REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND DIVISION

ELC CIVIL NO. 1248 OF 2014

MAHESH SHAH.....PLAINTIFF/APPLICANT

-VERSUS-

CHIEF LANDS REGISTRAR.....1ST DEFENDANT/RESPONDENT

JETLAK FOODS LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

On 28th May, 1997 Mahesh Shah, the plaintiff herein was registered as the proprietor of the leasehold interest of that property known as Ruiru Township/660. The lessor was the Government of Kenya. Mahesh continued to pay the arrival land rent to the lessor. Mahesh also continued to pay the periodical land rates to the local council, the municipal council of Ruiru. Then in the year 2011, Mahesh discovered that the original certificate of lease which had been issued to him was missing. he followed procedure to acquire a replacement.

Mahesh made a report to the local police station. He obtained a police abstract. Mahesh swore a statutory declaration as to the loss. He then moved the Registrar, the Land Registrar Thika for a replacement title documents. The Land Registrar being satisfied that Mahesh was the proprietor of Ruiru Township/660 advertised the loss in the Kenya Gazette. Gazette Notice No. 2118 of March, 2011 contained the advertisement. Sixty days later or so Mahesh was issued with anew certificate of lease. It was dated 19th may, 2011. Mahesh kept his new title documents, presumably in a safer place.

Then in august, 2014, Mahesh was to learn through his employees that someone else was also bringing claim to Ruiru Township/660 (the suit property). He discovered it was the 2nd Defendant, worried, Mahesh applied to the Land Registrar for an official search and it turned out the 2nd Defendant was now the registered proprietor and not Mahesh. Mahesh promptly moved to court.

In court Mahesh sought to restrain any further disposition of the suit property. He also sought to restraint the 2nd Defendant from interfering with his quiet possession, employment and occupation of the suit land.

In response to claims by Mahesh, the 2nd defendant filed a replying affidavit sworn by its managing director. That was now on 22nd October, 2014. The 2nd Defendant denied that Mahesh was the owner of the suit land. Instead the 2nd Defendant claimed ownership and proprietorship of the suit property. The

2nd Defendant denied that it had been fraudulent or dishonest in any way. The 2nd Defendant exhibited a copy of its certificate of lease. It was dated 8th June, 2012. Like the certificate of lease held by Mahesh, the 2nd Defendant certificate of lease was also issued by the 1st Defendant. The 2nd Defendant however categorically denied that it had trespassed into the suit property. It also denied allegations by Mahesh that the 2nd defendant wanted or was in the process of erecting a boundary wall around the suit property.

I am called upon to determine at an interlocutory stage the question whether the application filed by Mahesh on 24th September, 2014 ought to be allowed.

At this point of the proceedings, I am convinced that I am expected to answer the following questions. Has Mahesh the Plaintiff, demonstrated on the evidence and facts before the court a prima facie case with chances of success? Secondly, in the absence of an injunction, will the Plaintiff, Mahesh suffer irreparably, finally, in the event of any doubts then in whose favour does the balance of convince tilt. All there are the main principles for the grant of an interlocutory injunction as encapsulated in the case of Giella –v- Cassman Brown & Co. Ltd [1973] EA 358 and applied over the years: see Joseph Wachira Wamura –v- Savings & Loans (K) Ltd [2010] eKLR.

It is to be noted though that the principles set out in Giella –v- Cassman Brown & Co. Ltd case are not exhaustive. An injunction being a discretionary and equitable remedy will invite all other relevant consideration in the realm of equity. This indolent party will not be favoured. The conduct of both parties will also be considered as will the general circumstances of the case: see Bonde –v- Steyn [2013]2 E.A. 8.

