



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND DIVISION
MILIMANI LAW COURTS
E L C SUIT NO. 184 OF 2015

PETER MAINA WAWERU.....PLAINTIFF/APPLICANT

=VERSUS=

EXTROPICA FOOD LIMITED1ST DEFENDANT/RESPONDENT

WILLIAM ATATI ANGASA.....2ND DEFENDANT/RESPONDENT

LINDA KAARI MUCHUNKU.....3RD DEFENDANT/RESPONDENT

THE NATIONAL LAND COMMISSION.....4TH DEFENDANT/RESPONDENT

THE CHIEF LAND REGISTRAR5TH DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL..... 6TH DEFENDANT/RESPONDENT

RULING:

This is a Notice of Motion application brought by the Plaintiff/Applicant herein ***Peter Maina Waweru***, which is brought under ***Section 3A of the Civil Procedure Act Cap 21, Order 51 Rule 1, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules*** and all other enabling provisions of the Law. The applicant has sought for these orders against the Defendants/Respondents;-

- 1. The Court be pleased to grant an injunction restraining the 1st, 2nd and 3rd Respondents whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property, being land Reference number 14719 Nairobi (Grant Number I.R No.69908) the suit premises), pending the hearing and determination of this suit.***
- 2. The Officer Commanding Embakasi Police Station do enforce compliance of the orders above.***
- 3. The costs of this suit be in the cause.***
- 4. The Honourable Court be pleased to make such further or other orders as it may seem just***

and expedient in the circumstances of this case.

The application is predicated upon the grounds stated on the face of the application and on the Supporting Affidavit of **Peter Maina Waweru**. These grounds are:-

- 1. That the Plaintiff/Applicant is the legal owner of the parcel of land known as Land Reference Number 14719 Nairobi (Grant Number I.R No. 69908).**
- 2. That the 1st, 2nd, 3rd Defendants/Respondents have interfered with the Plaintiff/Applicants said property by trespassing thereupon and erecting a perimeter wall, buildings, and other structures.**
- 3. That unless restrained by injunction the 1st, 2nd and 3rd Defendants /Respondents would continue to interfere and build erect permanent structures on the suit premises thereby causing the Plaintiff/Applicant irreparable loss and damages.**

In the Supporting Affidavit of **Peter Maina Waweru**, averred that he was the lawful registered proprietor of the piece of land known as **LR No.14719 , Nairobi (Grant Number I.R No.69908)** hereinafter referred to as (“the suit property”).Further that while on a routine visit to check on the status and security of the suit property on 2012, he discovered that someone had encroached and interfered with the property and that the beacons had been removed. He therefore engaged a licensed land Surveyor to replace them. He also averred that on the **26th February 2013**, he placed a Caveat Emptor Notice with regard to the suit premises in the Daily Nation Newspaper of that date warning that no other person other than himself had an interest or right in and to the suit premises. It was his further averment that on or about **June 2013**, he discovered that the 1st Defendant /Respondent had illegally and unlawfully entered into and occupied the suit premises without his consent and had further proceeded to dig trenches and erect a perimeter wall around the suit premises thus interfering with and infringing on his legal rights and interest in the suit premises.

He contended that he reported the matter of encroachment into the suit premises by the 1st Defendant to the Embakasi Police Station and recorded a statement on **27th August 2013**. Further that on **7th April 2014**, he complained to the City Planning Department of Nairobi City Council (now Nairobi City County) on the issuance of approval of drawings presented to the authority by the 1st , 2nd and 3rd Defendants/Respondents under **CPF .AC-059**.

He also alleged that it came to his knowledge that the 4th Defendant/Respondent had illegally, fraudulently, and or negligently issued to the 1st Defendant/Respondent an illegal title to the suit premises. He further alleged that it also came to his knowledge that the 5th Defendant had on **4th December 2012**, illegally and unlawfully registered a **Grant Number I R 131436**. He therefore contended that if the 1st and 2nd Defendants/ Respondents were not restrained from entering onto the said suit property, developing, constructing or in any other manner interfering with his quiet occupation of the said suit property, he would suffer irreparable loss and damage. He contended that it was only fair and just and in the interest of justice that an order of injunction be issued to restrain the 1st and 2nd and 3rd Defendants/Respondents, their employees, servants and/or agents from trespassing on the suit premises forthwith and putting up or erecting thereon structures or buildings pending the hearing and determination of the suit herein. He therefore urged the court to allow his application.

