



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 148 OF 2014

DANES MAKORI MAGARA PLAINTIFF

VERSUS

PETER ORENGE NYANGARA..... 1ST DEFENDANT

JANE KERUBO ORENGE 2ND DEFENDANT

KIBAGENDI NYANGARA 3RD DEFENDANT

SAMWEL ONSOTI NYANGARA 4TH DEFENDANT

RULING

1. The plaintiff brought this suit on 11th April, 2014, seeking a declaration that he is a purchaser of a portion measuring 56 feet by 72 feet (hereinafter referred to as “**the suit property**”) of all that parcel of land known as **LR No. West Kitutu/Daraja Mbili/4320** (hereinafter referred to as “**Plot No. 4320**”) and an order directing the 2nd defendant to transfer the suit property to him. Upon service of summons to enter appearance upon the defendants, the defendants filed a joint statement of defence and counter-claim against the plaintiff on 5th June, 2014. In their counter-claim, the defendants sought an order for the eviction of the defendant from Plot No. 4320, a permanent injunction restraining the defendant from entering upon, trespassing onto, building on, cultivating, alienating, selling, transferring and/or otherwise interfering with Plot No.4320 and general damages for trespass. A few months after filing the suit, the plaintiff filed an application by way of Notice of Motion dated 25th July 2014 under order 40 rule 1 and 2 of the Civil Procedure Rules 2010 seeking the following orders:-

- a. **Spent**
- b. **Spent**
- c. **THAT pending the hearing and determination of this suit, a permanent injunction do issue restraining the 1st and 2nd defendants, their agents, servants or persons acting under their instructions from entering, removing the tenants therein, renovating, occupying, developing, wiring and/or dealing in any way whatsoever with that portion occupied by the plaintiff’s tenants measuring 56ft by 72ft (“the suit property”) in land parcel No. Central Kitutu/Daraja Mbili/4320 (“Plot No.4320”).**
- d. **THAT the costs of the application be provided for.**

2. The application was supported by the affidavit and supplementary affidavit of the plaintiff sworn on 25th July 2014 and 12th August, 2014 respectively. In his affidavit, the plaintiff stated that by a

written agreement dated 15th January 1996, the 1st defendant sold to him a portion measuring 56 feet by 72 feet (the suit property) of his late father's parcel of land that was registered in the name of **Petero Nyangara**, deceased as **LR No. Central Kitutu/Daraja Mbili/582** (hereinafter referred to as "**Plot No. 582**") at a consideration of Ksh.135,000/= which he paid in full. The said agreement was witnessed by among others the 2nd defendant. After the execution of the said agreement for sale, the 1st defendant gave him vacant possession of the suit property. He thereafter proceeded to develop the suit property by putting up permanent houses thereon which houses he has occupied for the last 18 years.

