



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 37 of 2013

ESTHER JEMINDIL KETER..... PLAINTIFF

VS

SALINA JESANG KASI..... DEFENDANT

(Application for injunction; principles to be applied in an application for injunction; defendant registered owner of suit land; plaintiff alleging that defendant obtained registration by way of fraud; previous proceeding in land disputes tribunal not determined for want of jurisdiction; prima facie case; little evidence of fraud; balance of convenience; order of prohibition issued; status quo to be maintained).

RULING

The application before me is that dated 25 January 2013. It is an application filed by the plaintiff and brought inter alia under the provisions of Order 40 Rule 1. It is an application for injunction. The principal prayer sought in this application is drafted as follows :-

That the defendant, her servants, agents and/or any other persons acting under her authority be restrained by way of a temporary injunction from trespassing upon, selling, leasing and/or in any other manner dealing with the plaintiff's land parcel number Nandi KoibarakB/252 measuring 2.04 Ha. or thereabouts situated within Nandi South District of the Republic of Kenya pending hearing and final determination of this suit.

The application is supported by the affidavit of the plaintiff. I must state at this juncture that the defendant has not filed a memorandum of appearance, statement of defence nor a replying affidavit to the application. This does not however mean that I must automatically allow the application. I need to be convinced that the ingredients laid out in the case of ***Giella v Cassman Brown (1973) EA 358*** have been attained by the applicant. First I need to be satisfied that the applicant has established a prima facie case with a probability of success; be alive to the tenet that an injunction will not normally be granted if damages can be an adequate remedy; and finally if in doubt decide the matter on a balance of convenience. To establish whether the plaintiff has established a prima facie case, I inevitably need to make a preliminary finding on the basis of the material that she has placed before me. The starting point has to be her pleadings as laid out in the plaint.

The plaintiff has pleaded that she is the administrator of the estate of Benjamin Kiptanui Keter (deceased). She has pleaded that the deceased was the registered owner of the land parcel Nandi/ Koibarak B/252 (the suit land). She has pleaded that the deceased purchased the suit land in 1966 and the same became registered in his name on 20.7.2004. The plaintiff has pleaded that she and her children have been residing thereon to date. The defendant is daughter in law to the plaintiff, being wife to her deceased son. The plaintiff has pleaded that the defendant fraudulently caused the said land to be

transferred into her name in the year 2006. The particulars of fraud pleaded are three and they are as follows :-

- (a) *Fraudulently transferring the suit land to herself without the plaintiff's knowledge and/or consent.*
- (b) *Secretly and unlawfully forging transfer documents to appear as if the deceased was a signatory to the same.*
- (c) *Attempting to sell the aforesaid parcel of land without the plaintiff's knowledge and/or consent.*

For these reasons the plaintiff has sought orders of a permanent injunction restraining the defendant from dealing with the suit land. She has also sought a cancellation of the registration of the defendant from being the registered owner of the suit land and in its place that she be registered as proprietor.

The supporting affidavit of the plaintiff has attempted to elaborate the plaintiff's claim. She has deponed that the deceased died on 9/3/2012. She took out letters of administration which she has annexed to her affidavit so there is no question that she is the administratrix of the estate of the deceased. She has reiterated that the deceased purchased the suit land in 1966 and later became the registered owner of the same. She has deponed that the defendant fraudulently obtained the title deed to the land sometime in 2006. The deceased then instituted a case at the Aldai Land Disputes Tribunal against the defendant seeking to have her title cancelled. The tribunal, correctly so in my view, held that it did not have jurisdiction in the matter and advised the parties to file their claim at the High Court. The award, if you can call that an award, was filed at the Kapsabet Principal Magistrate's Court and adopted as an order of the court. The defendant herein appears to have sought leave to file a Judicial Review Application to quash the award, but never proceeded to file the substantive motion for judicial review; probably after realizing that there was really no award to quash as no substantive decision had been made by the Tribunal. The plaintiff has further deponed that she is resident in the land parcel and that if the defendant is not restrained, she may sell the same to the detriment of the plaintiff and other beneficiaries of the estate of the deceased.

I have considered the application for injunction. The plaintiff's case is founded on fraud. It is her pleading that the defendant forged transfer documents to obtain the suit land. However, no such transfer documents were displayed in the supporting affidavit of the plaintiff. Indeed, there is not annexed a single document by the plaintiff which is alleged to have been forged. The allegation of forgery is thus a mere statement that is uncorroborated by any form of evidence. This is agricultural land and there is no allegation that the defendant forged any documents of the land control board in order to obtain title. The standard of proof for fraud is higher than the common standard in a civil suit which is a balance of probabilities. I do not see how the plaintiff can succeed in her case without demonstrating exactly what document was forged and bringing forth evidence to elaborate which signature in the said documents are forged.

I am however hesitant to consider the plaintiff's case as hopeless; I would judge it as doubtful. This is because there is some evidence that the deceased had alleged fraud against the defendant by instituting the suit before the land disputes tribunal. It is also a bit strange and unusual for a father in law, in the type of setting that has been demonstrated herein, to transfer land to his daughter in law and bypass his children. Since I am in doubt, I will decide the matter on a balance of convenience. The balance of convenience tilts in having the status quo prevailing on the suit land maintained until this suit is determined. I also have in mind that the purpose of an injunction is to preserve the subject matter of the suit. I feel that the subject matter of the suit will best be preserved if I issue an order of inhibition inhibiting the registration of any further dispositions on the suit land until this suit is finalized. With regard to occupation of the suit land, the status quo currently prevailing should be maintained until this suit is determined.

I therefore issue the following orders :-

- (a) That an order of inhibition do issue inhibiting the registration of any disposition in the subject land parcel Nandi / Koibarak B /252 pending the hearing and determination of this suit.
- (b) That the status quo with regard to occupation do prevail until the final determination of this suit.

It is so ordered.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY 2013.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of :

Miss J.J. Kiplimo advocate of M/s Kigen & Company Advocates for the plaintiff.