The Notice of Motion is contested and **William Atati Angasa**, the 2nd Defendant/Respondent herein swore a Replying Affidavit and averred that he had been advised by his Advocates on record which advise he verily believed to be true, that the Application as drawn and filed was unprocedural, without merit and an abuse of the court process and the same ought to be dismissed with costs. He further averred that he is the registered proprietor of Land title, **LR No.14719 9 (Grant Number I.R 131436)** having been issued with the allotment letter of the same dated **3rd June 1999**, and payment receipt dated **24th August 1999**. (**Grant I.R 131436**) as per annexure “**WAA1**”.

He also averred that he has been in possession of the suit land throughout the material time and took occupation thereof for purposes of development upon securing all the necessary approvals and licenses from the defunct Nairobi City Council as per annexure “ **WAA2**”. He alleged that he was a stranger to the applicant’s allegations and further averred that he had at all times been in an exclusive possession of the land as he had all along been remitting and/or paying land rent and rates as per annexure “ **WAA3**”.

He contended that his possession, proprietorship and occupation of the land was as **bona fide** registered leasehold therefore the applicant has failed to establish any prima facie rights without which would be superior to his rights as the registered owner of the land. Further that cost would not be sufficient compensation to him as the Applicant’s claim is illegal and he seeks to deny him the rightful use and enjoyment of his property noting that he had already constructed on the property. And in any event, one would wonder why the applicant was too slow to react to the developments until this year from 2013, if truly the property belonged to him. He urged the Court to dismiss the Plaintiff’s application with costs.

The applicant filed a further affidavit and denied the contents of 2nd Respondent’s Affidavit. He averred that he does question the alleged proprietorship by the 2nd Defendant/Respondents right and interest to L R Number 14719 (**Grant Number I.R 131436**). He further averred that under the law, the alleged proprietorship of the 1st or 2nd Defendant/Respondent’s which purportedly commenced in 1999 could not defeat or even challenge the bona fide ownership of the Plaintiff/Applicant which commenced way before then on the 1st June 1994.

He also alleged that the 1st and 2nd Respondents merely encroached on the land upon successfully forging and/or obtaining a fake title document. This invalid title documents could not be used to claim rights over the Plaintiff/Applicant’s, suit property. The plaintiff/Applicant further alleged that the documents attached to the said affidavit and marked “**WAA2**” do not support the allegation that the 2nd Defendant/Respondent has been in possession of the land. Further that the 1st, 2nd and 3rd Defendants had failed to prove ownership of the suit property. The 1st, 2nd and 3rd Defendants/Respondents’ purported (**Grant Number I R 131436**) was fake , invalid and acquired through corruption , having been acquired at a later date to that of the Plaintiff/Applicant. It was his contention that costs would not be sufficient to the Plaintiff/Applicant as that stage and hence an injunction was desired as prayed under paragraph 2 and 3 of the Plaintiff/ the Applicant’s application dated **4th March, 2015**. Further that the Plaintiff/Applicant’s claim was legal, and sought to allow the Plaintiff/Applicant to enjoy his rights to the suit property. The Plaintiff/Applicant averred that he was not slow in reacting to the encroachment of his land, but instead gave time to the Embakasi Police Station and the City Planning Department of Nairobi County Government to investigate his case and complaint, to which no solution was given. That necessitated the Plaintiff/Applicant’s Application dated **4th March 2015**.

The application was canvassed by way of written submissions and the Law Firm of **Maina Wachira & Co. Advocates** for the Plaintiff filed their submissions on **20th January 2016** , whereas the Law Firm of **Anya Kalwa & Co. Advocates** for the 1st , 2nd and 3rd Defendants/Respondents filed their written submissions on **12th July 2016**. The 4th, 5th and 6th Defendants did enter appearance on **15th April 2015**, but they did not file their Replying Affidavit in opposition to the instant Notice of Motion.

