



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC NO. 1272 OF 2013**

**JOSEPH MUMITA KIPEES**

**(Suing as the legal representative of the estate of**

**MOSES KISENTO).....PLAINTIFF**

**VERSUS**

**NTERI MERIK – OBO KIPAIIKA.....1<sup>ST</sup> DEFENDANT**

**NKOILE GROUP RANCH.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR KAJIADO.....3<sup>RD</sup> DEFENDANT**

**RULING**

The applicant herein **Joseph Mumita Kipees** ( suing as the legal representative of the Estate of **Moses Kisento**), filed this Notice of Motion application dated 5<sup>th</sup> November, 2013 seeking for various Orders. These Orders are;-

- a. *That an interim injunction Order restraining the 1<sup>st</sup> Defendant from selling , alienating or disposing off and transferring land reference No. Kajiado/Purko/248 to third parties pending the hearing and determination of this application interpartes.*
- b. *That an inhibition Order be made, inhibiting the 1<sup>st</sup> Defendant from selling, alienating or disposing off and transferring land Reference No. Kajiado/Purko/248 to third parties pending the hearing and determination of this case.*
- c. *That Court do make any other Order it deems suitable.*

The application was premised on the following grounds ; that the applicant filed a restriction on 23<sup>rd</sup> July, 2013 but the same has been removed by the Registrar of Lands Kajiado ; Again, that the applicant, on 5<sup>th</sup> November, 2013, tried to file another restriction through his advocate , but the same was rejected; Further, that the 1<sup>st</sup> Respondent has found a buyer, who is willing to pay the full purchase price including offsetting the loan obtained by the 1<sup>st</sup> Defendant and that the action of selling and transferring

the land is calculated to defeat the case; that the applicant will be prejudiced if the 1<sup>st</sup> Defendant is allowed to proceed and sell the subject property as the applicant will suffer substantial loss.

The application is also supported by the Affidavit of **Joseph Mumita Kipees** the Plaintiff herein. He averred that he lodged a restriction on the suit land through his advocate but the same was removed by the Registrar of Lands Kajiado, as per annexure JMK2. He further averred that he tried to lodge another restriction on 5<sup>th</sup> November, 2013, but the Registrar refused to register the same. It was his contention that he has information that the 1<sup>st</sup> Defendant intended to sell the land which is the subject matter in this suit. It was his further contention that if the suit land is sold that would be prejudicial to his case as the intention of the 1<sup>st</sup> Defendant is to defeat this case by selling and transferring the Land. Applicant urged the Court to allow his application.

The Notice of Motion is contested. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Replying Affidavits in opposition to the Notice of Motion.

1<sup>st</sup> Defendant **Nteri Merik Obo Kipaika**, in his Replying Affidavit averred that the suit land was registered on 17<sup>th</sup> March, 1992 in the names of the 2<sup>nd</sup> Defendant and title was issued in respect thereof. Further, that he was registered as joint proprietors of the suit Land, **LR No Kajiado/Purko/248** with **Moses Kisento** (deceased) on 16<sup>th</sup> April, 2004. He further averred that on 25<sup>th</sup> April 2005, **Moses Kisento** (deceased), caused the suit property herein to be transferred absolutely to the name of the 1<sup>st</sup> Defendant. The said transfer was effected by the 3<sup>rd</sup> Defendant as there was no objection.

It was his contention that the Plaintiff registered a restriction against the title to the effect that ‘**No dealings is to be registered since the title is under investigations by the CID Department**’. However, on 21<sup>st</sup> November, 2011, the 1<sup>st</sup> Defendant was cleared by the **C I D Machakos** of any wrong dealing as evidenced by **NMK-3**. He further deposed that on 14<sup>th</sup> November, 2012, the Principal State Counsel wrote a letter to the Provincial Criminal Investigating Officer, Rift Valley Province, clearing him of any fraudulent dealings over the suit land. (See **NMK 4**). The deponent stated that on 5<sup>th</sup> October, 2006 he charged the suit land to Agricultural Finance Co-corporation as a security for a loan facility and the deceased was aware of that fact but he had no objection. He denied that he has solicited for a buyer for the said parcel of land. It was his further contention that the applicant is only speculating and there is no sufficient reasons advanced in Court to grant inhibition Orders sought.