3. The plaintiff claimed that the 4th defendant in collusion with the 1st and 2nd defendants obtained letters of administration in respect of the estate of the 1st and 4th defendant's deceased father and proceeded to fraudulently sub-divide Plot No. 582 that was hitherto registered in the name of their said father which sub-division gave rise to among others, Plot No. 4320 in which the suit property is now comprised. The plaintiff claimed that in furtherance of the said fraud, the 1st, 2nd and 4th defendants caused Plot No. 4320 to be transferred to the 2nd defendant thereby conferring upon the 2nd defendant title to the suit property together with the developments that the plaintiff has carried out thereon.
4. The plaintiff stated further that on 21st July, 2014 after the filing of this suit, the 1st and 2nd defendants who are a husband and wife respectively made attempts to enter the suit property with the intention of evicting the plaintiff's tenants thereon. The 1st and 2nd defendants also commenced renovation works and cabling on the plaintiff's houses aforesaid. The plaintiff contended that the houses on the suit property are his only source of livelihood and as such unless the orders sought are granted he will suffer irreparable loss.
5. The application was opposed by the defendants through a replying affidavit sworn by the 2nd defendant on 30th July 2014 and grounds of opposition of the same date. The 2nd defendant termed the averments in the plaintiff's affidavit as pertains to the ownership of Plot No. 4320 as misleading. She contended that Plot No. 4320 is a sub-division of **LR No. Central Kitutu/Daraja Mbili/2009** (hereinafter referred to as "**Plot No.2009**") which was registered in the name of the 1st, 2nd and 4th defendant's father, Petero Nyangara Onsoti, deceased (hereinafter referred to only as "**the deceased**" who died on 2nd February 1995.
6. The 2nd defendant contended that no proceedings were taken to apply for letters of administration in respect of the estate of the deceased until the year 2012 when grant of letters of administration in respect of the estate of the deceased was issued to and subsequently confirmed in favour of the 4th defendant. The 4th defendant thereafter sub-divided Plot No. 2009 and transferred portions thereof to the beneficiaries of the estate of the deceased. Plot No. 2009 was sub-divided into (3) portions namely **LR Nos. Central Kitutu/Daraja Mbili/4318, 4319 and 4320**. Plot No. 4320 was allocated and registered in the name of the 2nd defendant as her share of the estate of the deceased. The 2nd defendant contended that as the registered owner of Plot No. 4320, she has not allowed or granted permission to the plaintiff to remain in possession thereof and as such the plaintiff's entry and occupation of Plot No. 4320 amounts to trespass.
7. The 2nd defendant contended that although Plot No. LR No. 582 was registered in the name of the deceased; the same was not in existence as at the time the plaintiff purported to enter into an agreement for sale of a portion thereof with the 1st defendant. The said parcel of land had been sub-divided by the deceased through amutation that was registered on the 29th day of August 1994. The 2nd defendant contended that since Plot No. 582 was not in existence as at 15th January, 1996 when the purported agreement was entered into between the plaintiff and the 1st defendant no right could accrue to the plaintiff in respect thereof. The 2nd respondent contended in the alternative that even assuming that Plot No. 582 was in existence, the same formed part of the estate of the deceased in respect of which no grant of letters of administration had been obtained and as such no one, not even the beneficiaries of the said estate had the capacity to alienate, sell and/or dispose of any portion thereof.
8. The 2nd defendant contended that the estate of the deceased could not be alienated, sold and/or disposed of to the plaintiff prior to the issuance of grant of letters of administration and that the

purported sale of the suit property that formed part of the estate of the deceased amounted to intermeddling in the said estate. The 2nd defendant contended further that the plaintiff's suit is time barred the cause of action having arisen on 15th January 1996 when the purported agreement for sale was made. In conclusion, the 2nd defendant contended that the plaintiff has not established a prima facie case against the defendants. The 2nd defendant contended that the orders sought by the plaintiff cannot issue since the plaintiff has not established any legal rights or interests over Plot No.4320.

9. When the application came for hearing before me on 30th July 2014, the plaintiff was granted leave to file a supplementary affidavit and the parties agreed to argue the application by way of written submissions. In his supplementary affidavit sworn on 12th August 2014, the plaintiff reiterated the contents of his affidavit in support of the application and contended that the 2nd defendant was registered as the owner of Plot No. 4320 fraudulently with a view to defeat the plaintiff's interest in the suit property.
10. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the written submissions made by the plaintiff and defendants' advocates in support of and in opposition to the application. This being an application for a temporary injunction, it has to be considered in light of the principles that were set out in the case of **Giella – vs- Cassman Brown Ltd [1973] E. A 358**, namely:-
 - a. **That the applicant must satisfy the court that he has a prima facie case with a probability of success.**
 - b. **That the applicant must show that he will otherwise suffer irreparable injury which cannot be compensated in damages and,**
 - c. **If in doubt, the court will determine the application on a balance of convenience.**
11. In the case of **Mrao –vs- First American Bank of Kenya & 2 Others [2003] KLR 125** a prima facie case was described as:-

“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 call for an explanation or rebuttal from the latter.”

