



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

ENVIRONMENT & LAND CASE NO 102 OF 2014

BENSON KATAMA CHUMAPLAINTIFF/APPLICANT

VERSUS

MAWENI "A" UMOJA SELF HELP GROUP & 6 OTHERS....DEFENDANTS/RESPONDENTS

RULING

1. The notice of motion application dated 7th May 2014 is premised under order 40051 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. In it the plaintiff/applicant seeks;

1. Spent

2. That the honourable court be pleased to grant an order of injunction restraining the 1st -5th defendants ,their servants or agents from utilizing, subdividing, alienating ,harassing and in anyway interfering with the applicant's possession and lawful enjoyment of half (1/2) acre plot situated within plot no 4745/111/MN,4746/111/MN or title no CR 47738 at Maweni area pending the hearing and determination of the suit.

2. The application is supported by the grounds listed on the face of it and on the affidavit of the applicant. Brief summary of the applicant's case is that he purchased this half acre plot from the 5th defendant in February 2000.He built on the portion and started living there. He deposed that he has lived peacefully until 2006 when a group named Maweni A Umoja ni Nguvu Self Help group [1st defendant] came and made claims that they owned the land and demanded that the applicant buys the plot from them.

3. The applicant continued that on 27th March 2014, the 1st – 4th defendant through a private surveyor came to subdivide the suit property. Despite his protests, they continued with the work. He deposed that the 1st defendant has continually harassed him by claiming to own the land and unless the court grants an injunction and order of production and revocation of the said titles no's 4745/111/MN and 4746/111/MN, the plaintiff stands to suffer loss and damage.

4. The application is opposed by the 1st -4th defendants who have entered appearance and filed a replying affidavit through the 4th defendant. The 4th defendant avers that the 1st defendant is the registered owner of the suit land. He deposed that the plaintiffs erected his structure as a squatter and not as a bonafide owner as he claims. He deposed further that the applicant was aware of several meetings held with squatters and the local administration towards negotiation to purchase the land and contributions towards its purchase price. The plaintiff was requested to pay his share but he refused. Lastly that the property has been subdivided and distributed between the members of the 1st defendant and the applicant has no interest in the property that can be enforced through these proceedings.

5. The plaintiff put in written submission while the 1st -4th respondents offered oral submissions. The plaintiff submitted that he has established a prima facie case with a probability of succeeding. While justifying this, the plaintiff questioned the title document submitting that he bought the land before the 1-4th defendants and that the 5th defendant has denied transferring the property to the 1st defendant. The applicant even questioned the authenticity of the transfer documents and asked the court to revoke the title under article 40(6) of the Constitution.

6. On irreparable loss, the applicant submitted that the defendant has trespassed on the applicant's plot by bringing a surveyor with intention to sub-divide and sell to outsiders. He relied on the case of **Maingi Mutisya VS Mbuki Kisari NBI CACA NO 97 of 2004 and Gitwany Investments LTD VS Tajmal Limited & 3 others (2006) eKLR** to support the prayers sought.

7. The 1st – 4th defendant on their part submitted that the transaction sought to be enforced is illegal as the land being agricultural land, no relevant L.C.B consent was obtained. The 2nd – 4th defendants submit there is no case against them. It is also submitted that the application is vague as regards the subject matter. Lastly that 1st defendant is not a legal person and therefore the suit against it is a non-starter. The 1st – 4th defendants state there is no prima facie case established hence the application should be dismissed.

8. The principles for granting injunction are well settled in our jurisprudence i.e an applicant must

- i] Establish a prima facie case with a probability of success.
- ii] Irreparable loss will be suffered that cannot be compensated in damages.
- iii] If in doubt, balance of convenience tilts in his favour.

9. In the instant case before me, the applicant admits the 1st defendant is currently the registered owner of the suit property. The 2nd - 4th defendants also admit the applicant has a structure on the land except they treat him as a squatter. Under sec 24 and 25 of the Land Registration Act, registration confers on proprietor all rights and interests to exclusively occupy and use the land subject to only exceptions under section 28 of the same Act. These rights/ interests can only be challenged when there is proof of fraud under section 26. I have perused the plaint as filed and nowhere in the pleadings is there any allegation of fraud against any of the defendants.

10. The applicant attempted to raise the allegations of fraud through submissions which is not permitted in law. He did not raise issue of fraud either on the grounds on the face of the application or the affidavit in support. In the absence of such pleadings, I don't see how he can confidently state he has a prima facie case against a title holder.

11. There is no evidence of threatened eviction by any of the defendants issued against the plaintiffs. There is no evidence of survey undertaken on the plaintiff's portion. This court has also not been satisfied that there is intention of sale of the suit portion to any 3rd parties by any of the defendants. The mere visit by a surveyor to carry out a subdivision in my view cannot result into irreparable loss. Probably the exercise could help the applicant ascertain his boundaries and get title for his portion. The heading of irreparable loss is also not proved. The cases referred to by the applicant were final judgments and therefore they do not assist the applicant at this interlocutory stage.

12. The last aspect is the principle of balance of convenience. The defendants have not stated that the plaintiff's presence on the land is causing them or their membership any inconvenience. Instead they deposed that they even offered the plaintiff an opportunity to purchase this portion. Having admitted the plaintiff's presence on the suit land it is only justiciable to maintain the status quo to give the plaintiff an opportunity to present his case. On this account, I will allow prayer 2 of the motion. The cost of the motion is awarded to the 1st to 4th defendants.

Ruling Dated and Delivered in Mombasa this 12th day of February 2016

A. OMOLLO

JUDGE