



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 159 OF 2014

CHARLES MAGOMA NYAKWEBA PLAINTIFF

VERSUS

SIMEON OBONGO DEFENDANT

RULING

1. The plaintiff is the registered proprietor of all that parcel of land known as **LR No. Kisii Municipality/Block I/491** (hereinafter referred to as “**the suit property**”). The plaintiff acquired the suit property by way of a gift from one, **Paul Nyakweba Ongwacho** (hereinafter referred to only as “**Ongwacho**”) on 18th April 2000. The suit property was allocated to Ongwacho by the Commissioner of Lands on 10th April 1984. Ongwacho accepted the allotment, paid the requisite charges on 13th February 1984 and was issued with a lease and certificate of lease ten (10) years later on 7th January 1994. Ongwacho held the suit property for over 6 years before he transferred the same to the plaintiff on 18th April 2000 by way of a gift as aforesaid.
2. The plaintiff has brought this suit against the defendant claiming that on or about 14th April, 2014 the defendant entered the suit property without his consent and destroyed the fence that he had erected around the property. The defendant thereafter started digging trenches and depositing building materials on the suit property with the intention of commencing construction of a building thereon. The plaintiff has contended that as a result of the said acts of trespass by the defendant, he has been deprived of the right to use and develop the suit property thereby suffering loss and damage.
3. Contemporaneous with the plaint, the plaintiff filed an application by way of Notice of Motion dated 16th April 2014 seeking a temporary injunction to restrain the defendant from entering upon, trespassing onto, sinking trenches, laying foundation, depositing building materials, building on, interfering with and/or in any other manner dealing with the suit property pending the hearing and determination of this suit. The plaintiff’s application was supported by the affidavit of the plaintiff sworn on 16th April 2014. The plaintiff has contended that as the registered proprietor of the suit property, he is entitled to exclusive rights over the suit property. The plaintiff has contended that the activities being undertaken by the defendant on the suit property would change and/or alter the character of the suit property in addition to dispossessing and/or depriving him of his rights to use and enjoy the suit property. The plaintiff has contended that following the defendant’s trespass onto the suit property, he reported the matter to the police at Kisii Police Station with a view to have the defendant stopped from carrying out the offensive activities. Although he recorded a statement at the said police station, no action was taken against the defendant and the defendant has therefore continued with the activities complained of. The plaintiff has contended that the activities being carried out by the defendant on the suit property are criminal in nature and as such the intervention of the court is required to arrest the same. The plaintiff has annexed to his affidavit in support of the application documents that give the history

