



**REPUBLIC OF KENYA**

**ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 580 OF 2014**

**BENJAMIN MAPI OLE PARTIMO..... PLAINTIFF**

**VERSUS**

**NAISENYU PARNGARWA MUTUNKEI..... DEFENDANT**

**RULING**

**The Plaintiff's Application**

The application before this Court for determination is a Notice of Motion dated 16<sup>th</sup> April 2014 filed by the Plaintiff in which he is seeking the following orders:

1. That an injunction be issued restraining the Defendant from trespassing upon, cultivating, constructing upon, charging selling, subdividing, disposing off or in any other manner interfering with the Plaintiff's quiet possession and ownership of Land Reference Number KAJIADO/KAPUTIEI-CENTRAL/1766, pending the hearing and determination of this suit.
2. That pending hearing and determination of this suit the Defendant be ordered to deposit in Court the Original Title Deed to Land Reference Number KAJIADO/KAPUTIEI-CENTRAL/1766 (hereinafter referred to as "the suit property").

The application is supported by an affidavit sworn by the Plaintiff on 16<sup>th</sup> April 2014 and a further affidavit he swore on 4<sup>th</sup> August 2014, wherein he stated that he is the legally registered owner of the suit property, and he attached a copy of his title. Further that he lost and/or misplaced his title deed on or about January 2013, and that he sought help from the Land Registrar of Kajiado Lands Office who advised him to obtain a police abstract to ascertain the loss; swear an affidavit confirming the loss; procure advertisement of the loss of title deed in two (2) national newspapers with wide circulation, and pay the requisite charges for publication in the Kenya Gazette.

The Plaintiff stated that he duly complied with all these requirements and the Gazette Notice was published in the Kenya Gazette issue of 8<sup>th</sup> November 2013. He annexed copies of the advertisements and Kenya Gazette. The Plaintiff further stated that after the expiry of the statutory sixty (60) days he went to Kajiado Lands Office on 8<sup>th</sup> January 2014 to enquire when he would collect his new title deed, and was informed that that the Defendant had attempted to lodge a transfer in the intervening period before the expiry of the Gazette Notice.

The Plaintiff denied ever selling the suit property to the Defendant, or attending the Land Control Board to obtain consent to transfer his land or executing any transfer forms/documents in favour of anybody

whatsoever . He also stated that the Defendant has procured the original title deed to the suit property and that he is apprehensive that she may deal fraudulently, illegally and/or treacherously with it.

### **The Defendant's Response**

The Defendant opposed the Plaintiff's application in a replying affidavit she swore on 5<sup>th</sup> May 2014. The deponent stated that the Plaintiff is her first cousin, and that sometime in the year 2004 she verbally agreed with the Plaintiff that she would give him 3 acres of her land as Kitengela, and that he would in exchange give her 50 acres excised from the suit property. Further, that the Plaintiff gave her the 50 acres whereupon she moved thereon with her family and constructed a homestead. The Defendant also stated that after the Plaintiff obtained the title to the suit property, he gave her the said title to keep until the time she wanted to start the transfer process.

The Defendant further stated that sometime in the month of November 2013 the Plaintiff executed the consent forms, lodged them with the Kajiado Land Control Board and subsequently obtained consent to transfer the land to her. She attached copies of the application for consent and land transfer forms. However, that upon lodging the documents with the land registrar she was informed that the Plaintiff had reported that the title deed to the suit property had gotten lost.

### **The Issues and Submissions**

The Plaintiff's application was canvassed by way of written submissions. Wachira Maina Advocates, the Advocates for the Plaintiff, filed written submissions dated 4<sup>th</sup> August 2014. The Advocates for the Defendant, J. Kamanda and Company Advocates, filed submissions dated 26<sup>th</sup> September 2014. I have carefully read and considered the pleadings and arguments made by the parties herein. The primary issue to be decided is whether the Plaintiff has met the threshold for the grant of the temporary and mandatory injunctions he seeks.

The requirements for the grant of a temporary injunction as stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience. Furthermore, the required threshold for the grant of a mandatory injunction is that an applicant in addition to showing a *prima facie* case, has to show special circumstances that make it a clear case where the matter ought to be decided at once. These requirements were stated by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215** as follows:

**“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

The Plaintiff submitted that he is the registered owner of the suit property and that under the Law of Contract Act all dispositions in land must be in writing, yet the Defendant has not produced any document to corroborate the allegations that the parties herein transacted in, or were involved in an exchange of the suit property. Further, that the Defendant purports to have bought land from the Plaintiff

in 2004, yet the Plaintiff was issued with his title deed on 30<sup>th</sup> December 2009. It was also submitted by the Plaintiff that the Defendant purported to obtain the Land Control Board consent in December 2013, 9 years after the alleged sale. The Plaintiff argued that he had thereby established a *prima facie* case, and was the one likely to suffer irreparable harm if the injunctions sought are not granted.

The Defendant on her part submitted that the Plaintiff has been holding the suit property in trust for her until the transfer to her is effected, and that any registered land is subject to the overriding interests specified in section 28 of the Land Registration Act including trusts. The Plaintiff also relied on section 120 of the Evidence Act to argue that the Plaintiff was estopped from denying the oral agreement they entered into by his conduct of acquiescence to the Defendant moving to the suit property, and that the injunctions orders sought would deprive the Defendant and her family of their home and security as they have no other place to reside in.

I find that the Plaintiff has shown a *prima facie* case for two reasons. Firstly, he is the one who is presently registered as the owner of the suit property, which fact is not disputed. Secondly, the Defendant has not produced any written evidence as required by law of the alleged exchange of the portion of the suit property with her property in Kitengela. Further, she has not provided any evidence of the existence of the said property in Kitengela. I also find that this is a clear case for the mandatory injunction sought of the deposit of the title to the suit property in court to issue for the same reasons. In addition, such deposit of the title will also be necessary to preserve the suit property pending the hearing and determination of the dispute herein.

These findings notwithstanding, I note that the Defendant alleges that she has been living on the suit property, although she did not provide any evidence of the same. Granting the temporary injunction on the terms sought may result in her eviction and it is thus also necessary to preserve her status in this regard.

I accordingly allow the Plaintiff's Notice of Motion dated 16<sup>th</sup> April 2014 on the terms of the following orders:

1. The Defendant by herself, her servants and/or agents be and is hereby restrained from undertaking any further construction upon, charging, selling, subdividing, disposing of or in any other manner alienating the property known as Land Reference Number KAJIADO/KAPUTIEI-CENTRAL/1766 pending the hearing and determination of this suit or until further orders.
2. That pending the hearing and determination of this suit or until further orders, the Defendant is hereby ordered to deposit in Court the original title deed to Land Reference Number KAJIADO/KAPUTIEI-CENTRAL/1766 by availing the same to the custody of the Nairobi Environment and Land Court Deputy Registrar within 15 days of service upon her by the Plaintiff of the orders given herein.
3. The costs of the Plaintiff's Notice of Motion dated 16<sup>th</sup> April 2014 shall be in the cause

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_9<sup>th</sup>\_\_\_\_ day of \_\_\_\_December\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**



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