One, **Lekisenke Lialo Ole Tauwo**, swore an affidavit on behalf of the 2<sup>nd</sup> Defendant/Respondent. He stated that he is the Chairman of the 2<sup>nd</sup> Defendant and therefore conversant with the facts herein. He averred that he has been the Chairman of the 2<sup>nd</sup> Defendant since its establishment in the early 1970s to date and the Ranch has more than 300 members with **Moses Kisento** (deceased) and 1<sup>st</sup> Defendant, being among the members. Further that the suit property was hived out of the Ranch on 17<sup>th</sup> March 1992, and was registered in the names of the 2<sup>nd</sup> Defendant and a title was issued in respect thereof. He further deposed that the suit land was registered in the names of the 1<sup>st</sup> Defendant and the deceased **Moses Kisento** on 16<sup>th</sup> April, 2004. Again on 25<sup>th</sup> April 2005, **Moses Kisento** (deceased) transferred the suit Land to the 1<sup>st</sup> Defendant in the company of the deponent and there was no objection from anyone. He further deposed that the deceased, **Moses Kisento** was never married and had no children and there was no need for anyone to give consent to the 1<sup>st</sup> Defendant. He urged the Court to dismiss the application. Parties herein filed their written submissions which I have now considered. The parties also attached their authorities in support of their rival arguments. I have now carefully considered the pleadings general, the exhibits attached to the written submissions, and the relevant laws, and I make the following findings.

There is no doubt that the applicant herein hold Limited Grant of **Letters of Administration Ad Litem** to the Estate of **Moses Kisento Kipees**. The said **Moses Kisento Kipees** died on 21<sup>st</sup> December, 2007. There is no doubt that the suit land, **Kajiado/Purko/248**, is registered in the names of **Nteri Merik Obo Kipaika**, the 1<sup>st</sup> Defendant. There is also no doubt that the Plaintiff herein had reported a criminal

case at Machakos against the 1<sup>st</sup> Defendant that he had fraudulently registered the suit land into his name. After the CID investigated the matter, the 1<sup>st</sup> Defendant was cleared of any wrong dealing as evidenced by the letter dated 21<sup>st</sup> November, 2011 from the Director of Public Prosecution.

The applicant herein has sought for injunctive relief. This is an equitable relief granted at the discretion of the Court. This discretion however, must be exercised judiciously. The principles of grant of such injunctive orders were well established in the case of **Giella Vs Casman Brown & Co.Ltd 1973 EA 358**. These conditions are:-

- a. *The applicant must establish that he has a prima facie case with probability of success.*
- b. *That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.*
- c. *When the court is in doubt, to decide the case on a balance of convenience.*

Has the applicant established the said principles?

The applicant alleged that the 1<sup>st</sup> Defendant fraudulently transferred the parcel of land into his names. He reported the matter to the Police and after investigations, 1<sup>st</sup> Defendant was cleared. There is nothing attached to the Plaintiff's application to show that such fraud occurred. Again the suit land was transferred in the name of the 1<sup>st</sup> Defendant in the year 2005. That was during the life time of **Moses Kisento** (deceased) . There is no evidence that the said Moses Kisento ever complained of fraud or objected to the said transfer. 1<sup>st</sup> Defendant and one **Lekisenke Lialo Ole Tauwo** have alleged that the suit land was initially jointly registered in the names of the 1<sup>st</sup> Defendant and Moses Kisento (deceased). That Moses Kisento later transferred it to the name of the 1<sup>st</sup> Defendant. There is no evidence to the contrary. It is evident that the suit land is in the name of 1<sup>st</sup> Defendant. Section 26 of the **Land Registration Act**, states that such Certificate of Registration is **prima facie** evidence that the Land is owned by the registered proprietor. The said Section 26 (1) reads as follows:-

***“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— “.***

The 1<sup>st</sup> Defendant is the registered proprietor of the suit land as per the title deed exhibit 'NGR3'. The 1<sup>st</sup> Defendant is therefore the absolute indefeasible owner of the suit land. However, the said title may be challenged on ground of fraud or misrepresentation to which the person is proved to be a party.

The applicant herein has alleged that the 1<sup>st</sup> Defendant obtained the registration through fraud. Such allegations can only be proved through calling evidence in a full hearing. This court cannot hold with certainty that there was indeed fraud on the part of the Defendants herein. The court finds that the Plaintiff/Applicant has failed to satisfy the court that he has a **prima faces case** with probability of success.

Further the applicant must satisfy that he will suffer irreparable loss which cannot be compensated by an award of damages. The applicant had not alleged that he lives on the suit land. He has only alleged that the 1<sup>st</sup> Defendant intends to sell the suit land. However, 1<sup>st</sup> Defendant is the registered owner and he can deal with the suit land as he wishes. The rights of a registered owner are protected by **Section 24** of the **Land Registrar Act** which reads as follows:-

***““The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant***

*thereto.”*

Furthermore, the Land in issue can be quantified and since the applicant does not live on the suit land, in the event that he succeeds in the main suit and the 1<sup>st</sup> Defendant would have sold the Land in question, then he can be compensated by an award of damages. This was the finding in the case of **Wairimu Mureithi Vs City Council of Nairobi , Civil Appeal No. 5 of 1979 KLR 332 396** held that:-

***“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.*** (See **American Cynamid Company Vs Ethicon Ltd (1975)AC 396**).

Having found that the applicant is not in possession of the suit land and the same is registered in the names of the 1<sup>st</sup> Defendant, the Court finds that the balance of convenience does not tilt in favor of the applicant. The applicant is not merited of any injunctive Order.

The applicant has further sought for **inhibition Order** inhibiting the 1<sup>st</sup> Defendant from selling, alienating, or disposing off **LR No. Kajiado/Purko/ 248** to third parties.

The applicant has alleged that the 1<sup>st</sup> Defendant intends to sell the suit Land. There is no evidence to that allegation. ***Under Section 68(1) of the Land Registration Act***; the Court has power to grant inhibition Orders against a suit land restricting registration of any dealing with the suit land for a particular period or until the occurrence of a particular event. The Courts have severally held that in an application for orders of inhibition the applicant has to satisfy that;

- a. ***That the suit property is at risk of being disposed off or alienated or transferred to the detriment of the applicant unless preservative Orders of inhibition are issued.***
- b. ***That the refusal to grant orders of inhibition would render the applicants’ suit nugatory.***
- c. ***That the applicant has an arguable case.***

In the instant case, the suit land is in the name of the 1<sup>st</sup> Defendant. The applicant has alleged that the 1<sup>st</sup> Defendant has intention of selling the suit Land. No evidence of such transaction has been brought out. As a registered proprietor, the 1<sup>st</sup> Defendant has his rights protected under **Section 24** of the **Land Registration Act** and he can deal with the Land as he so desires.

The applicant has not shown good reasons why this Court should issue inhibition Order to preserve or stay any dealings with the suit land.

The upshot of the foregoing is that the applicant’s Notice of Motion dated 5<sup>th</sup> November, 2013 is not merited. The same is accordingly dismissed entirely with costs to the Defendants/Respondents.

It is so ordered.

Dated, Signed and delivered this **3<sup>rd</sup>** day of **October, 2014**

**L. GACHERU**

**JUDGE**

In the Presence of:-

None attendance for the Plaintiff/Applicant

M/s Mudae for 1<sup>st</sup> and 2<sup>nd</sup> Defendants

None attendance for 3<sup>rd</sup> Defendant/Respondent

Kamau: Court Clerk

**L.GACHERU**

**JUDGE**