



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO 467 OF 2015

DIAKEN INVESTMENT CO. LTD.....APPLICANT/ PLAINTIFF

VERSUS

FRANCIS NDIKIRU MUIKIA.....1ST RESPONDENT/DEFENDANT

CHEGE MUIKIA.....2ND RESPONDENT/DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 28th May 2015 brought under **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010 and section 3A of the Civil Procedure Act** seeking for orders that a temporary injunction be issued against the Defendants restraining them from entering or trespassing, erecting structures, dumping building materials, destroying the chain link fence, uprooting blue gum poles and all crops planted on or interfering with the Plaintiff's quiet possession, occupation, absolute proprietorship and legal ownership of the parcel of land identified as Karai/Gikambura/3636 (hereinafter referred to as the "suit property") pending the hearing and determination of this suit. The Plaintiff has also sought to have the O.C.S Kikuyu Police station be ordered to supervise compliance of this order.

This Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Michael Mungai Macharia sworn on 28th May 2015 in which he averred that he is a director of the Plaintiff/Applicant. He averred that he purchased the suit property at a cost of Kshs 2.8 million from the previous registered owner, Peter Kihiko Njunge, on 21st May 2012, proceeded to Kikuyu Land Control Board and obtained the consent to transfer and got the requisite documents which it lodged at Kiambu Land Registry. He further averred that the Plaintiff is now the registered owner of the suit property and produced a copy of the title deed issued on 28th May 2012 as proof of this assertion. He also annexed a copy of the previous registered owner Peter Kihiko Njunge. He further averred that on 3rd April 2015, 4th April 2015, 11th May 2015 and 18th May 2015, the Defendants repeatedly trespassed, entered upon and interfered with the suit property by maliciously destroying the perimeter chain link, uprooted blue gum posts, slashed bananas crops and brought gangs on the suit property and have threatened to forcefully erect permanent structures thereon which will interfere with the Plaintiff's quiet possession, use, occupation and absolute proprietorship of its land. He further averred that on 17th February 2015, his advocates served the Defendants a warning against trespassing on the suit property which they have not complied with. He stated that unless the Defendants are restrained from violent illegal and unlawful

trespass on the suit property, it will suffer dispossession of its parcel of land therefore a temporary injunction is the most appropriate remedy pending the full hearing of this suit.

This Application is contested. Francis Muikia Ndambo, the 1st Defendant/Respondent, filed his Replying Affidavit sworn on 15th June 2015 in which he averred that he was in occupation of one acre of land being part of Karai/Gikambura/53, having provided the funds to his late wife, Elizabeth Wairimu Muikia, to purchase the same. He averred that his wife entered into a sale agreement with Mugaa Mwhoko on 18th December 2008 to purchase 0.5 acres being his portion of land hived off Karai/Gikambura/53 and paid Kshs. 1,150,000/= as consideration therefor. He further averred that in 2011, she entered into another sale agreement with Peter Kihiko Njunge to purchase his portion of land hived out of Karai/Gikambura/53. The 1st Defendant exhibited the sale agreements and copies of receipts of payments of the consideration. He further stated that the parties agreed to include his wife's name as a beneficiary in **Succession Cause No. 64 of 2006** Estate of Mary Nyakio Njunge which had been filed by Mugaa Mwhoko and which they consented to in Limuru Law Courts in order to enable them realize their respective shares in the land which was held under their deceased mother's name. He further stated that the title deed to the suit property was deposited at PCEA Kikuyu Hospital to secure hospital bills incurred by the late Mary Nyakio Njunge. He further stated that because he wanted to have the title deed surrendered to the Land Registrar, Kiambu for purposes of subdivision and distribution according to the agreed mode, he sent money to his wife in order to clear the hospital bills and is now in possession of the original title deed to Karai/Gikambura/53. He further averred that one of the beneficiaries to that estate, namely David Mukirae Njunge, who was a signatory to the consent at the Limuru Succession Cause proceeded to take out succession proceeding at the High Court in Nairobi without including his wife and when she objected the court stated that her proceedings were peremptory. He added that the outcome of that succession cause was that Mugaa Mwhoko sold his portion now Karai/Gikambura/3637 to one Anne Gathoni Kairu and Peter Kihiko Njunge also allegedly sold his portion now the suit property to the Plaintiff, all in complete disregard of his wife's interest in the suit property. He also disclosed that he further learnt that David Mukirae Njunge had allegedly informed Kiambu District Land Registrar and the High Court that the title deed for Karai/Gikambura/53 was lost to enable him fraudulently obtain a duplicate for purposes of the succession cause and subsequent subdivision. He added that because of these developments, his wife filed a suit being **ELC No. 1450 of 2014 Elizabeth Muikia –vs.- Mugaa Mwhoko, Peter Kihiko Njunge, Diaken Investments Co. Ltd and Ann Gathoni Kairu**, which is pending hearing. He denied trespassing onto the suit property as he has been in occupation since the year 2008. He stated that the Plaintiff has never been in occupation of the suit property and the truth is that the Plaintiff hired goons with an intention to evict him from the suit property but they were repelled by the villagers. He stated further that in the best interest of justice, the situation on the ground should be maintained pending hearing and determination of this suit together with the earlier suit filed by his late wife.