The Court has carefully considered the instant Notice of Motion , the pleadings in general, the annexures thereto, the relevant laws and the written submissions and the court makes these findings ;-

The applicant herein is enjoying Interim Orders which were issued on **4th March 2015**, restraining the 1st, 2nd, 3rd Respondents whether by **themselves, their agents, and/or servants from trespassing on, wasting, constructing on, alienating or, otherwise interfering**, or dealing with the Plaintiff’s property **LR NO. 14719, (Grant No.69908 Nairobi** suit property). The Plaintiff/Applicant has sought for confirmation of the above prayers. The 1st, 2nd and 3rd Respondents have vehemently opposed the said confirmation and seek for dismissal of the Plaintiff /applicant’s application dated **4th March 2015**.

The Court is now called upon to determine whether to confirm the said prayer or to dismiss the instant application. For determination of the application herein, the court will be guided by the principles laid down in the case of **Giella Vs Cassman Brown & Co.Ltd 1973 EA 358.**

These principles are:-

- a) The applicant must establish that he has a prima facie case with probability of success.*
- b) That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.*
- c) When the court is in doubt, to decide the case on a balance of convenience.*

These principles have been repeated in various other judicial pronouncements. See the case of **Kibutiri Vs Kenya Shell, Nairobi High Court Civil Case no. 3398 of 1980 (1981KLR,** where the court held that: -

“The conditions for granting a temporary injunction in East Africa are well known and these are;-First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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.”

The applicant has to establish that he has a prima facie case, which was described in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125 as.**

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

For the applicant to establish that he has a prima facie case, the available evidence should not only point to an arguable case, but it must also show that his right has been infringed.

From the available evidence, the suit property is **LR No. 14719** which has two Grants. I say so because applicant title is **LR No. 14719 Grant No. I.R No. 69908**, whereas the 1st Defendant title is **LR No. 14719 Grant No. I.R 131436**. There is no doubt that there are two title deeds for this specific suit property in the names of two different entities, the plaintiff, and the 1st Defendant. The plaintiff/Applicant's title was issued on **1st June 1994**, to one **Michael Maina of Box No. 5334, Nairobi** and later transferred to **Peter Maina Waweru** the Plaintiff herein on **20th June 2001**, as exchange. The Deed Plan for the title held by the Plaintiff was issued on **7th June 1996**. The title deed held by the 1st Defendant was issued on **1st June 1996** and the Deed Plan was issued on **22nd February 1996, Deed Plan No. 705825** which is a similar number to the Deed Plan held by the Plaintiff herein. From the documents held by the 1st Defendant, the suit land was allocated to the 2nd Defendant under a letter of allotment dated **3rd June 1999**. However, by then, the suit land had already been registered in the name of **Michael Maina** and he had a title deed to that effect. The 2nd Defendant has also attached a receipt from the Department of Lands dated **24th August 1999**, to confirm that he paid the necessary amount claimed in the letter of allotment.

It is therefore evident that there are two certificates of titles herein emanating from the Ministry of Lands. The applicant has alleged that the 1st, 2nd and 3rd Defendants forged the title documents. However, there has been no response from the 4th, 5th and 6th Defendants. The 5th Defendant is the only one in a position to shed light as to which of the two titles are genuine. Further the Plaintiff/Applicant has alleged fraud on the part of the 1st, 2nd and 3rd Defendants. However, allegation of fraud has to be strictly proven and

cannot be done so through affidavit evidence. The said allegation has to be proved by calling of evidence in the main trial and interrogating the same. See the case of **Urmilla Mahindra Shah Vs Barclays Bank International & Another (1979) KLR 67;-**

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt; something more than a mere balance of probabilities is required a Higher standard of proof is required to establish such findings”.

At this juncture, there are two titles herein, both coming from the government department. However, the Plaintiff title deed is the first in time but since at this time the court is not called to gauge the strength of the main suit, the court cannot hold and find that the plaintiff’s title is the genuine one as that has to be determined by the evidence that will be adduced at the main trial and especially from the 4th, 5th and 6th Defendant. See the case of **Edwin Kamau Muniu vs Barclays Bank of Kenya [Milimani] High Court Civil Case No.118 of 2002**, where the Court held that;-

“In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality”.

