



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. E 306 OF 2021

SOLOMON CHEPSAT.....PLAINTIFF

VERSUS

SCION HEALTHCARE LIMITED.....DEFENDANT/RESPONDENT

RULING

Before me for determination is the Notice of Motion dated 17/08/2021 in which the Plaintiff/Applicant seeks for orders of a temporary injunction restraining the Defendant/Respondents and or its agents and/or servant(s) and/or employee(s) be restrained by way of a temporary injunction from excavating, constructing, disposing, alienating and/or in any other manner from dealing with the property known as LR. No. 209/11026 situated within Imara Daima area, off Nairobi – Mombasa road pending the hearing and determination of this Application and suit together with costs. Further that the Officer in charge, Villa Police post do assist in the enforcement and implementation of the orders sought herein once granted. The Application is brought under **Sections 3(2) of the High Court (Practice and Procedure) Rules and under section 3A of the Civil Procedure Act** cap 21 of the laws of Kenya and **Order 40 Rules 1, 2, 3(3) and 4 and Order 51 Rule 1 of the Civil Procedure Rules 2010**

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Solomon Chepsat sworn on 17/08/2021 wherein he stated that he bought the Suit property from one Wilfred Musyoka Mina on 5/03/2003 who was a member of Imara Daima Self Help Group who was the holder of a letter of allotment in respect of the Suit Plot issued by Imara Daima Self Help Group who are not parties to this suit. He exhibited a copy of a Sale Agreement between himself and the said Wilfred Musyoka Mina dated 05/03/2003. He also had a letter dated 29/10/2020 written by Imara Daima Self Help Group affirming ownership of the property to Wilfred Musyoka Mina.

He confirmed that he took possession of the suit property till July 2019 when she was she was shocked that the defendant through its director Mr. Kinyua forcefully invaded the property. He reported the matter to the Director of Criminal Investigations, along Kiambu road. Since the defendant continued illegal excavation with a view to starting an illegal development he reported to Imara Daima Police post where the OCS advised him to seek court intervention.

The Application is contested. The defendant filed his Replying Affidavit sworn on 29/09/2021 herein. He averred that while the plaintiff/applicant claims the Suit Plot, the purported agreement for sale is a non-existent and non-recognizable interest. That the plot identification certificate being relied on by the plaintiff is unknown in law and further that the letter issued on 29/10/2020 has no legal effect in law. The defendant contends that he acquired the Suit property from William Wako Tari and Abdullahi Mohammed vide an agreement for sale dated 20/03/2018. He attached a copy of the sale agreement. He further attached the official search which was issued by the Registrar of Titles dated 16/11/2017. He stated that the defendant has an impeachable title and the plaintiff has not raised any grounds to void the title.

Further the defendant attached a copy of what he referred to as being a fraudulent title obtained by the plaintiff. That the defendant reported the existence of this fraudulent title to Embakasi Police station under OB number 49/5/7/2019. He contends that the defendant will be inconvenienced if the application is allowed. He avers that the defendant has paid Kesh 1,417,000.00, for the approval of the development plan, Kesh 9,691,000.00 for the contractor and he had planned to get financing of Kesh. 57,230,000.00 and therefore if these plans are scuttled he will suffer a loss of about Kesh 100,000,000.00 which the plaintiff has undertaken to provide security for.

He further averred that he has invested a substantial amount of money in his said plot and it is unfair for the plaintiff/applicant to seek to stop him from developing his land. He further stated that 19/03/2020 the defendant has received the full approval of the Council to construct. The parties have not filed any submissions and therefore only the pleadings have been considered in this ruling.

In deciding whether 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.”

Looking at the facts of this case, the plaintiff has based his claims of ownership over the Suit property on a letter of allotment issued to one Mr Wilfred Musyoka Mina who is not a party to this suit and neither is the Imara Daima Self Help group which the plaintiff avers allocated the land to Mr. Wilfred Musyoka Mina. He has relied on a Sale Agreement entered into between himself and the said Wilfred Musyoka Mina. His claim has been attacked by the defendant/respondent on two fronts. Firstly, that the plaintiff does not allege fraud as a foundation of the defendant’s ownership and secondly the plaintiff does not allege having been in continuous and uninterrupted possession of the of the Suit property. That since acquisition of the Suit property the defendant has been in control and occupation of the Suit property. The plaintiff has also not produced any official search to buttress his claim of ownership the only documents are letters and agreements signed by parties not party to the suit.