In reply to the 1st Defendants averments, the Plaintiff filed a Supplementary Affidavit sworn on 25th September 2015 in which he averred that in view of the admissions by the Defendants that the transactions the late Elizabeth Muikia entered into with the two beneficiaries over their portions of their deceased mother's original land which was still registered under her names and before distribution by a competent succession court clearly shows these were illegal transactions and intermeddling with the deceased property under section 45 of the Law of Succession. He further stated that the Plaintiff/Applicant is the bonfide purchaser and the registered owner of the suit property as evidenced by its title dated 28th May 2012 hence the Defendants and their deceased's wife/mother have no valid legal interest capable of defeating their title.

I have considered the submissions that were filed by the parties and the cases that were cited in their support.

The issue arising for my determination is whether or not to issue the temporary sought after by the Plaintiff/Applicant. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must warn the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

With that background laid down, I adopt the position that the suit property is a part of the parcel of land known as Karai/Gikambura/53. This position was put forward by the 1st Defendant/Respondent but was not challenged by the Plaintiff/Applicant by way of a further affidavit or otherwise. I will therefore take this to be the factual position on the ground. That being the case, the Plaintiff/Applicant’s claim of ownership to the suit property is based on the copy of title deed issued on 28th May 2012, which it produced. On the other hand, the 1st Defendant/Respondent has challenged the validity of that title deed on the argument that his late wife, Elizabeth Wairimu Muikia, entered into sale agreements with the beneficiaries namely Peter Kihiko Njunge and Mugaa Mwhoko way back in the year 2008 and 2011 for the purchase of the suit property well before the Plaintiff came into the scene. Mr. Michael Macharia asserted that he even holds the original title deed for the larger parcel of land Karai/Gikambura/53 in his custody. The law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1) of the Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

In this particular case, the validity of the Plaintiff/Applicant’s title deed has been challenged on the grounds of fraud and illegality. The Defendants have not been able to demonstrate whether or not the Plaintiff/Applicant was a party to such fraud. To that extent therefore, I find that the Plaintiff/Applicant has established a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where

it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

Further, land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's right of ownership over the suit property.

In whose favour does the balance of convenience tilt? In the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the court had this to say:

“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted.”

In this particular suit, the party in possession of the suit property is not clear. The Defendants insist that they are the parties in possession since the year 2008 whilst the Plaintiff/Applicant, which has a title over the suit property issued to them four years later in 2012, all claim to be in possession of the suit property. My finding is that the Defendants/Respondents are the ones in possession at the moment, having entered the land in the year 2008. That being the case, I am of the view that the balance of convenience dictates that the party in possession at this time, namely the Defendants/Respondents do continue to remain in possession without interference from the Plaintiff/Applicant until this suit is heard and determined.

The costs of this Application shall be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH
DAY OF AUGUST 2016.**

MARY M. GITUMBI

JUDGE