietor without proper verification of the company documents including the member register. It is also alleged that the title was obtained in collusion with the Chief of the area. In the suit, they want the title of the 1st defendant cancelled and an order restraining the defendants from interfering with the suit land.

Together with the plaint, the plaintiffs filed an application for injunction to restrain the defendants from interfering with the suit land pending hearing of the suit. In the supporting affidavit to the application, the plaintiffs have averred that their late father was allocated the suit land. Their father also fenced the same

with posts and barbed wire. They had caretakers on the land until the year 2012 when the 1st defendant warned them that the land belongs to him. It is then that they went to check on the land records and found that the 1st defendant had been registered as proprietor. They then lodged a dispute with the Land Registrar, Uasin Gishu who called a meeting on 24 July 2012 to resolve the issue. The plaintiffs annexed copies of the minutes of the said meeting. The plaintiffs also annexed a letter dated 15 May 2012 from Tugen Estates Farm stating that the suit land belongs to the late Chelal.

The application first came before me on 27 February 2014 and I granted interim orders of injunction stopping the defendants from interfering with the suit land.

Upon being served the 1st and 2nd defendants entered appearance and filed a joint statement of defence and counterclaim. They have averred that the deceased never owned any shares in Tugen Estates and that he was never allocated the suit land. They have also contended in their defence that if at all the late Chelal was allocated the said land, his rights over the land have been extinguished by the Limitation of Actions Act. In the counterclaim, the 1st and 2nd defendants have pleaded that they purchased the suit land from Tugen Estates Ltd, the initial owners of the land. They have inter alia sought a permanent injunction to have the plaintiffs restrained from the suit land and a declaration that they are the rightful owners of the said land.

They also filed an application of their own dated 9 April 2014, in which they inter alia sought to have the interim orders of 27 February 2014 vacated. In that application, they sought orders of status quo and asserted that they have been in possession of the suit land for the last two years. There are two supporting affidavits to this application, one sworn by the 1st defendant and the other by the 2nd defendant. The 1st defendant has stated that in the year 2001, he was re-allocated the suit land as he had got less acreage than he was entitled to. This was done through a meeting of 12 September 2001 and he has annexed minutes to that meeting. He has stated that he has been utilizing the same since until the year 2012 when the plaintiffs started laying claim to the land. The 2nd defendant deponed that he is the legal owner of the suit land having purchased it from the 1st defendant in the year 2009. He has stated that he is aware that the 1st defendant was using the said land since the year 2000. He bought the land because it was adjacent to what he already owned. He stated that he then removed the fence so that he could use the land as one parcel and has asserted that he has been using the land since the year 2012 when the plaintiffs started laying claim on it. He has stated that on 4 April 2014, the plaintiffs came to the land with the order of injunction and seized possession of the land an action which has aggrieved him.

The two applications came before me on 14 October 2014 and I directed that the application dated 9 April 2014, filed by the 1st and 2nd defendants, be deemed to be a reply to the application dated 27 February 2014. I also heard the submissions of Mr. Tarus for the plaintiffs and Mr. Korir for the 1st and 2nd defendants. The 3rd defendant so far has neither entered appearance nor filed any response to any of the two applications.

I have considered the subject matter of litigation and the opposing views of the parties. The contention of the plaintiff is that the suit land belonged to their late father and that the same was fraudulently acquired by the 1st and 2nd defendants. On the other hand the 1st and 2nd defendants assert that they are properly entitled to the land. Both parties also assert that they are the ones who have been in possession of the suit land before the filing of this suit.

The principles upon which a court is to determine an application for injunction were laid down by the Court of Appeal in the case of ***Giella v Cassman Brown (1973) EA 358***. It was stated that to be entitled to an injunction, an applicant needs to demonstrate a prima facie case, and if the court is in doubt, it will determine the matter on a balance of convenience. It was also stated that an application for injunction will only be granted if damages are an inadequate remedy.

Assessing whether or not a party has laid down a prima facie case inevitably requires the court to make a rough preliminary assessment of the case presented by the applicant. Where the other party has filed a response to the application, the court needs to assess the applicant's case in light of the material provided by the respondent. It is from weighing the evidence tabled by the opposing side at that preliminary stage

of the proceedings, that the court can determine whether or not a prima facie case has been tabled by the applicant.

I have looked at the material tabled by both parties. The plaintiffs tabled a register of the members of the Tugen Estates Ltd. They also tabled a certificate of official search which shows that the 1st defendant became registered as proprietor of the suit land on 28 April 2011. They were no doubt aggrieved by his registration hence the complaint to the District Land Registrar. I have looked at the minutes of the meeting that the District Land Registrar held on 24 July 2012 in an attempt to resolve the dispute. The Land Registrar heard the disputing parties together with their witnesses. The District Land Registrar observed that the 1st defendant did not have any authentic document to show why he was entitled to be allocated the suit land. The District Land Registrar ruled that the 1st defendant irregularly obtained title to the suit land and ordered him to surrender it for cancellation. I have also seen a letter dated 23 January 2000 written by Tugen Estate Ltd stating that the late Chelal had cleared with the farm directors for the allocation of the plot No. 115 (which I presume to be referring to the suit land which is registered as Moiben/ Moiben Block 4 (Tugen)/115.) Further to this, there is also a letter dated 15 May 2012 in which Tugen Estates Farm Ltd have stated that the suit land belongs to the late Chelal.

I have seen the minutes of the meeting of 12 September 2001 where the 1st defendant states that the suit land was re-allocated to him. I have seen the entry which states that for those who got less acreage, some plots would be acquired and utilized to compensate them. These plots are 10 in number, one of which is the suit land. However, there is no resolution on how the compensation was to be done among the 8 person affected by less acreage, and there is no resolution that the suit land is to be given to the 1st defendant.

Mr. Korir for the 1st and 2nd defendants argued that possession should be given to the 1st and 2nd defendants as they hold title to the suit land. He contended that as title holders they need protection and that their title ought to be given sanctity.

In principle, I agree with the submissions of Mr. Korir. However, titles are liable to be cancelled if the same have been acquired by way of fraud, mistake or misrepresentation. This is contained in Section 26 (1) (b) of the Land Registration Act, Act No. 3 of 2012. The full Section 26 provides as follows :-

*26. (1) 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.*

*(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

It will be seen from the above that where title is acquired through fraud or misrepresentation, the title is liable to be cancelled. The issue of whether or not the 1st defendant's title was acquired regularly or irregularly will of course be determined at the hearing of this suit, but in my opinion, the plaintiffs have laid some evidence that casts doubt on the title of the 1st defendant. I am of the considered view that they have laid down a prima facie case with a probability of success.

There has been opposing evidence on who was in possession of the suit land before the commencement of this suit. No party presented any valuation report, or other appropriate report, to demonstrate the possession on the ground. I have on my part been unable to resolve the conflict of who was in possession before the suit. For the convenience of this case, since I am of the opinion that a prima facie case has been tabled by the plaintiffs, I order that the plaintiffs be in possession of the suit land for the duration of this

suit. The plaintiffs shall however give an undertaking as to damages within 7 days of this ruling.

Costs of the application shall be costs in the cause.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF OCTOBER 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Delivered in the presence of:*

*Mr. J.R. Tarus present for plaintiffs/applicants.*

*N/A for Mr. J.K. Korir for 1st and 2nd defendants/respondents.*

*Mr. P. Kuria present for 3rd defendant.*