



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO. 504 OF 2014

FRANCIS THUO WANYOIKE PLAINTIFF

VERSUS

EMBAKASI RANCHING COMPANY LTD. 1ST DEFENDANT

SAM KAMAU GACHERU 2ND DEFENDANT

R U L I N G

The matter coming up for determination is the Notice of Motion application dated **28th April 2014**, brought under **Order 51 Rule 40**, under **Rules 1, 2 and 4** of the *Civil Procedure Rules*, **Sections 1A, 1B and 3A** of the *Civil Procedure Act* and all other enabling provisions of the law.

The application herein is brought by **Francis Thuo Wanyoike** against the 1st and 2nd Defendants seeking for orders that:

1. ***The court be pleased to issue a temporary injunction restraining the Defendants/Respondents, their agents, kin, servants and/or employees from evicting the applicant, disposing off, selling, re-allocating, alienating, transferring or in any other manner dealing with Plot No. 4063 and Plot 4063B or interfering in any other manner with the applicant's quiet possession thereof pending the hearing and determination of this suit.***
2. ***Costs of this application be borne by the Respondents.***

The application was supported by the grounds stated on the face of the application and also the supporting Affidavit of **Francis Thuo Wanyoike**.

These grounds are; that the Plaintiff is the registered owner of **Plots No. P4063 and P4063B** situated at **Embakasi Ranching, Ruai** having been duly issued with a share **Certificate No. 11647**, by the 1st Respondent on 18th April 1988. Further, that he took possession of the said plots and have remained in quiet possession for a period of over 25 years and he is also in possession of all ownership documents and receipts concerning the suit land. Further, that the applicant began developing **Plot No. P4063**, in 2011 and has put up two permanent houses.

However, on or about October 2013, the 2nd Respondent in company of hired goons interrupted the applicant's workmen who were undertaking the said construction on **Plot No. P4063** belonging to the

Plaintiff and 2nd Respondent produced a certificate for **Plot No. Q48**. That when the applicant raised the issue with officials of the 1st Defendant, the said 1st Defendant summoned the parties on **24th April 2014**, and after a hurriedly constituted '**Internal Board**' reached a decision that the 2nd Respondent was the rightful owner of **Plot No. P4063**, notwithstanding the fact that he had produced certificate bearing **Plot No. 048**. Further, the 1st Respondent directed that the buildings under construction be demolished and materials thereof be transported at the applicant's cost to a new plot that the applicant would be shown in future. Therefore the applicant is now faced with the real threat of getting illegally evicted and dispossessed of his property and the Defendants actions are tainted with malice, fraud and bad faith. The applicant is therefore apprehensive that unless the Defendants are restrained by this court, the applicant stands to suffer and lose his lifetime investment. In his supporting affidavit, the applicant annexed various documents to support his claim.

The application is contested by the 2nd Respondent. The 1st Respondent did not file its Replying Affidavit. The 2nd Respondent, **Samuel Kamau Gacheru**, swore a Replying Affidavit and averred that he was issued with the **Share Certificate No. 2505**, by the 1st Defendant. Further, on 28th November 1982, he bought Plot No. Q48 and was issued with a provisional letter of allotment **Serial No. 1561** as evidenced by SKG2. He further averred that he has been the lawful and bona fide owner of Plot No. Q48 for the last 33 years and has remained in occupation of the same uninterrupted. It was his contention that the Plaintiff through his proxy **John Kamau**, started lying claim of the plot in May 2013. Therefore the 2nd Respondent raised the issue with 1st Respondent and the said **John Kamau** was summoned but he refused to attend and avail the necessary documents. Therefore, the 2nd Respondent filed **Suit No. 5798/2013**, at Chief Magistrate's Court. He was granted interim orders and construction stopped and he thereafter reported the matter at Ruai Police Station for trespass to property. He contended that the Plaintiff is out to deprive him of ownership and possession of **Plot No. Q48** despite the fact that the 1st Defendant through a letter dated 16th August 2013 confirmed that the property was for 2nd Respondent. Further, that when the surveyors went to the disputed property, they confirmed that the actual plot on the ground which is the suit property is **Plot No. Q48** and not **P4063 and P4063B**. He urged the court to dismiss the Plaintiff's application.