The Court has now carefully considered the pleadings in general and the annexure thereto. The parties did not file any submissions. The application herein is anchored under **Order 40 Rule 1(a)** of the **Civil Procedure Rules** which provides:-

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b)..... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

Further, the application is premised under **Sections 1A, 1B** and **3A** of the **Civil Procedure Act** which Sections empower the court to facilitate the overriding objective of the **Civil Procedure Act** which is to ensure ***just, expeditious*** and ***proportionate*** determination of the matters before the court.

Further, the court is called upon under **Section 3A** to make or issue such orders that are necessary for end of justice to be done and also to prevent abuse of the court process.

Since the Applicant is seeking for injunctive orders, at this juncture, the court will not deal with the disputed issues with a finality given that the available evidence now is through affidavits. The court is only called upon to determine whether the Applicant is deserving of injunctive orders based on the usual criteria laid down in the case of ***Giella...Vs... Cassman Brown & Co. Ltd(supra)***, and later repeated in various judicial pronouncements. See the case of ***Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR***, the Court held that:-

“The conditions for granting a temporary injunction is East Africa are well known and these are: First, the 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 might 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. See also E.A Industries ..Vs..Trufoods (1972) EA 420.”

There is no doubt that the Applicant herein is seeking for injunctive orders against the defendant on allegation that the said suit land belongs to him. He attached a sale agreement, a letter of allotment from a party he bought the land from and certificate from Imara Self Help group. The defendant attached a sale agreement, certificate of title, a transfer of title, official search, deed plan and letter of approval for the development plan.

I am of the view that the Plaintiff has not established a prima facie case in that his claim to LR No. 209/11026 is not supported by any evidence. In the plaintiff's own admission, he bought the land from one Wilfred Mutisya Mina who was allotted the plot vide a certificate no. 340 by Imara Daima Self Help group.

The defendant in his submissions filed on 10/02/2022 has relied on the following cases’ ***Paul Wairuri Mwangi -vs- Njogu Macharia [2010] eKLR, Bharmal Kanji Shah -vs- Shah Depar Devji [1965] EA 91 and Kisumu Market -vs- BP(K) Ltd [1990] eKLR*** where he argues that the defendant has a greater interest and connection to the suit property. Further that Imara Daima Self Help Group did not have title which they could pass to the plaintiff. He contends that the plaintiff has not shown a genuine and arguable case. Further he avers that the defendant has shown from the development plans that he will suffer irreparable loss which the plaintiff has not shown in any way.

The Plaintiff did not file any submissions and therefore the court has relied on the pleadings filed.

Determination

The plaintiff's claim is highly contested and a prima facie case has not been established. In the case of **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125**, a prima facie case was said to be *one in which on the material presented to the court or 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 opposite party.*

The plaintiff has not also demonstrated what loss if any he stands to suffer if the orders sought are not granted and further, that the loss cannot be compensated with an award of damages. Indeed my view is that the plaintiff cannot suffer any damage that cannot be compensated for by an award in damages in case the injunction is not granted and he is successful at the trial. The documents in court do not bear credence to a prima facie case. The balance of convenience is clearly in favour of the defendant who has demonstrated that he purchased the suit plot and has taken possession and has commenced development on the plot and has put in a substantial amount of money. This evidence of substantial investment by the defendant has not been rebutted and on that basis I am persuaded that the balance of convenience tilts in favour of the defendant.

In the premises I find and hold that the plaintiff has not established that he has a prima facie case with any probability of success and I decline to grant the order of injunction sought and the plaintiff's notice of motion application dated 17/08/2021 is accordingly dismissed. Costs shall be in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24th DAY OF FEBRUARY, 2022

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MOGENI

JUDGE

In the Presence of

Ms. Chelagat for Plaintiff

N/A for Defendant

Mr. Vincent Owuor.....Court Assistant