



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 281 OF 2013

ROSALINE JEPKOECH SAWE.....PLAINTIFF

VS

ELISHA SAWE.....DEFENDANT

RULING

This suit was instituted by way of plaint in which the plaintiff inter alia seeks orders to have the defendant permanently restrained from dealing with the land parcel Nandi/Kipkarren/ Salient/ 544. The plaintiff also seeks a declaration that she is the lawful owner of the suit land. Contemporaneously with the filing of the suit, the plaintiff filed this application under the provisions of Order 40 Rule 1, seeking that the defendant be restrained by way of an interlocutory injunction from dealing with the suit land pending the hearing and determination of this suit.

The case of the plaintiff is that she is the registered proprietor of the suit land which measures 8.9 hectares after having been awarded the same by her father, one Cheluget. The defendant is her brother. In the month of January 2013, the plaintiff claims that the defendant trespassed into the suit land, ploughed it and cut trees. She has averred that unless the defendant is restrained, she stands to suffer irreparable loss. She has annexed a copy of the certificate of title which shows that she became registered as proprietor on the 14 June 2012.

The defendant filed a statement of defence and a replying affidavit. He has denied that the plaintiff is the registered owner of the suit land and has averred that if at all the plaintiff is the registered owner, then she obtained registration by way of fraud and without the consent of their father. In his replying affidavit, he has averred that their father never transferred the suit land to the plaintiff. He has stated that he has been utilizing the suit land with the blessings of their father. He has further averred that their father had sued the plaintiff in Eldoret HCCC No. 132/06 which seems to have been withdrawn, but the respondent has asserted that it is not true that there was such withdrawal. No counterclaim has been filed.

The application was canvassed before me on 18 September 2013 and Mr. Namiti for the plaintiff urged me to allow the application. He submitted that the suit land was transferred to the plaintiff while their father was still alive and that even the defendant has his own share.

Mr. Tuitoek for the respondent naturally urged me to disallow the application. He pointed to the particulars of fraud pleaded by the defendant and asserted that the plaintiff obtained registration by way of fraud.

I have considered the pleadings, the documents in support and in opposition to the application and the submissions of counsel. In order to sustain an application for injunction, one has to demonstrate a prima facie case with a probability of success and demonstrate that he/she stands to suffer irreparable loss. If the

court is in doubt, then it will decide the application on a balance of convenience. These are the principles that were laid out in the case of ***Giella vs Cassman Brown (1973) EA 358***, to guide the court when faced with an application for injunction. It should also not be lost that the essence of an application for injunction is for the court to make a determination of how best the subject matter of the suit ought to be preserved pending the hearing and determination of the suit.

I can see that the plaintiff holds title to the suit land. Section 26 of the Land Registration Act, Act No. 6 of 2012 protects title and provides that such title is only impeachable if obtained by fraud for which the title holder must be proved to have been a party, or if such title was received illegally, unprocedurally or through a corrupt scheme. The said provision is drafted 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.

The defendant has pleaded fraud and at this stage of the proceedings, I hesitate to make any pronouncements on whether or not the pleadings of fraud are substantiated or not. That is best left to be determined at the hearing of the suit. There is however no counterclaim that attempts to impeach the title of the plaintiff.

I think that given the circumstances of this case, the plaintiff has demonstrated a prima facie case with a probability of success. There is no question that she stands to suffer irreparably and indeed in my view, irreparable loss ought to be readily presumed unless proved otherwise, where land is involved. If I am wrong on this and I have to consider the balance of convenience, I think that in the circumstances of this suit, the balance of convenience lies with the plaintiff.

It is therefore my view, that in the circumstances of this case, the suit land is best left in the hands of the plaintiff pending the hearing and determination of this suit. I therefore allow the application and issue an order of injunction restraining the defendant and his servants/agents from entering, being upon, or in any other way utilizing the land parcel Nandi/Kipkarren Salient/544 pending the hearing and

determination of this suit. The costs of this application shall be costs in the cause.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF OCTOBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. P.N. Namiti present for the plaintiff/applicant

Mr. C.K. Mitei holding brief for M/s D.K. Korir for the defendant/respondent