Though Section 26(1) of the Land Registration Act states that the Certificate of Registration issued to a proprietor is conclusive evidence that such proprietor is the **absolute** and **indefeasible** owner of the suit property and the said certificate cannot be challenged except on the instances stated in the said section, the court finds that there are two proprietors herein holding two different certificates of titles, over the same piece of land. There should be one that is genuine and maybe another issued through misrepresentation **irregularly** or **unprocedurally** and that certificate would be subject to challenge. However at this stage, the court cannot confirm with certainty which of the two is the genuine certificate of title. The determination of that issue will have to await the calling of evidence in the main trial. The court would therefore find it very difficult to hold that the Plaintiffs/Applicant’s right has been infringed by the 1st, 2nd and 3rd Defendants herein. The Court therefore comes to a conclusion that the applicant has not established that he has a prima facie with high probability of success at the trial.

On the second limb, the applicant must establish that it will suffer irreparable loss that cannot be compensated by an award of damages. From the available evidence, the applicant herein got registered as the proprietor of the suit property on **20th June 2001**. He alleged that he visited the suit property in the **year 2012** and discovered that someone had encroached on the suit property. He further placed a caveat emptor on **26th February 2012**, but later noted that the 1st Defendant had illegally and unlawfully entered into the suit land on or about **June 2013**. He did not come to court until **March 2015**. By then the 1st Defendant had already obtained approval to put up a development on the suit property. The 1st Defendant got registered as a proprietor of the suit property in 1999. The 2nd Defendant alleged that 1st Defendant has been in possession since then. No evidence that the applicant took over possession of the suit property in 2001 where he got registered.

There is no evidence that he has put up any structure on the suit property. However, there is evidence that 1st Defendant has been putting up a perimeter wall on the suit property. The suit property herein is land which can be quantified and its value given. The applicant herein cannot therefore argue that he cannot be compensated adequately by an award of damages. See the case **Wairimu Mureithi Vs City Council of Nairobi Civil Appeal No.5 of 1979**, where the Court held that;-

“However strong the Plaintiff’s case appear to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them”.

The Court finds that in the instant case an award of damages would be adequate compensation for the loss incurred by the Plaintiff/Applicant.

On the third limb of if the court is in doubt to decide on a balance of convenience, the court finds that it is indeed in doubt herein on which of the two certificates of titles is genuine and which is not genuine. The court finds that the balance of convenience herein would tilt in favour of maintaining the **status quo**. Though the 1st Defendant is in possession and has allegedly put up some structures on the suit property, the court finds that the balance of convenience would dictate that the court issue an order that none of the parties herein should **deal** and/or **interfere** with the suit property until the matter is heard and determined in the main suit. See the case of **Ougo v Otieno & another Civil Appeal No. 3 of 1987 (1987) eKLR** where the court held that:-

“the general principle is that where there are serious conflicts of facts, the trial court should maintain status quo until the dispute has been decided on trial.

The court after considering the available evidence finds that the **status quo** herein should be maintained and that means that none of the parties herein should **deal, interfere, further develop or construct on, alienate, waste, charge or otherwise deal** with the suit property **LR No. 14719**, until the matter is heard and determined or until further orders of this court.

Further, the parties should comply with **Order 11** expeditiously so that the main suit can be set down for hearing and determination, for the underlying issues to be resolved with finality.

It is so ordered.

Dated, Signed and Delivered this **11th** day of **October 2016**.

L. GACHERU

JUDGE

In the presence of :-

Mr Kagunda holding 4brief Mr Maina for the Plaintiff/Applicant

None attendance for the 1st, 2nd 3rd Defendants/Respondents {though notified}

None attendance for the 4th, 5th, 6th Defendants/Respondents

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of Mr Kagunda for the Plaintiff/Applicant and absence of the Counsels for 1st, 2nd, and 3rd Defendants though aware of the Ruling date.

L. GACHERU

JUDGE