The Plaintiff filed a supplementary Affidavit and averred that he is a stranger to **Share Certificate No. 2505** and is also a stranger to **Plot No. Q48** as the subject plots are **Nos. P4063 and P4063B** which were allocated to him on the strength of his shareholding in the 1st Defendants Company. He further averred that he has not laid any claim on plot No. Q48 and the 2nd Defendant ought to enforce his right over **Plot No. Q48** in another forum as that is completely different from the Plaintiff's. He further deposed that he is a stranger to **John Kamau** who has been mentioned by the 2nd Respondent and he has never been his proxy or agent as alleged by the 2nd Respondent. Applicant further contended that he is not a party in **CMCC No. 5798 of 2013** and that the said court has no jurisdiction to hear land matters.

The parties canvassed this Notice of Motion by way of written submissions. I have now carefully considered the pleadings, the annexures thereto and the written submissions and I make the following findings;

The applicant herein has sought for injunctive orders which are equitable remedies granted at the discretion of the court. However, the court is alive to the fact that such discretion must be exercised judiciously. See the case of **Hasmukh Khetshi Shah vs. Tinga Tranders Ltd, Civil Appeal No. 326 of 2002 (2002) KLR 4628**, where the court held that:

“It must be stated at the outset that the granting of the interim injunction is an exercise of judicial discretion”.

At this juncture, the court is not required to determine the very issues which will be canvassed at the trial with finality but will only be concerned as to whether the applicant has established the principles for grant of injunctive relief. I refer to the case of **Edwin Kamau Muniu vs. Barclays Bank of Kenya Ltd, Nairobi (Milimani) High Court, Civil Case No. 1118 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”.

The principles to be considered in determining whether to grant or not to grant the injunctive order were settled in the case of **Giella vs. Cassman Brown & Co. Ltd 1973 EA 358** and which have later been repeated in other judicial pronouncements. In the case of **Kibuturi Vs. Kenya Shell, Nairobi High Court, Civil Case No. 3398/1980 (1981) LR 390**, the court held that:

“The conditions for granting of a temporary injunction in East Africa are well known and these are; First, the applicant must show 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 be adequately compensated by an award of damages; thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

Therefore, the applicant herein needs to establish the three stated principles and demonstrate that he deserves the injunctive relief sought. See **EA Industries vs. Trufoods (1972) EA 420**.

Firstly, the applicant needed to demonstrate that he has a prima facie case with probability of success. In the case of **Mrao Ltd Vs. First American Bank of Kenya and 2 Others (2003) KLR 125**, the court described a prima facie case as:

“A prima 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”.

The Plaintiff/Applicant has alleged that in the year 1983, the applicant purchased one ordinary share in the 1st Defendant Company and became a shareholder with share certificate No. 11647, on 18th April 1988 after paying full considerations. The applicant on the strength of shareholding was allocated **Plot No. P4063 and No. P4063B** and took possession immediately. He allegedly started developing the plot in October 2013, but the 2nd Defendant confronted his workers claiming he owns the plot and produced share certificate **No. Q48**. Further, the 1st Respondent in a hurriedly held Board meeting directed the applicant to demolish his buildings and carry away the building materials at his own cost to a new plot which would be allocated to him in future. He thus asks the court to injunct the two respondents from interfering in his peaceful possession of the suit plot.

The 2nd Respondent on his part alleges that the suit plot belongs to him and that he has obtained an injunctive order from the Chief Magistrate’s court in **CMCCC No. 5798 of 2013**. He asked the court to dismiss the applicant’s application.

There is no doubt that the Plaintiff and the 2nd Respondent are both claiming ownership of the same suit plot. There is also no doubt that the original owner of the suit plot was 1st Respondent who has not filed their papers in response as to this application. However, it is alleged that they supported the 2nd Respondent allegations that the suit plot belongs to 2nd Respondent. This is therefore a case of double allocation. The only person who can shed light to court as to who indeed owns the suit plot is the 1st Respondent. This can only be determined in a full trial after evidence has been called and the same interrogated through cross-examination. That is the only time the court would hold with certainty as to who really own the suit plot. Though each of the party herein alleges that they were allocated the suit plot in the 1980s, none of them developed the suit plot until 2013. Each of the party however has a share certificate, but the conflict is who indeed owns the suit plot. Is it **Plot No. P4063 or Q48**.

That can only be resolved by a surveyor who will have visited the site and produce the relevant evidence in court or by evidence from the representatives of 1st Respondent. As I stated earlier, the issue of ownership of the suit plot can only be conclusively dealt with after a full trial. In this matter now, the

court cannot find conclusively who is to be believed or not.

The Court finds that the applicant has not established that he has prima facie with probability of success. And where it is found that the applicant does not have a prima facie case with probability of success at the trial, the application is refused. See the case of **Airland Tours and Travel Ltd vs National Industrial Credit Bank**, Nairobi (Milimani) High Court, **Civil Case No. 1234 of 2002**.

The second principle that must be fulfilled is that the applicant must show that he will suffer irreparable loss or injury which cannot be compensated by an award of damages. The applicant has alleged that he has started construction on the suit plot. That the 1st Respondent informed him the suit plot belongs to 2nd Respondent and that he must demolish the construction and remove the building materials at his own costs. The issue of who owns the suit land can only certainly be resolved after the trial. The costs of the construction of the building on the suit land can be quantified or assessed. If after the trial the Plaintiff is found to be the rightful owner of the suit plot, the Plaintiff would certainly be awarded costs and/or damages which are quantifiable. The costs of the construction can be quantified and the same awarded to the applicant. I will rely on the case of **Wairimu Mureithi vs City Council of Nairobi, Civil Appeal No. 5 of 1979, KLR 332**, where the court held that:

“However strong the Plaintiff’s case appears 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”. See also **American Cynamid Co. Lt vs Ethicon Ltd (1975) AC 396**.

The applicant herein has not established that they will suffer irreparable loss which cannot be compensated by an award of damages.

Thirdly, if the court is in doubt, to decide on a balance of convenience. I find herein that the court is not in doubt. The issue of who owns the suit plot can only be resolved after evidence is called in a full trial. However, if I was to decide on a balance of convenience, I find that the best option herein is to maintain the Status Quo. The status quo prevailing now is that no party is developing the suit plot.

The court finds that for the interest of justice and by invoking the inherent jurisdiction of the Court as provided by **Section 3A** of the **Civil Procedure Act**, the court should grant an order for preservation of the suit plot herein. The Court therefore finds and holds that status quo herein should be maintained and the **Status Quo** at the moment means that no party herein should develop, interfere, and/or deal with suit plot herein in any way until the suit is heard and determined. (See the case of **Noor Mohammed Jan Mohammed Vs Kassamali UN (1953(EA8.)**) The parties to ensure that the main suit is heard within the next 12 months from the date hereof failure to which the **Status Quo** order will stand discharged unless extended by the order of this court.

The costs of this application shall be in the cause.

It is so ordered.

Dated, Signed and delivered this *27th day of February, 2015*

L. GACHERU

JUDGE

In the Presence of:-

Mr Wachira for Plaintiff/Applicant

None attendance for 1st Defendant/Respondent

Mr Muthama holding brief Mr Thuku for the 2nd Defendant/Respondents

None attendance for the 2nd Defendant

Lerionka: Court Clerk

L. GACHERU

JUDGE

Dated, Signed and delivered this 27th day of February, 2015.

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above Counsels.

L. GACHERU

JUDGE