



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC SUIT NO. 20 OF 2015

GABRIEL NYAGA NTHUMBI.....PLAINTIFF

VERSUS

JAMES NGARI MUTURI.....DEFENDANT

RULING

This is in respect to the defendant's Notice of Motion dated 27th January 2016 brought under **Section 1A, 1B 3A and 63 (e) of the Civil Procedure Act, Section 68 of the Land Registration Act, Order 51 Rule 1 of the Civil Procedure Rules and Articles 40 and 159 of the Constitution** of Kenya seeking the following orders:-

1. *Spent*

2. *Spent*

3. *That pending the hearing and determination of this suit or until further Court orders, an inhibition be issued inhibiting the registration of any dealing with land parcels No. L.R NTHAWA/RIANDU/4701, NTHAWA/RIANDU/4702, NTHAWA/RIANDU/4703 and NTHAWA/RIANDU/4704 and the District Land Registrar Siakago be directed to register the said inhibition against the aforesaid parcels of land.*

4. *That costs of this application be provided for.*

The application is premised on the grounds set out therein and supported by the supporting affidavit of the defendant **JAMES NGARI MUTURI**. His case is that the above mentioned parcels of land (the suit land) were a resultant sub-division of land parcel No. NTHAWA/RIANDU/293 which belonged to the plaintiff's father one **NTHUMBI KARIYU** (deceased) who had sold three (3) acres to the defendant and who has been in occupation of the said three (3) acres since 1981 having developed the same and which is where he resides with his family. That a dispute involving the suit land had been determined by the Siakago Land Disputes Tribunal which ordered that three (3) acres be registered in the defendant's names. However, the plaintiff is in the process of transferring the suit land to third parties hence this application.

In opposing the application, the plaintiff **GABRIEL NYAGA NTHUMBI** has filed a replying affidavit in which he has deponed, inter alia, that he is the proprietor of the suit land and the defendant has no interest in it whatsoever and has not even filed a counter-claim to the plaintiff's suit seeking inter alia, a declaration that the decision/award of the Siakago Land Disputes Tribunal in Case No. 22 of 1997

ordering the transfer of three (3) acres out of parcel No. MBEERE.RIANDU/293 be quashed and also an order restraining the defendant from interfering with the said land. The plaintiff deponed further that he never sold any land to the defendant and is not liable to any agreement that the defendant may have entered into with the plaintiff's deceased father.

In a further supporting affidavit, the defendant deponed that he has an interest in the suit land from which he bought three (3) acres from the plaintiff's late father and which was ordered by the Siakago Land Disputes Tribunal to be set aside.

I have considered the application, the rival affidavits and annexures thereto and the submissions by Mr. Gitonga advocate for the defendant and Mr. Muyodi advocate for the plaintiff.

The genesis of this application is the plaint by the plaintiff seeking the orders mentioned above. That plaint was resisted by the defendant who filed a defence in which he pleaded that he is lawfully utilizing three (3) acres out of land parcel No. NTHAWA/RIANDU/293 having bought the same from the plaintiff's late father. The defendant further pleaded that this suit is in-competent as the plaintiff cannot challenge the decision of the Siakago Land Disputes Tribunal by plaint but can only do so through Judicial Review and in any case, this suit is statute barred. No counter-claim was pleaded by the defendant and this has prompted counsel for the plaintiff Mr. Muyodi to submit that the decision of the Siakago Land Disputes Tribunal ordering that three (3) acres of parcel No. NTHAWA/RIANDU/293 be sub-divided and three (3) acres be transferred to the defendant is ultra vires and further, the defendant has no claim to the suit land since he has not filed any counter-claim and is only a trespasser.

Mr. Gitonga for the defendant has submitted that the orders of the Siakago Land Disputes Tribunal have not been set aside and the defendant has an interest in the suit land having bought three (3) acres from the plaintiff's late father and which is where he resides and he will therefore suffer substantial and irreparable loss if the suit land is transferred to third parties.

The following are not really in dispute:-

- 1. That the plaintiff is the registered proprietor of the suit land.**
- 3. That the defendant is in occupation of three (3) acres out of the said land since 1981 having purchased it from plaintiff's late father.**
- 3. That the Siakago Land Disputes Tribunal ordered that three (3) acres be transferred to the defendant.**
- 4. That decision of the Siakago Land Disputes Tribunal is the subject of this suit in which the plaintiff seeks the quashing of the decision to transfer three (3) acres to the defendant.**

Section 68 (1) of the Land Registration Act 2012 grants the Court power to inhibit dealings in registered land. It states:-

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”

An order of inhibition is similar to an injunction as it seeks to preserve the property in dispute and in considering whether or not to grant it, the Court will take into account:-

- 1. Whether the applicant has good grounds for the grant of the same.**
- 2. Whether the property in dispute is at risk of being alienated or transferred to the detriment of the applicant.**

3. Whether failure to grant the application will render the suit nugatory.

4. What prejudice will be caused to the other party?

5. The conduct of the parties.

The defendant is currently in occupation of part of the land since 1981 having bought three (3) acres from the plaintiff's late father and following the Siakago Land Disputes Tribunal's decision that the portion he occupies be transferred to him. That decision is being challenged in this suit and before it is quashed, it binds the parties and must be respected. The plaintiff has not rebutted the defendant's averments that he (plaintiff) has sub-divided the suit land with the intention of selling it to third parties. Therefore, the suit land is at risk of being alienated to other parties before this suit is determined. That would effectively destroy the substratum of the whole suit. Whether or not the defendant has a valid claim to the suit land is a matter for the trial Court. What is crucial for now though is that he has not filed any counter-claim to the plaintiff's suit in which he can prosecute any claim he may have on the suit land. However, this Court is alive to the fact that there is a wide discretion granted to the Court to amend pleadings as and when necessary and since the defendant's occupation of part of the suit land is not in dispute, a greater injustice would be caused if the suit land was alienated before whatever interest he has in it is considered and determined by this Court. Looking also at the conduct of the defendant, he cannot be described as a trespasser on the suit land. He is there on the basis of a transaction involving him and the plaintiff's late father which has been protected by a Tribunal whose decision is yet to be quashed. I do not see what possible prejudice will be caused to the plaintiff if the order sought is granted.

Having considered all the above, I am satisfied that the defendant is deserving of the order of inhibition inhibiting the registration of any dealing with land parcels No. NTHAWA/RIANDU/4701, 4702, 4703 and 4704 pending the hearing and determination of this suit. The Land Registrar Siakago is directed to register the said inhibition against the said parcels of land.

B.N. OLAO

JUDGE

13TH MAY, 2016

Ruling delivered, dated and signed in open Court this 13th day of May 2016.

Mr. Muyodi for Plaintiff/Respondent present

Mr. Ithiga for Mr. Gitonga for Defendant/Applicant present.

B.N. OLAO

JUDGE

13TH MAY, 2016