Turning to the present case, the question which this court needs to answer is whether the plaintiff has satisfied the conditions for granting a temporary injunction as set out in the Giella case (Supra). Looking at the facts of this case as a whole and the affidavit evidence placed before me by the parties, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants. Although the defendants have denied it, I have noted that Plot No. 4320 has its origin in Plot No. 582. Plot No. 582 was sub-divided on 29th August, 1994 into three (3) portions namely, **LR Nos. Central Kitutu/Daraja Mbili/2007, 2008 and 2009. LR No. Central Kitutu/Daraja Mbili/2009** (“Plot No.2009”) was subsequently subdivided on or about 18th November, 2013 into three (3) portions namely, **LR Nos. Central Kitutu/Daraja Mbili/4318, 4319 and 4320**. It is following this sub-division that the 2nd defendant acquired Plot No. 4320. As at 15th January, 1996, when the plaintiff entered into an agreement for sale of a portion of Plot No. 582 with the 1st and 3rd defendants, the title of the said parcel of land had been closed upon sub-division that gave rise to LR Nos. Central Kitutu/Daraja Mbili/ 2007, 2008 and 2009 aforesaid. Since the plaintiff's claim is that the suit property that was sold to him by the 1st and 3rd defendants is now comprised in Plot No. 4020 which is a subdivision of Plot No. 2009, the sale agreement aforesaid should have referred to Plot No. 2009 and not Plot No. 582.

12. I have looked at the agreement for sale dated 15th January, 1996 between the plaintiff on the one hand and the 1st and 3rd defendant's on the other hand. It is acknowledged in the said agreement that the portion of land that was being sold to the plaintiff was registered in name of Petero

- Nyangara Onsoti (“the deceased”) and that the sale was subject to the 1st and 3rd defendants obtaining grant of letters of administration in respect of the estate of the deceased. I don’t think that there is anything wrong with such agreement. The portion of land that was sold to the plaintiff could not be transferred to him until the grant of letters of administration in respect of the estate of the deceased was obtained. This is clear from clause 3 (b) of the said agreement for sale.
13. The plaintiff has claimed that the portion of land that was sold to him is now comprised in Plot No. 4320 after the sub-division of the original parcel of land namely, Plot No. 582. The plaintiff has contended that the 1st and 4th defendants colluded with the 2nd defendant who is the 1st defendant’s wife and fraudulently caused Plot No. 4320 to be transferred to the 2nd defendant inclusive of the portion thereof that had been sold to the plaintiff together with the developments that the plaintiff has carried out thereon.
 14. In response to the plaintiff’s claim the defendants have contended that the portion of land that was purportedly sold to the plaintiff belonged to the deceased and the same could not be dealt with until a grant of letters of administration in respect of the estate of the deceased was obtained. The defendants have contended that the 2nd defendant acquired Plot No. 4320 lawfully from the 4th defendant who is the administrator of the estate of the deceased. As I have stated above, the agreement for sale between the 1st and 3rd defendants and the plaintiff was subject to a grant of letters of administration in respect of the estate of the deceased being issued to the 1st and 3rd defendants. It seems as if the grant of letters of administration of the estate of the deceased was not issued to the 1st and 3rd defendant as was envisaged in the agreement aforesaid but rather to the 4th defendant. I am in agreement with the defendants that the said agreement for sale between the 1st and 3rd defendant with the plaintiff could not bind the 4th defendant as the duly appointed administrator of the estate of the deceased. It follows therefore that the transfer of Plot No. 4320 by the 4th defendant in his capacity as the administrator of the estate of the deceased to the 2nd defendant would be proper and lawful and the plaintiff’s recourse if any would only be against the 1st and 3rd defendants for recovery of any damages that may flow from their agreement for sale referred to above.
 15. The defendants however have not placed any evidence before the court to show that the 4th defendant is the administrator of the estate of the deceased. The defendants have not exhibited a copy of the grant of letters of administration in respect of the estate of the deceased that is alleged to have been issued to the 4th defendant in their bundle of documents filed herein on 5th June, 2014 or in the 2nd defendant’s replying affidavit filed herein on 30th July, 2014. There is also no evidence of how Plot No. 4320 was transferred to the 2nd defendant. A copy of the death certificate alleged to be of the deceased that was annexed to the 2nd defendant’s affidavit in reply to the application herein considered together with the failure of the defendants to place before court for scrutiny a copy of the grant of letters of administration of the estate of the deceased raises serious doubt on the defendants contention that the 4th defendant was duly appointed as the administrator of the estate of the deceased and that in that capacity he lawfully sub-divided plot No. 2009 and transferred a portion thereof namely, Plot No. 4320 to the 2nd defendant.
 16. According to the Certificate of Death annexed to the replying affidavit of the 2nd defendant as annexure “JKO1”, the death of the deceased was registered on 8th July, 2014 and the said certificate was issued on 9th July, 2014. What this means is that the defendants acquired the said certificate of death after the filing of this suit. If that is the case then there is no way in which they could have applied for and obtained a grant of letters of administration in respect of the estate of the deceased on the strength of which the 4th defendant could have sub-divided Plot No. 2009 on 6th November, 2013 and transferred a portion thereof namely Plot No. 4320 to the 2nd defendant on 18th November, 2013. A certificate of death is a prerequisite to the issuance of grant of letters of administration. It is curious that although the defendants have claimed that the grant of letters of administration was issued to the 4th defendant in the year 2012, they have not mentioned the date when it was so issued or annexed a copy thereof. Due to the foregoing, the plaintiff’s claim that Plot No. 4320 was transferred to the 2nd defendant fraudulently in a dubious manner is not farfetched.

