



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL NO. 183 OF 2013

THOMAS KINYANJUI THIGA1ST PLAINTIFF

JAMES THIGA KINYANJUI 2ND PLAINTIFF

VERSUS

ALLAN KASARO MATINKOI..... 1ST DEFENDANT

EDWARD MULA MAATO.....2ND DEFENDANT

TIMOTHY NAISON MATINKOI.....3RD DEFENDANT

ANNA MANTIKOI MULA.....4TH DEFENDANT

KITETOI ENE MATINKOI.....5TH DEFENDANT

DISTRICT LAND REGISTRAR, KAJIADO6TH DEFENDANT

RULING

The Plaintiff by a Notice of Motion application dated 5th February 2013 seeks an order of temporary injunction restraining the Defendants from in any way transferring and/or in any manner dealing with the three parcels of land known as Title Numbers **Kajiado/Kisaju/1210, 1211 and 1208** registered in the joint names of the plaintiffs and/or the purported subdivisions occasioned at the instance of the Defendants being numbers **Kajiado/Kisaju/8462-8473** pending the hearing and determination of the suit and/or further orders of the court.

The application is founded on the grounds appearing on the face of the application and on the supporting affidavit sworn by **Thomas Kinyanjui Thiga** the 1st plaintiff herein on 5th February 2013. The plaintiffs state that they purchased the land parcels **Kajiado/Kisaju/1210, 1211 and 1208** from United Insurance Company Ltd way back in 2005 and that the subject parcels of land were transferred to the plaintiffs regularly and lawfully after due observance of the legal process. The plaintiffs have annexed copies of the agreements for sale in respect of the 3 parcels of land, the applications to the Land Control Board and the resultant Land Control Board consents and copies of the duly registered instruments of transfer. After the registration of the transfers the plaintiffs were issued with title deeds on 23rd February 2005 in respect of Title Numbers **Kajiado/Kisaju/1210 and 1211**. In respect of Title Number **Kajiado/Kisaju/1208** the title was issued to the plaintiffs on 14th April 2005. Certificates of official searches issued in respect of

the three properties by the Land Registrar on 18/1/2006 shows that the three parcels of land are registered in the joint names of the plaintiffs.

The plaintiffs aver that on or about 8th November 2010 when they sought to carry out a search on the three parcels of land they were surprised to be informed that the “**Green Cards**” on the three properties were missing and/or had been misplaced. That after following up with the Land Registrar, the Land Registrar confirmed the loss of the records and vide a Gazette Notice dated 27th May 2011 the Land Registrar notified members of the public of the loss of the register in respect of the three parcels of land and gave notice that a new land register would be opened at the expiry of 60 days from the date of the Gazette Notice. After the expiry the Gazette Notice and after the physical inspection of the three parcels of land, the Land Registrar opened new registers for the parcels of land and on 29th March 2012 issued the plaintiffs with new title deeds against the new registers.

The Plaintiffs further aver that in April 2012 they engaged the services of a private surveyor to re establish the beacons and the boundaries of the parcels of land as they intended to fence and while the surveyor confirmed the beacons for parcels **Kajiado/Kisaju/1210** and **1211**, he found that the beacons for parcel **Kajiado/Kisaju/1208** had been interfered with and there was encroachment thereon. The plaintiff state that on inquiry they established that it was the Defendants and their agents who had encroached onto their land and were claiming that the land belonged to them. The plaintiffs reported the matter to the Kisaju police station and subsequently lodged a complaint with the Land Registrar who agreed to arrange a site visit with surveyors but which did not materialize.

The plaintiffs further aver that the Kajiado Land Registry without consulting them proceeded to fraudulently close the land register (**Green Cards**) in respect of the plaintiffs three parcels of land and proceeded to issue land title documents purportedly pursuant to orders issued in Land Dispute Tribunal case **NO. 34 of 2012** which was subsequently affirmed by the Principal Magistrate’s Court Kajiado.

The 1st-5th Defendants filed a replying affidavit sworn on their behalf by **Allan Kasoro Mantinkoi** the 1st Defendant herein. By the replying affidavit the Defendants aver that the three parcels of land that the plaintiffs claim belonged to their father one **Moses Matinkoi Ole Mula** was (**now deceased**) and annex copies of the land records (**Green cards and Title Deeds**) marked “**AKM1**” which show **Moses Mantinkoi Ole Mula** as the registered owner of the parcels of land as at 9th June 1992. The Defendants claim that their father has never sold the above land to anybody and that as at the time he passed away on 23rd December 2004 he had in his possession the original title deeds and the Defendants assert they are not aware of any sale of the suit properties having been effected to the United Insurance Company Ltd from whom the plaintiffs claim to have purchased the properties barely 2 months after the death of their father the said **Moses Mantinkoi Ole Mula**. The Defendants state they have all along possessed the suit properties which they use for grazing their livestock and deny that the plaintiffs have at any time been in possession or occupation of the suit lands.

The 1st Defendant depones that after some time following his father’s demise he visited the Kajiado Lands Registry to confirm the status of the suit properties and was surprised to find that the ownership had been changed to persons who were unknown to him. The Deponent states he took out letters of Administration and commenced a land dispute before the Land Dispute’s Tribunal, Kajiado North District who rendered a decision directing that titles in respect of the suit parcels of land be issued in the name of **Moses Matinkoi Ole Mula**. The Magistrate’s court Kajiado endorsed the decision of the Land disputes Tribunal and ordered that the title deeds for the suit properties be reverted to the names of **Moses Mantinkoi Ole Mula** which was duly done and that the parcels of land have since been subdivided and transmitted to the heirs as per the certificate of confirmation of grant issued by the Kajiado Magistrate’s court on 30th August 2012. The Defendants aver that there is no time that United Insurance Co. Ltd ever owned the suit properties so as to sell and transfer the same to the plaintiffs.

The plaintiffs and the Defendants filed written submissions on 31/7/2013 and 23rd June 2014 respectively, articulating their respective positions. The plaintiffs submit that they have met the threshold established in the **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** for the grant of a temporary

injunction and have argued they have a prima facie case with a probability of success and that they stand to suffer irreparable injury which cannot be compensated by an award of damages if the injunction is not granted. The plaintiffs further argue they have demonstrated how they acquired the land parcels and have valid title documents to the parcels of land and that the balance of convenience tilts in their favour.

The 1st to 5th Defendants for their part submit that land parcels were owned by their deceased father **Moses Mantinkoi Ole Mula** and at no time were the same sold by their father to United Insurance Co. Ltd from whom the plaintiffs purport to have purchased the land. The Defendants further submit the suit parcels of land were subject of a Judicial process vide the Land Dispute Tribunal case **NO. 34 of 2012** and the Principal Magistrate's Court Kajiado which decreed the land parcels to the Defendants. The Defendants submit the Defendants titles (if any) were therefore extinguished through the Judicial process which they never challenged and they therefore cannot be entitled to an order of injunction.

I have carefully considered the plaintiffs application, the affidavits in support and in opposition, and the parties written submissions. I note that the plaintiffs claim ownership of the suit properties on the basis that they validly and regularly purchased the same from United insurance company Ltd and have tendered agreements of sale dated 11th February 2005 in support of their claim. The Defendants (1st-5th) claim their father was registered owner of the suit lands in 1992 and that as at 23rd December 2004 when he died, he had not sold the land to anybody and contend therefore United Insurance Company Ltd could not have been the owner in February 2005 so as to sell the same to the plaintiffs. Although there are copies of titles issued to the plaintiffs in 2005 and copies of search certificates issued on 18/1/2006 which show the plaintiffs were the registered owners of the suit properties as at that date no record has been furnished to show when United Insurance Company Ltd was registered as owner of the suit properties and neither has any copy of agreement between United Insurance Co. Ltd and **Moses Mantinkoi Ole Mula** to demonstrate how United Insurance Co. Ltd came to own the suit lands.

While issues of Jurisdiction of the Kajiado Land Disputes Tribunal arise in regard to the determination they made touching on title to land in relation to the suit properties which at the time of the proceedings was registered in the name of the plaintiffs there is nonetheless the unexplained ownership by United Insurance Company Ltd and in my view this crucial evidence is lacking from the material placed by the parties before the court. While the plaintiffs rely on the ownership documents that they hold, the Defendants contend that United Insurance Co. Ltd was not the owner of the property at the time they purported to transfer the same to the plaintiffs. In view of the apparent lacuna in the land office records it is my view that the issue of ownership can only be settled at the trial when witnesses will be called and cross-examined. I am thus unable to make a finding and holding that the plaintiffs have on the basis of the evidence and material placed before the court established a prima facie case with probability of success though it cannot be said their case is frivolous. They hold documents of title to the land they claim and therefore they have an arguable case.

In the circumstances of this matter I am satisfied that the order that would commend itself is not one for injunction as sought by the plaintiffs but one requiring the parties to observe and maintain the obtaining status quo. I consequently order and direct that:-

- (1) The parties do observe and maintain the present obtaining status quo where no party shall sell, dispose and/or transfer the land parcels known as **Kajiado/Kisaju/1210, 1211 and 1208** and this order will also apply to the purported subdivisions being **Kajiado/Kisaju/8462, 8463, 8464, 8465, 8566, 8467, 8468, 8469, 8470, 8471, 8472 and 8473** pending the hearing and determination of this suit and/or further orders of the court.
- (2) That the parties shall make full compliance with order 11 of the Civil Procedure Rules within the next 45 days of this ruling.
- (3) After the expiry of the period of under (2) above any party who will have complied with Order 11 of the Civil Procedure Rules will be at liberty to fix the suit for pretrial conference notwithstanding the other party may not have fully complied.

(4) The costs of the application shall be in the cause.

Ruling dated, signed and delivered this...**23rd**...day of...**October**...2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiffs

..... for the Defendants