- of the suit property from the time it was allocated to Ongwacho upto the time it changed hands through transfer to the plaintiff.
4. The application was opposed by the defendant through affidavit and further affidavit sworn on 24th April 2014 and 5th May 2014 respectively. In his replying affidavit, the defendant has contended that he owns and occupies a parcel of land known as **Plot No. 59, Nyanchwa site and Service Scheme** within Kisii town (hereinafter referred to only as “**Plot No. 59**”). The defendant has contended the suit property which is purportedly owned by the plaintiff has been superimposed on Plot No. 59. The defendant has contended that he acquired Plot No. 59 from one, **Pacifica Nyakerario Obong’o** on 2nd October 2006 at a consideration of kshs.450,000/=. The defendant has contended further that Plot No. 59 was allocated to Pacifica Nyakerario Obong’o (hereinafter referred to only as “**Pacifica**”) on 23rd March 1977 by Kisii Town Council, the predecessor to the defunct Municipal Council of Kisii and that the site where Plot No. 59 is situated is under the management of National Housing Corporation. The defendant has contended that his ownership of Plot No. 59 has received recognition over the years by the defunct Municipal Council of Kisii, its successor, County Government of Kisii and the National Housing Corporation. The defendant has contended that he paid land rent and rates to Municipal Council of Kisii over the years for the suit property and has continued to do so to its successor, Kisii County Government.
 5. The defendant has contended that he is in possession of the disputed parcel of land which is Plot No. 59 and which the plaintiff on the other hands has claimed to be LR No. Kisii Municipality/Block I/ 491(“the suit property”). He has contended that the plaintiff has never occupied the disputed parcel of land. The defendant has contended that he has a right to develop Plot No.59 having obtained all necessary consents from the relevant authorities. The defendant has claimed that it is the plaintiff who trespassed on Plot No. 59 and interfered with the defendant’s occupation thereof which interference he reported to Kisii Central Police station on 13th April 2014. In his further affidavit, the defendant seems to have changed his stand regarding Plot No.59 and the suit property. The defendant has contended that he has cleared all the payments that were due to National Housing Corporation in respect of Plot No. 59 and that a title is being processed in his favour which title would be registered and issued as LR No. Kisii Municipality/Block I/491 (“the suit property”). The defendant has contended that Plot No. 59 and the suit property is one and the same parcel of land and that the plaintiff has acquired his title over the suit property fraudulently. The defendant has contended that the documents of title produced by the plaintiff in support of his claim over the suit property are full of contradictions and inconsistencies which are a pointer to fraud. The defendant annexed to his affidavit a number of documents that give the history of Plot No. 59 from 1977 when it was allocated to Pacifica upto 22nd April 2014 when National Housing Corporation advised the Commissioner of Lands to process a title for Plot No. 59 in the defendant’s favour which title is to be issued over LR No. Kisii Municipality/Block I/491 (“the suit property”).
 6. When the plaintiff’s application came up for hearing on 6th May 2014, I directed that the same be heard by way of written submissions. The defendant’s advocates filed their submissions on 20th June 2014 while the plaintiff’s advocates did so on 8th September 2014. I have considered the plaintiff’s application together with the affidavit filed in support thereof. I have also considered the affidavits filed by the defendant in opposition to the application. Finally, I have considered the submissions by the parties’ respective advocates and the authorities cited in support thereof. The principles governing the grant of interlocutory injunctions are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, an applicant for interlocutory injunction must establish a prima facie case with a probability of success and must also demonstrate that he stands to suffer irreparable injury which cannot be compensated in damages unless the injunction is granted. If the court is in doubt as to the above, the application would be determined on a balance of convenience. The decision in **Giella –vs- Cassman Brown & Co. Ltd**, (Supra) was adopted in the Court of Appeal case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** that has been cited by the plaintiff. In that case, the court stated that “**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.”