I have considered carefully the rival submission of the parties. I have also considered the facts of the case and now return my finding as follows:

The Plaitniff claims to have acquired the property by way of purchase in the year 1997 when he was issued with a title document. He mislaid the same and was issued with a new one on the year 2011. The misplacement or loss of the 1997 title was advertised in the Kenya Gazzette but only after the Land Registrar was satisfied that the Plaintiff was the registered proprietor. A certificate of official search issued by the Land Registrar in November, 2010 confirms this fact. Then came the 2nd Defendant with another identical certificate of lease for the suit property in the year 2012 with the only difference being the commencement date of the leasehold interest. The Plaintiff maintained that he has established a prima facie case with a probability of success. He was the victim who had been divested of his genuine title fraudulently and he needed answers. He contended he had been paying all the rates and rent on the property and availed receipts to like effect. I was the Plaintiff's contention that even though the 2nd defendant has a title document to show the Plaintiff's title stands in better stead as it was first in time and all other records indicate this title. The Plaintiff wrapped it up by stating that the Plaintiff stands to suffer irreparably. On the 2nd Defendants part it was submitted by Mr. Sehmi that he Plaintiff has not made out a case as provided for under Order 40 of the Civil Procedure Rules. The 2nd Defendant was also of the clear view that as the tile is not registered in the name of the 2nd defendant it cannot be impeached and the court ought to recognize that fact of proprietorship. Besides submitting that the Plaintiff had not shown that the Plaintiff would suffer irreparably if an injunction was no granted, the 2nd Defendants also faulted the Plaintiff for not joining a party to these proceedings. The part in question was one Agnes Wamui who has lodged a caution against the title registered in the name of the 2nd Defendant.

Before juxtapositioning the facts and the law, it would be important to deal with the issue of non-joinder which I deem to be more of a technical objection than anything. To the 2nd defendant the party .... from the tray is critical as the said party Agnes Wambui also claims the same property. For that reason alone she should have been joined. My quick answer is that non-joinder or misjoinder of a party should never lead to a suit, let alone an application, being defeated. Suits as well as applications in their interlocutory form should be determined on the basis of parties before the court. It is for this reason that Order 1 Rule 9 of the Civil Procedure Rules provides that the court may deal with the matter in controversy so far as regards the ... and interests of the parties actually before it. The controversy currently before the court concerns who as between the Plaintiff and the 2nd Defendant is the true registered owner of the suit

property. The said Agnes Wambui may have in my view only asymmetrical claim. He claim is subservient to that of the Plaintiff as well as the 2nd Defendants as it is limited to a beneficiary's interest. I would not fault the Plaintiff for not impleading her noting as it were that her claim is registered against eh 2nd Defendants title which the Plaintiff claims should not even exist. In any event if so inclined the court may at an appropriate time invoke the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules and formally order the joinder of the said party. At the moment the import and relevance of her absence is absolutely minimal.

The 2nd Defendnats second line of submission was that he sit proeprty is nto in any danger of being wasted, damaged or alienated by either party. Order 40 Rule 1(a) of the civil Procedure Rules is to like effect. A party under the said rule it is stated, should sow by affidavit or otherwise that he suit property is in danger of alienating, wastage or damage. I am not convinced that he jurisdiction of the court to grant an interlocutory injunction is limited by the provisions of Order 40 Rule 1. Injunctions being discretionary and equitable reliefs no doubt serve a crucial purpose. Certainly they must not be issued on flimsy grounds. The court must weigh all the circumstances. The aim should be that at the end of the litigation the subject matter is still preserved: see Bonde –v- Steyn [2013] 2EA 8. At the interlocutory stage a party is not expected to prove to the standard of a balance of probabilities the alleged loss or damage or wastage or alienation. One need only establish he same on a prima facie basis: see Mrao Ltd –v- First American Bank Ltd [2003] KLR 125. In my view there is no larger threat to ones ... property where the same has been registered in another person's name. Nobody can stop the other person from disposing of the same or alienating the real property at any time. The threat of danger of disposal in such cases is clear present and real.

With regard to whether the Plaintiff has proved a prima facie case my view is that he Plaintiff indeed has. The Plaintiff has shown in the basis of the documents availed to the court that once upon a time the Plaintiff owned the suit property. He still claims he does. He has also shown that at one time he mislaid or misplaced his title document and he was then issued with another one. There is no way of really saying it otherwise: the land Registrar could not have issued the plaintiff with another replacement title document if the registry records did not reflect the Plaintiff as a proprietor. On the other hand documents availed especially the letter from the Commissioner of Lands to the District Land Registrar dated 28th May, 2012 reveal that the 2nd Defendant acquired interest in the suit property through a fresh grant by the Commissioner of lands in the year 2012. The question posit then is this: at what point in time did the Plaintiff or any person acting on his behalf surrender the then existing title for re-issue or re-allocation. I have no good reason to impugn and fault the 2nd Defendant but as far as the Plaintiffs' interest and case is concerned, there is good reason to call upon the Defendants to show how the title in favour of the 2nd Defendant came to exist.

