



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 176 OF 2015

ALOYS NYAMWARO OSORO PLAINTIFF

VERSUS

CHARLES OGOTI ARIGISI 1ST DEFENDANT

THE LAND REGISTRAR (NYAMIRA COUNTY) 2ND DEFENDANT

RULING

1. Before me for determination is the plaintiff's Notice of Motion application dated 9th May 2015. The plaintiff prays interalia for orders:-

1. THAT the defendants, their agents, servants, employees or anybody else be and are hereby restrained, stopped and or prevented from trespassing, transferring, possessing, disturbing, selling, damaging, wasting, alienating or doing any other act on that suit property known as Mwangori Settlement Scheme/628 more specifically a subdivision of Mwangori Settlement Scheme/153 pending the hearing and determination of this suit.

2. That the defendants, their servants, agents or anybody else be and is hereby restrained and/or prevented from committing the breach of control of any kind relating to the suit property pending the hearing and determination of the suit.

2. The plaintiff in support of the application claims to have purchased the suit property from one **Mary Kemunto** (deceased) when her siblings were abroad for studies and states she has been in possession for over 10 years as the bonafide purchaser of the property. The plaintiff avers the 1st defendant to whom the 2nd defendant has unlawfully and illegally issued title is a trespasser and that he on 7th May 2015 caused the properties of the plaintiff to be destroyed. The plaintiff has sworn a supporting affidavit in support of the application dated 9th March 2015. The plaintiff depones that he purchased the parcel of land from his late sister **Mary Kemunto Morara** which land formed part of land parcel **Mwangori Settlement Scheme/153** which was subsequently subdivided into 6 portions on the basis of Land Control Board consent obtained on 4th July 2006.

3. The plaintiff avers that he purchased the land for kshs. 500,000/= and that he occupied and took possession of the parcel of land with the knowledge of all family members and has had uninterrupted possession and occupation until the intrusion by the defendant in March 2015. The plaintiff avers that the family of the late Mary Kemunto have all along been aware of the sale transaction and permitted and allowed the plaintiff's possession and occupation. The plaintiff states he had applied for title to the parcel of land and has been waiting to be issued with title. However the plaintiff states the 1st defendant through

what must have been fraudulent means and connivance with the 2nd defendant obtained registration of the parcel of land in his name on or about 19th November 2014. The plaintiff lodged a caution over the suit property on 22nd April 2015 claiming a purchaser's interest.

4. One **Augustus Omwanza Matara** swore a further supporting affidavit dated 11th May 2015 and deponed that he has since November 2009 been employed by the plaintiff at the suit land and has been in occupation of the land since. He affirmed he has known the family of the late Mary Kemunto Morara being the one who sold the land to his employer. The deponent states that some strange persons started visiting the farm on or about the month of November 2014 and that he later came to learn one of them was the 1st defendant. He states a group of persons on the 7th May 2015 came with a motor vehicle Canter **Reg. No. KAH 876H** and demolished the semi permanent houses and carted away the materials leaving him and his family homeless. The deponent states he informed his employer of the happenings who came to the site on the 10th May 2015 and took the photographs annexed and marked "**AOM1**" depicting the state of the farm following the demolitions.

5. The 1st defendant filed a replying affidavit in opposition to the plaintiff's application sworn on 20th May 2015 and a further replying affidavit sworn on the same date by one **Sandy Morara** from whom the 1st defendant claims to have purchased the suit land. By the replying affidavit the 1st defendant states he purchased land parcel **LR No. Mwangori Settlement Scheme/ 628** from one **Sandy Morara** pursuant to a sale agreement dated 11th November 2014 "**COA1**" for kshs. 5,800,000/= . The 1st defendant avers the parcel of land was transferred to him upon payment to the seller of the sum of kshs. 1,200,000/= being the sum that was payable upon transfer. The parcel of land was transferred to the 1st defendant on 19th November 2014 as per the title deed annexed and marked "**COA2**". In the further replying affidavit Sandy Morara depones that she was registered owner of **LR No. Mwangori Settlement Scheme/628** the same having been transferred to her by her mother, Mary Morara as a beneficiary of the estate of the late George Justus Morara. Sandy Morara admits having entered into the sale agreement dated 11th November 2014 with the 1st defendant for the purchase of the suit land. She denies the plaintiff to be her uncle and or that the plaintiff was in occupation of the suit land and claims that the structures that were pulled down as shown in the pictures annexed to the further affidavit by Augustus Omwanza Matara were hers and she removed them to pave the way for the 1st defendant to take vacant possession of the land.

6. The plaintiff/applicant filed a supplementary affidavit sworn by himself on 5th June 2015 and other affidavits by **Agnes Ondiek** and **Julius Omosa Ototo** siblings of the plaintiff sworn on the same date. The supplementary affidavits reiterate that the plaintiff was the occupant of the parcel of land in November 2014 when the sale to the 1st defendant is alleged to have taken place and on 7th May 2015 when the ejection and demolition of the plaintiff's structures took place. The supplementary affidavits by Agnes Ondiek and Julius Omosa Ototo who were sister and brother respectively of the late Mary Kemunto Morara affirm that indeed the latter sold the parcel of land to the plaintiff and that the plaintiff has been in possession since the 1990s.

7. The 1st defendant swore a further replying affidavit dated 18th June 2015 reiterating that he validly purchased the land from the duly registered owner, one Sandy Morara and that his title is indefeasible.

8. The parties canvassed the application dated 9th May 2015 by way of written submissions. The plaintiff/applicant's written submissions dated 24th June 2015 were filed on 1st July 2015 while the 1st defendant submissions dated 9th July 2015 were filed on the same date. I have reviewed the pleadings, the notice of motion application and the affidavits in support and in opposition and the annexures thereto and the submissions by the parties. In considering the plaintiff's application, I have to ask myself whether on the basis of all the material placed before the court whether the plaintiff has made out a case for grant of a temporary injunction. In other words, has the plaintiff satisfied the threshold for grant of temporary injunction as established in the case of **Giella -vs- Cassman Brown & Co. Ltd [1973] EA** which the courts in this county have routinely followed when considering applications for injunction?

9. An applicant for a temporary injunction must show he/she has a prima facie case with a probability of success. Secondly, he/she must show that he stands to suffer irreparable damage which cannot be compensated in damages unless the injunction is granted. And if the court has any doubt in regard to the stated conditions the court may determine the application on consideration of the balance of convenience having regard to all the circumstances.

10. On the basis of the material availed to the court there is no doubt that Mary Kemunto Morara was the registered proprietor of land title **Mwongori Settlement Scheme/628**. The abstract of title annexed to the 1st defendant's further replying affidavit shows that Mary Kemunto Morara was registered proprietor of the property on 10th May 2007 and that the property was a subdivision of Plot No. No. 153. The copy of the land control board minutes of the meeting held on 4th July 2006 annexed to the plaintiff's supporting affidavit – **Min. No. 69/2006 – Mwongori/153** and which states:

“Application made by Mary Kemunto Morara to subdivide her plot of 31.4ha into six portions of 2.02ha, 2.02ha, 8.09ha, 8.09ha, 4.85ha and 6.33ha was approved”

shows the origin of the suit property. Both Agnes Ondieki and Julius Omosa Ototo who are sister and brother of the late Mary Kemunto Morara respectively confirm from their affidavits that their late sister sold the suit land to the plaintiff in the 1990's and that the plaintiff has occupied the land since then. It is apparent the suit land was hived out of Plot No. 153 Mwongori and the subdivision approval vide the land control board meeting minutes referred to above must have related to the subject land. On the evidence on record and particularly having regard to the statements of Justus Omwanza Matara the employee of the plaintiff and the averments by Agnes Ondieki and Julius Omosa Ototo there is credible evidence that the plaintiff was in occupation of the suit property on 7th May 2015 and had been for a long period before then.

11. The 1st defendant alleges to have purchased the suit land vide the agreement for sale dated 11th November 2015 from one Sandy Morara who is said to have been the registered owner of the parcel of land for kshs. 5,800,000/=. Under the terms of the agreement for sale kshs. 2,100,000/= is said to have been paid on execution of the agreement; kshs. 1,000,000/= was payable on or before 21st November 2014; kshs. 1,500,000/= was to be paid on or before 20th December, 2014; and the final balance of kshs. 1,000,000/= was to be paid to the vendor upon transfer. There is no demonstration how the sums aforementioned were paid but a transfer is said to have been effected in favour of the 1st defendant on 19th November 2014 and a title deed issued in favour of the 1st defendant on the same date. Although this is property falling under the provisions of the **Land Control Act**, Cap 302 Laws of Kenya there is no demonstration that the consent of the land board was sought and procured before the transfer was registered.

12. While it is agreed that Mary Kemunto Morara is deceased and the record (abstract of title) shows that she was registered as owner of the suit property on 10th May 2007 no evidence of when she died has been adduced. Sandy Morara in her affidavit paragraph 3 depones thus:-

1. That I was initially the registered owner of LR No. Mwongori Settlement Scheme/628, transferred to myself by my deceased mother, Mary Morara as one of the beneficiaries to the estate of the late George Justus Morara.”

The abstract of title as indicated earlier shows Mary Kemunto Morara was registered as owner of the suit property on 10th May 2007. Sandy Morara is shown to have been registered as owner on 11th November 2014 the same date she entered the agreement with the 1st defendant. There are questions that beg answers in this matter. For instance when did Mary Kemunto Morara die? How did she transfer the suit land to Sandy Morara? Did she execute a transfer in favour of Sandy Morara or was there a succession cause? These are pertinent questions whose answers are critical to the determination of this suit. The plaintiff has claimed there was fraud in the manner the transfer to the 1st defendant was effected. Having evaluated all the evidence and material placed before the court, I am satisfied the plaintiff's suit is not

frivolous or vexatious and that he has an arguable case. Under Sections 25 and 28 of the **Land Registration Act, 2012** rights of occupation or rights in the process of being acquired through adverse possession are recognized as overriding rights that do not require noting in the register. There is credible evidence that the plaintiff was in occupation and possession of the suit land for a long period going back to 1990's and may have occupation rights deserving protection under the law.

13. In the circumstances of this matter I am satisfied the plaintiff deserves an order of injunction that will preserve and conserve the suit property until the suit is heard and determined. I accordingly grant an injunction in favour of the plaintiff in terms of prayer (3) of the Notice of Motion. I further direct that the parties complete all the pretrial preparations within the next 45 days from the date of this ruling and thereafter fix the suit for pretrial directions.

14. I order that the costs of the application be in the cause.

Ruling dated, signed and delivered at Kisii this 12th day of February, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st defendant

..... for the 2nd defendant

J. M. MUTUNGI

JUDGE