7. The plaintiff's claim against the defendant is based on trespass. The plaintiff has placed sufficient material before the court in proof of his title to the suit property. The plaintiff has explained adequately how he acquired the suit property which explanation is supported by the relevant documents. The plaintiff has exhibited a certificate of lease in his favour and a certificate of official search on the title of the suit property which shows that the property is registered in the name of the plaintiff as the leasehold proprietor thereof. The plaintiff has contended that he was at all material times in possession of the suit property until 14th April 2014 when the defendant forcefully entered onto the property, dispossessed him of the same and started digging trenches thereon with the intention of constructing a building thereon. The plaintiff has contended that the defendant has no known legal interest in the suit property which can justify his entry and occupation of the same and as such he is a trespasser and ought to be restrained from committing further acts of trespass.
8. In response to the plaintiff's claim, the defendant first contended in his replying affidavit that he is a stranger to the suit property. He claimed that he owned and occupied Plot No. 59 which had no relationship with the suit property. The defendant however changed his story later in his further affidavit and claimed that Plot No. 59 that he owns and occupies is indeed one and the same parcel of land with the suit property. The defendant claimed that his predecessor in title Pacifica was allocated Plot No. 59 by Kisii Town Council in 1977 and that Plot No. 59 is within a site and service scheme which is being managed by National Housing Corporation. The defendant has claimed that his title to Plot No. 59 is being processed and that it will be issued over the suit property. The defendant has contended that he is the one who is entitled to own the suit property and that the plaintiff's title over the suit property has been obtained fraudulently. Whereas the defendant has placed material before the court showing that he is the owner of Plot No. 59, Nyanhwa Site and Service Scheme, the defendant who had initially denied any relationship between Plot No. 59 and the suit property has not come out clearly as to how Plot No. 59 came to be known as LR No. Kisii Municipality/Block I/491 (“the suit property”). The defendant has also accused the plaintiff of fraud in the acquisition of the suit property. It is settled law that the standard of proof of fraud is higher than a balance of probability. In the case of **Kampala Bottlers Ltd. vs. Damanico (U) Ltd.[1990-1994] EA 141** that was cited by the defendant, it was held that **“To impeach the title of a registered proprietor of land, fraud must be attributed to the transferee, either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act.”** It was held further that **“The burden of proof of fraud must be heavier than a balance of probabilities generally applied in civil matters”**. The defendant has pointed out that the identity card number for the plaintiff and his predecessor in title, Ongwacho, appears to be the same in the certificate of lease that was issued to Ongwacho and the certificate of lease that was issued to the plaintiff upon transfer of the suit property to him by Ongwacho. The defendant has also pointed out several discrepancies in the other documents that have been submitted by the plaintiff in support of the present application. The genuineness or otherwise of these documents can only be determined at the trial. I am not convinced on a prima facie basis from the discrepancies that have been pointed out by the defendant that the plaintiff acquired the suit property fraudulently.
9. Due to the foregoing, I am satisfied that the plaintiff has established a prima facie case against the defendant with a probability of success. The plaintiff is the registered owner of the suit property. Whether the plaintiff has been in possession of the suit property or not is contested and the issue must await the trial. However, by virtue of being the registered proprietor of the suit property, the plaintiff is entitled to immediate possession thereof. The defendant's activities on the suit property amount to dispossession of the plaintiff of the property and if the injunction is not granted the dispossession would continue and the plaintiff would no doubt suffer irreparable injury which cannot be compensated in damages. See, the court of appeal case of **George Orango Orago –vs- George Liewa Jagalo & 4 Others, Court of Appeal, Civil Appeal No. 62 of 2009** (unreported) that was cited by the plaintiff's advocates. For the foregoing reasons, I am satisfied that the plaintiff has satisfied the conditions for granting interlocutory injunction.
10. I must say before I conclude this ruling that the defendant has also demonstrated that he has an

interest on the parcel of land known as Plot No. 59 which seems to be on the same ground location as the suit property. The defendant claimed that Plot No. 59 was allocated to his predecessor in title by the Town Council of Kisii, the predecessor to the defunct Municipal Council of Kisii. The defendant also claimed that Plot No. 59 is situated on a site and service scheme that is being managed by National Housing Corporation. The defendant has placed evidence that he has made payments to National Housing Corporation for Plot No. 59 and that he has over the years paid land rent and rates to the Municipal Council of Kisii for the said plot. Even as I hold that the plaintiff has established a prima facie case against the defendant and has also demonstrated that he stands to suffer irreparable injury that cannot be compensated in damages, one question continues to disturb my mind namely, “where has the defendant’s parcel of land known as Plot No. 59 whose origin dates back to 1977 disappeared to?” I believe that this is a question that can only be answered at the trial of this suit and the defendant’s counter-claim against the plaintiff. It would be necessary however in this ruling to make certain orders that would protect the defendants’ interest in the said parcel of land.

11. In conclusion, I will allow the application dated 16th April 2014 in terms of prayers 3 and 5 thereof. So as to ensure that the property in dispute is preserved pending the hearing and determination of this suit and the defendant’s counter-claim, I would make a further order pursuant to section 3 (1) and 13 (7) of the Environment and Land Court Act, 2011 and section 3A of the Civil Procedure Act, Cap.21 Laws of Kenya that pending the hearing and determination of this suit and the counter-claim, the plaintiff shall maintain the status quo as concerns the title of the suit property. In other words, the suit property shall not be sold, leased or charged pending the hearing and determination of this suit and counter-claim.

Delivered, signed and dated at KISII this 20th day of March 2015.

S. OKONG’O

JUDGE

In the presence of:-

Mr. Agure Odero h/b Oguttu Mboya for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG’O

JUDGE