I would hold as I do that he Plaintiff has established a prima facie case as the proprietor who unbeknown to him has been divested of his interest in property and is consequently entitled to an explanation. In other words, the Plaintiff had an undoubted right to the suit property as demonstrated by the re-issuance of a title to him among other facts and which right on the basis of the material presented to the court was apparently infringed in unclear circumstances when the 2nd Defendant was issued by the 1st Defendant with a lease over the same property.

As to whether the Plaintiff has also satisfied the second hints of the principles encapsulated in the case of Giella –v- Cassman Brown & Co. Ltd [1973] EA, ti was submitted by the Plaintiff's counsel that he Plaintiff stands to suffer irreparably if an injunction is not granted. The 2nd Defendant replied that the subject matte can actually be valued if at the end of the litigation the Plaintiff wins and the suit property is no longer within reach. The Plaintiff could then be compensated.

I take the view that it is not a relentless and inescapable rule that an interlocutory injunction can never issue where damages may be available or an appropriate remedy. As was stated by Ringera J (as he then was) in the case of Wamaitha –v- Industrial & Commercial Development Corporation [2001] KLR 374 "if that were the rule the law would unduly lean in favour of those rich enough to pay damages..." indeed, even in the celebrated case of Giella –v- Cassman Brown (supra), it was stated that "an injunction will not

normally be granted unless the applicant may suffer irreparably...". The court in Giella was quite cautions and used the word "normally" the use of that word 'normally' was quite telling. In its natural and ordinary meaning the word normally means "more often than not" or "usually". It is thus clear that even where it is possible to quantify damages to the penny, an injunction may still be granted in appropriate cases. I believe that it is high time that the motion that for an injunction to be issued the applicant must show that he will suffer irreparable damage was dispense with as that is not what Giella –v- Cassman Brown stood for, truly, it should not be enough to simply ascertain he subject matter, place a monetary value and state that compensation is possible. Such an approach may see parties lose their assets and properties as there is certainly no property, tangible or intangible that can no longer be valued. As was stated in the case of Shetfer –v- City of London Electronic Lighting co. ltd [1895] 1Ch 287 at page 315 by A. L. Smith LJ

"(a) person by committing a wrongful act whether it be public company for public purposes or a private individual is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbors rights, by assessing damages, in that behalf .... there are however cases where this rule may be relaxed and in which damages may be awarded in substitution... in my opinion, it may be state as a good working rule that (i) if the injury to the Plaintiff legal rights is small (ii) and is one capable of being estimated in money (iii) and is one frequently compensated by small money payment and (iv) the case is one in which it would be oppressive to the defendant to grant an injunction then damages in substitution for an injunction may be given"

Truly those should be the considerations. In that instant case the subject matter includes land. Loss of the same, unique as laid is as property, may be before were monetary refund.

The totality of the circumstances of this case would lead me to conclude that solace cannot be taken by the plaintiff in any form of monetary compensation. This is an appropriate case where an injunction ought to issue in view of the existing second title in favour of the 2nd Defendant. It would indeed not be oppressive to the 2nd defendant who has not been in possession yet the Plaintiff has been. It would be better to maintaint he status quo and I am satisfied that an injunction will do that satisfactorily. I consequently allow the application dated 24th September, 2014 in terms of prayer No. 3 thereof.

I decline to allow prayer No. 4 of the said application as the same is premature and amounts to an early fishing expedition. The orders sought are a kin to direction to be made at a pretrial conference once all parties have filed their pleadings and documents.

The costs of the application will however abide the outcome of the suit.

Order accordingly

Dated, signed and delivered at Nairobi this 18th day of March, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant

..... for the Defendants/Respondent