



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 229 OF 2016

THOMAS MUTUNGA MUTUKU.....PLAINTIFF/APPLICANT

-VERSUS-

DANIEL MDACHI MNENE.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant moved this Court under section 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 1,2 & 3 of the Rules vide his application dated 17th August 2016 seeking orders ;

1. The application be heard exparte in the first instance

2.That pending the hearing and determination of suit a temporary injunction restraining the Defendants himself agents and/or employees from from trespassing, working, selling, leasing, cultivating and or dealing with plot no 1243 phase 1 phase Settlement Scheme Taveta District.

3. That the costs of the application be provided.

2. The application is supported by the 7 grounds listed on the face of it inter alia, that the applicant was allotted the property. Secondly that he is the one in occupation and that the respondent procured registration into his name fraudulently. The application is supported by the affidavit of Thomas Mutunga sworn on 17th August 2016. The Applicant deposes that the 1st Respondent procured registration of the suit plot fraudulently. He attempted to register a caution but the same was rejected with the land registrar's commenting that the allotment letter was not attached and the statutory declaration was also not commissioned. The Applicant deposed that sometimes the defendant visited the disputed plot with hired goons and invaded his crops. He urged the court to grant the orders sought to protect him from suffering loss.

3. The application is opposed by the Respondent who filed a replying affidavit sworn on 22nd September 2016. The Respondent deposes that he acquired the plot lawfully and legally by following due process. That it is the applicant and his father who was engaged in malpractices resulting in his father being charged with the offence of altering documents in criminal case no 88 of 2013. The Respondent denies that the applicant is in occupation and that the applicant has no cause of action as against him. The Respondent deposes that granting the orders sought will unnecessarily encumber him in dealing with his own land. He prayed that the application be dismissed.

4. The advocates on record thereafter filed written submissions. The Applicant submits that he has

established a prima facie case with probability of success because he was the first one to be issued with a letter of allotment on 25th May 2012 and paid the required amount to be issued with a title. That the court should allow parties to ventilate their case in court. To buttress their submissions, they cited the case of **Nguruman Limited vs Jan Bonde Nielsen & 2 Others Civ Appeal no 77 of 2012**. On irreparable loss, the applicant submits that he risks being evicted which will cause him embarrassment, pain & suffering.

5. The Respondent on his part submits that he is the one in occupation of the suit premises. That the applicant's case does not meet the requirements for the grant of interlocutory injunction with any probability of success. In support of the submissions of his case he has cited the case of **VIVO ENERGY KENYA LTD VS MALOBA PETROL STATION & 3 OTHERS**. He also submitted on the issue of proof of fraud which in my view is premature at this interlocutory stage.

6. The principles of granting injunction is well settled both in our case law and in order 40 of the Civil Procedure Rules. The facts of this case are that the respondent is the current registered owner of the suit land. The applicant has come to court to challenge his registration alluding the same was acquired through fraud. The applicant deposed that he is the one in occupation and that the respondent hired goons and invaded his crops. The particulars of the invasion are not stated clearly in the affidavit. The applicant also pleaded that he was issued with a letter of allotment on 25th May 2012 and made the necessary payments so he was only waiting to be issued with a title deed.

7. The offer was valid for a period of 90 days within which time the applicant was to make the payments. I have seen the copy of receipt attached to the list of documents. It is dated 5th April 2013 which is beyond the 90 day period. The applicant's pleadings and documents does not in my view demonstrate that he has a prima facie case because he has not satisfied me that he is in actual possession and when did the Respondent invade his land to make out a case for issuance of orders of temporary injunction. Further the respondent was issued with a title deed in August 2013 and there has been no threat of eviction shown to have been issued to the applicant by the Respondent.

8. The fears of the Applicant are therefore unfounded and or unsubstantiated. It is not always necessary that every suit must be accompanied by an application where the subject matter of the dispute is not in danger of being damaged and or disposed of. This suit was filed three years after the Respondent obtained title in his name and so far nothing has happened that has changed the subject matter. Consequently I do not find any merit in the application. The parties should comply with order 11 forthwith so that the suit is heard on its merits. The application is hereby dismissed with costs to the Respondent.

Ruling Dated & Signed at Mombasa this 21st day of March 2017

A. OMOLLO

JUDGE

And Delivered in Mombasa this 23rd Day of March 2017 by

C. YANO

JUDGE