17. It is not disputed that the plaintiff is in occupation of a portion of Plot No. 4320 (the suit property) and has developed the same extensively. There is also no dispute that the plaintiff has occupied the said portion of Plot No. 4320 (the suit property) for over 18 years. The plaintiff's occupation of the said portion of Plot No. 4320 can only be brought to question by a lawful proprietor of Plot No. 4320 who would have a superior interest to his. From what I have stated above, the manner in which the 2nd defendant acquired her title to Plot No. 4320 is questionable and from the material on record, it is likely that the plaintiff would be able to prove that the 2nd defendant's title was not acquired in a fraudulent and unlawful manner.
18. Even if it is assumed that the 2nd defendant is the lawful owner of Plot No. 4320, could this entitle her together with the 1st defendant who is her husband to forcefully enter on a portion of the said parcel of land which is occupied by the plaintiff (the suit property) and convert the buildings that the plaintiff has put up thereon to their use? The answer is no. The rule of law must be observed by everyone. The 1st and 2nd defendants have to follow the due process in repossessing the suit property from the plaintiff. I believe that the counter-claim that they have lodged herein is the way to go. The 1st and 2nd defendants attempt to forcefully take possession of the suit property was wrong and the plaintiff who claims to have a legitimate interest in the suit property is entitled to protection by the court against the self-help remedy that the 1st and 2nd defendants have attempted to employ against him. To deny the plaintiff the injunction sought on the face of this illegal onslaught by the 1st and 2nd defendants would be tantamount to leaving him at the mercy of the 1st and 2nd defendants. The plaintiff having come to court for the determination of the dispute that he has with the defendants over the suit property, to deny him injunction in the circumstances and leave him to sort out the matter with the 1st and 2nd defendants extra-judicially would be a violation of his right under Article 50(1) of the Constitution of Kenya. The court would have also failed to observe the National Values and Principles of Governance set out in Article 10 of the Constitution as read with Article 159(2) (e) thereof.
19. Having held that the plaintiff has established a prima facie case with a probability of success against the defendants, the next question to consider is whether the plaintiff has demonstrated that he stands to suffer irreparable injury that cannot be compensated in damages unless the injunction sought is granted. As I have stated above, it is not in dispute that plaintiff is in occupation of the suit property. It is also not in dispute that the plaintiff has developed the suit property. The 1st and 2nd defendants have not denied that they had made attempts dispossess the plaintiff of the property together with the developments thereon. If the orders sought are not granted, the plaintiff is likely to be dispossessed of the said property and the 2nd defendant who has a title to Plot No. 4320 would be free to dispose of the same. In such event, the plaintiff would no doubt suffer irreparable injury. In the circumstances, I am satisfied that the plaintiff has shown that he would suffer irreparable injury which cannot be compensated in damages if the orders sought herein are not granted.
20. In conclusion, it is my finding that the plaintiff has satisfied the conditions for granting interlocutory injunction. The plaintiff's application dated 25th July, 2014 has merit. The same is allowed in terms of prayer 3 thereof. The cost of the application shall be in the cause.

Delivered, Signed and Dated at Kisii this 20th day of March 2015.

S. OKONG'O

JUDGE

In the presence of :

N/A for the plaintiff

N/A for the defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE