



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.18 OF 2014

MARK JOMO OSORO PLAINTIFF

VERSUS

SAMWEL KENANI OMWANDO1ST DEFENDANT

LAND REGISTRAR, KISII2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. In his plaint dated 21st January, 2014, the plaintiff averred that he was at all material times the registered proprietor of all that parcel of land known as **LR No. Kisii Municipality/Block III/326** (hereinafter referred to as “**the suit property**”) which is a leasehold interest from Gusii County Council for a term of 99 years with effect from 4th May 1991. The plaintiff averred that on or about 6th January, 2014 he discovered that the records held by the 2nd defendant relating to the suit property had been tampered with in that the land register bearing his name as the proprietor of the suit property was removed from the folder of land registers for Kisii Municipality Block III and replaced with a new land register bearing the 1st defendant’s name as the proprietor of the suit property. The plaintiff averred that he acquired the suit property on 8th February 2010 from one, Leonard Okoth Olelo to whom the property was allocated by the Commissioner of Lands on 29th April 1991. The plaintiff claimed that the 1st defendant’s title to the suit property was acquired through forgery and fraud in collusion with the 2nd defendant. The plaintiff sought a declaration that he is the bona-fide owner of the suit property.
2. The 1st defendant filed a defence and counter-claim against the plaintiff. In his defence, the 1st defendant averred that he acquired the suit property from one, Marita Bwari Nyachoti on 16th March 1993 and that the property had been allocated to the said Marita Bwari Nyachoti on 12th January 1988. The 1st defendant averred that since the suit property had already been allocated to Marita Bwari Nyachoti on 12th January 1988 as aforesaid, there is no way the same could have been allocated again to Leonard Okoth Olelo in the year 1991. The 1st defendant has contended that the purported letter of allotment that was issued to Leonard Okoth Olelo on 29th April 1991 is the work of fraudsters. The 1st defendant averred that he is the lawful proprietor of the suit property and as such there is no basis upon which the reliefs sought against him by the plaintiff in the plaint can issue. In the counter-claim, the 1st defendant averred that after he purchased the suit property from Marita Bwari Nyachoti he was registered as the proprietor thereof on 16th March 1993 and issued with a certificate of lease on the same date. The 1st defendant averred that the

- purported certificate of lease held by the plaintiff in respect of the suit property that was issued on 2nd June 2010 was acquired irregularly and fraudulently and as such is invalid. The 1st defendant averred that the plaintiff has colluded with Leonard Okoth Olelo to defraud him of the suit property. The 1st defendant counter-claimed against the plaintiff for; an order for the cancellation of the certificate of lease held by the plaintiff in respect of the suit property, a permanent injunction to restrain the plaintiff from entering upon, trespassing onto, alienating, selling, transferring and/or otherwise interfering with the suit property and general damages for trespass.
3. Together with the plaint, the plaintiff brought an application for a temporary injunction to restrain the 1st defendant from trespassing on, damaging, wasting, transferring, alienating and/or doing any act on the suit property and an order to compel the 1st defendant to deliver vacant possession of the suit property pending the hearing and determination of this suit. In his affidavit in support of the application sworn on 21st January 2014, the plaintiff reiterated the contents of the plaint that I have highlighted at the beginning of this ruling. The plaintiff annexed to his affidavit in support of the application; a copy of the certificate of lease that was issued to him in respect of the suit property, a copy of a lease dated 8th February 2010 between the Gusii County Council and Leonard Okoth Olelo over the suit property, a copy of a letter of allotment dated 29th April 1991 that was issued by the Commissioner of Lands to Leonard Okoth in respect of the suit property, a copy of letter of consent dated 29th June 2010 issued by the Kisii Municipal Council, a copy of rates demand notice dated 8th June 2010 issued to Leonard Okoth, a copy of the register of the suit property and a receipt for payment that was made therefor dated 10th February 2012, rates payment receipt dated 29th July 2013, a copy of a letter dated 11th March 2010 forwarding the lease in favour of Leonard Okoth Olelo to the 2nd defendant for execution by the said Leonard Okoth Olelo and registration, a copy of rates clearance certificate issued to Leonard Okoth on 8th June 2010 by Kisii Municipal Council and a copy of certificate of official search dated 30th September 2013 on the title of the suit property. The plaintiff stated in his affidavit that he is apprehensive that the 1st defendant is likely to sell or alienate the suit property while this suit is pending unless restrained by this court. The plaintiff contended further that if the property is disposed of by the 1st defendant, the suit herein will be rendered nugatory.
 4. The plaintiff's application was opposed by the 1st defendant through a replying affidavit sworn on 17th February 2014. In his response to the application, the 1st defendant reiterated the contents of his defence and counter-claim that I have highlighted above. I would not wish to reproduce the same here save only to state that the 1st defendant maintained that the plaintiff's application is anchored on fraudulent and false documents. The 1st defendant annexed to his affidavit in support of the application; a copy of a letter of allotment dated 12th January 1988 through which the suit property was allocated to Marita Bwari Nyachoti ("hereinafter referred to only as "**Marita**"), a copy of the receipt dated 31st July 1990 for Kshs. 11,240/= for the payments that were made on account of registration fees, conveyancing, survey fees, rent and stand premium, a copy of a lease between Gusii County Council and Marita Bwari Nyachoti dated 17th March 1992, a copy of a letter dated 19th March 1992 that forwarded the said lease to the 2nd defendant for execution by Marita and registration, a copy of a cancelled certificate of lease dated 22nd October 1992 in favour of Marita, a copy of agreement for sale dated 15th December 1992 between Marita and the 1st defendant, letter of consent to transfer dated 9th March 1993, a copy of rates payment receipt dated 22nd October 1992, a copy of certificate of lease dated 16th March 1993 in respect of the suit property in favour of the 1st defendant, rates payment receipts dated 23rd December 2003 and land rent demand note dated 22nd January 2014.
 5. When the plaintiff's application came up for hearing on 11th March 2014, I directed that the same be heard by way of written submissions. The advocates for both parties filed their written submissions and the same are on record. In their written submissions the plaintiff's advocates submitted that the plaintiff has placed sufficient material before the court in proof of the fact that the plaintiff acquired the suit property lawfully from the previous owner thereof, Leonard Okoth Olelo. The plaintiff's advocates submitted that since the parties have accused each other of fraud

- in the acquisition of the suit property, it would be prudent to grant the orders sought so as to maintain the status quo pending further investigation by the court as to how two titles were issued for the same property to the plaintiff and the 1st defendant.
6. On their part, the 1st defendant's advocates submitted that the plaintiff has failed to satisfy the conditions for granting the orders sought and as such he is not entitled to the same. The 1st defendant's advocates submitted that the plaintiff has failed to establish a prima facie case with a probability of success against the 1st defendant and also to demonstrate that he stands to suffer irreparable injury which cannot be compensated in damages unless the injunction sought is granted.
 7. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit sworn by the 1st defendant in opposition to the application. Finally, I have considered the written submissions that were filed herein by the respective advocates for the parties and the authorities cited in support thereof. The plaintiff's case against the 1st defendant is that the 1st defendant acquired his purported title over the suit property fraudulently and as such the same is illegal. The plaintiff has given the history of the suit property from the time it was allocated to one, Leonard Okoth Olelo upto the time the same was registered in his name. He has exhibited an extract of the register of the suit property that was issued to him by the 2nd defendant on 10th February 2012 which shows that the suit property was registered in the name of Leonard Okoth Olelo on 4th May 2010 before the same was transferred to the plaintiff on 2nd June, 2010. The plaintiff has also exhibited a copy of his certificate of lease for the suit property that was issued to him on 2nd June 2010 by the 2nd defendant and documents showing that he was at all material times registered with the defunct Kisii Municipal Council as a rent and rate payer in respect of the suit property.
 8. In his response to the plaintiff's claim, the 1st defendant has contended that it is the plaintiff's purported title over the suit property which is fraudulent and illegal. The 1st defendant has contended that he acquired the suit property from Marita who was the first allottee of the same and to whom a lease and certificate was first issued. The 1st defendant has contended that there is no way in which the suit property that had already been allocated to Marita and a lease and certificate of lease in respect thereof issued to her could be allocated a fresh to Leonard Okoth Olelo from whom the plaintiff purportedly acquired the same. The 1st defendant has also given the history of the suit property from the time it was allocated to Marita upto the time the same was sold and transferred to him. The 1st defendant has exhibited his certificate of title for the suit property. The 1st defendant has also exhibited land rent and rates demand notices and rates and rent payment receipts in proof of the fact that he was registered with the defunct Kisii Municipal Council as rent and rate payer in relation to the suit property.
 9. The 2nd defendant who is the custodian of records relating to the ownership of the suit property did not respond to the plaintiff's application. It did not also file a statement of defence to the plaintiff's claim. From what I have set out above, there is no dispute that both the plaintiff and the 1st defendant have titles to the suit property. The plaintiff has a letter of allotment, a lease and a certificate of lease. The plaintiff also has a certified copy of the register for the suit property which shows that he was registered as the proprietor of the suit property on 4th May, 2010. The 1st defendant has also produced and placed before the court, a letter of allotment, a lease and a certificate of lease in respect of the suit property in support of his claim to the property. The plaintiff has accused the 1st defendant of fraud and forgery in his acquisition of the title to the suit property. The 1st defendant has also accused the plaintiff of being a fraudster. The 1st defendant has contended that his title was first in time and as such is valid.
 10. I have carefully analyzed the documents placed before me by the two parties and the rival arguments by their respective advocates. I have no doubt in my mind that one of the parties has fraudulent documents of title to the suit property. On the material before me however, I am unable to determine which of the contestants herein holds a fraudulent title. I am unable to agree with the 1st defendant's contention that because his documents of title appear to have been issued earlier than the plaintiff's, that gives the said documents a clean bill of health. To demonstrate that the

documents presented by the 1st defendant cannot be taken on face value, I have noted that the signature of Marita in the instrument of lease is different from her signature in the agreement for sale of the suit property that she is said to have entered into with the 1st defendant. The plaintiff's contention in these proceedings is that the documents of title held by the 1st defendant have been forged by the 1st defendant in collusion with the 2nd defendant to dispossess the plaintiff of the suit property. The 1st defendant on the other hand has contended that the plaintiff has forged his title documents in collusion with Leonard Okoth Olelo in a conspiracy aimed at defrauding the 1st defendant of the suit property. I am of the view that these are issues which can only be determined at the trial.

11. In view of what I have stated above, I am not certain that the plaintiff has established a prima facie case with a probability of success against the 1st defendant. Since the validity of the plaintiff's title is in doubt and the plaintiff is not in possession of the suit property, I am equally doubtful that the plaintiff would suffer irreparable injury which cannot be compensated in damages if the orders sought are not granted.
12. The foregoing being my view of the matter, the plaintiff's application falls for consideration of a balance of convenience. The 1st defendant has a title to the suit property albeit contested. The 1st defendant is also in possession of the said property. In the circumstances, I am of the view that the balance of convenience would tilt against the granting the injunction sought against the 1st defendant. I am of the view that justice would be better served if the status quo is maintained. I would therefore dismiss the plaintiff's application dated 21st January 2014 and order that pending the hearing and determination of this suit the parties shall maintain the status quo prevailing as of the date hereof as relates to title, possession and use of all that parcel of land known as **LR No. Kisii Municipality/Block III/326**. For the avoidance of doubt, neither party shall sell, transfer, lease or charge the suit property pending the hearing and determination of this suit. The cost of the application shall be in the cause.

Delivered, signed and dated at KISII this 13th day of March, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

Mr. Ochwang'i: for the 1st defendant

N/A 2nd and 3rd defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE