



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 232 OF 2014

JOYCE SARANGE KENYATTA PLAINTIFF

VERSUS

LUCAS NYAMBEGERA NYANGWESO DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 18th June, 2014 seeking; a permanent injunction to restrain the defendant by himself or through his agents or servants from interfering with all that parcel of land known as **LR No. Kisii Municipality/Block I/595** (hereinafter referred to as “**the suit property**”) and damages. In her plaint, the plaintiff averred that she is and was at all material times the registered proprietor of the suit property which she purchased from one, Petiro Ongwacho Ongwacho on 11th November 2013 at a consideration of kshs. 1,400,000/=. The plaintiff averred that after purchasing the suit property she commenced construction thereon of a permanent building after obtaining approvals from the relevant authorities. The plaintiff averred that while the construction was in progress, the defendant stormed the site without any lawful or justifiable cause in the company of police officers from Kisii Police Station, chased away her workers and confiscated the tools which they were using. The defendant thereafter; again with assistance of the said police officers, proceeded to use the building materials that the plaintiff had assembled on site to put up a wall around the suit property thereby blocking the plaintiff from continuing with construction on the suit property.
2. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 17th June 2014 seeking a temporary injunction to restrain the defendant from entering, demolishing, removing construction materials from or in any way whatsoever trespassing onto the suit property pending the hearing and determination of this suit. The plaintiff’s application was brought on the grounds that were set out in the body thereof and in the affidavit of the plaintiff that was sworn on 17th June 2014. In her affidavit in support of the application, the plaintiff reiterated the contents of the plaint that I have set out above. The plaintiff reiterated that she acquired the suit property from Petiro Ongwacho Ongwacho. She annexed to the said affidavit among others; a copy of an agreement for assignment of lease dated 11th November 2013 between her and Petiro Ongwacho Ongwacho through which she acquired the property, a copy of certificate of official search dated 11th October 2013 on the title of the suit property, a copy of a certificate of lease dated 11th August 2011 in respect of the suit property in the name of Petiro Ongwacho Ongwacho, a copy of the instrument of transfer of lease dated 2nd December 2013 that was executed by Petiro Ongwacho Ongwacho in her favour in respect of the suit property and a copy of certificate of official search on the title of the suit property dated 13th May 2014. The plaintiff contended that as the registered proprietor of the suit property, she had indefeasible and inalienable rights over the same to the exclusion of all and sundry including the defendant. The plaintiff contended that the defendant’s acts of entering the suit property and carrying out the activities set out above

- amounted to trespass. The plaintiff contended that she stood to suffer irreparable harm if the injunction that she had sought was not granted as the defendant's activities aforesaid were bound to change the nature and character of the suit property.
3. The plaintiff's application was opposed by the defendant through a replying affidavit that was sworn by the defendant on 25th June 2014. In his affidavit, the defendant admitted that on 28th May 2014 he made a report at Kisii Police Station that there were people carrying out construction on the suit property which he claimed to own. Following that report, he was accompanied to the suit property by police officers where they found construction in progress. The defendant claimed that the workers who were on site fled after seeing police officers. The said officers then confiscated the tools that were being used by the said workers in the construction that they were carrying out on the suit property and took the same to Kisii Police Station. The defendant thereafter fenced the suit property. The defendant contended that the suit property lawfully belongs to him. The defendant contended that the suit property was a portion of a parcel of land known as Plot No. 48"G" that he purchased from one, Nelson Gichana Mabeya at a consideration of kshs. 200,000/= and that he had been issued with a letter of allotment in respect thereof and was in the process of being issued with a lease and a certificate of lease over the same.
 4. The defendant contended that the plaintiff has no lawful claim over the suit property and that the documents that she had exhibited in her affidavit in support of the application for injunction particularly the certificate of lease dated 11th August 2011 in the name of Petiro Ongwacho Ongwacho were fake. The defendant contended that the plaintiff fell in the hands of fraudsters who conned her into buying the suit property. He contended that the plaintiff having acquired the property from fraudsters she did not obtain good title over the property which she can enforce against him. The defendant contended that the plaintiff is a trespasser on the suit property.
 5. The plaintiff's application for injunction was heard on 26th June 2014 when the advocates for the parties addressed me at length on their respective cases. The submissions of counsel are on record and I do not wish to reproduce them here save only to state that the plaintiff maintained in her submission that she is the lawful proprietor of the suit property and that the defendant had no right to dispossess her of the property forcefully using police officers. The defendant on the other hand maintained that the plaintiff acquired title to the suit property fraudulently. As evidence of fraud, the advocate for the defendant pointed out to the court that the measurement of the suit property in the certificate of lease dated 11th August, 2011 that the plaintiff had annexed to her affidavit in support of the application was given both in acres and hectares.
 6. I considered the plaintiff's application and made a detailed ruling on the same on 14th November 2014. In my ruling I stated among others that;

“There is no doubt that the suit property and Plot No. 1022 which the defendant claims to own are at the same location on the ground. However, whereas the plaintiff has a title to the suit property and was in possession thereof at all material times, the defendant's title to Plot No. 1022 is said to be in the process of being acquired. A title which is in the process of being acquired cannot defeat an existing title.”

I proceeded further as follows;-

“I have no evidence on the material before me that the plaintiff's title to the suit property was acquired fraudulently as claimed by the defendant. Whether or not the said title is fraudulent is an issue that can only be determined at the trial. In any event, the fact that the plaintiff's title to the suit property is fraudulent could not justify the defendant's forceful entry and eviction of the plaintiff therefrom.”

7. For the reasons that I gave in the said ruling, I allowed the plaintiff's application for injunction against the defendant. What I now have before me is the defendant's application by way of Notice of Motion dated 3rd December 2014 brought under section 19 (3) (f) (sic) of the Environment and Land Court Act, 2011. The defendant has sought the following reliefs;

a. Spent

- b. **Spent**
- c. **That the honourable court be pleased to review, set aside and/or vary the order made on 14th November 2014.**
- d. **That in the alternative and without prejudice to prayer (c) above, the honourable court be pleased to issue an order preserving the suit premises until the suit is heard and determined.**
- e. **That the cost of this application be provided for.**

The defendant's application was brought on the grounds set out on the face of the application and in the supporting affidavit of the defendant sworn on 3rd December 2014. The defendant contended that after the delivery of the ruling on the plaintiff's application for injunction on 14th November 2014, the defendant discovered new and important evidence that was not within his knowledge at the time the application was heard. The defendant contended further that the plaintiff's entire suit and application for injunction were founded on fraud and as such the court was deceived into granting the injunction. The defendant contended that in the circumstances, it would serve the interest of justice if the order of this court made on 14th November 2014 is reviewed, set aside and/or varied. In his affidavit, the defendant stated that upon delivery of the ruling aforesaid, he instructed his advocates on record to ascertain the authenticity of the identification numbers which are appearing in the certificate of lease dated 11th August, 2011, assignment of lease dated 11th November, 2013 and instrument of transfer dated 2nd December, 2013 that were exhibited by the plaintiff in her affidavit in support of the application for injunction. The identification numbers that were to be authenticated were, identification No. 4119371 that appeared against the name of Petiro Ongwacho Ongwacho in the assignment of lease dated 11th November 2013 and certificate of lease dated 11th August 2011 and, identification No. 4113371 which appeared against the name of Petiro Ogowancho Ogowancho in the instrument of transfer of lease dated 2nd December 2013.

- 8. The defendant stated that inquiry made by his advocates aforesaid at the office of the Registrar of Persons revealed that identification No. 4119371 belongs to Petiro Ongwacho Ongwacho and that identification No. 4113371 which is said to belong to Petiro Ogowancho Ogowancho does not exist. The defendant contended that this revelation means that Petiro Ongwacho Ongwacho of identity card No. 4113371 who was said to be the leasehold proprietor of the suit property under the certificate of lease dated 11th August 2011 aforesaid is not the same as Petiro Ogowancho Ogowancho of identity card No. 4113371 who is said to have executed the instrument of transfer of lease dated 2nd December 2013 pursuant to which the suit property was transferred to the plaintiff. The defendant contended that the existence of two different identification numbers and names for the person who is said to have sold and transferred the suit property to the plaintiff is evidence of fraud and this fortifies his claim that this suit is founded on fraud.
- 9. The defendant's application was opposed by the plaintiff through a replying affidavit filed in court on 19th January 2015. The plaintiff termed the defendant's application as unmeritorious, an academic exercise and an abuse of the court process. The plaintiff stated that the discrepancies in the name and identity card number for Petiro Ongwacho Ongwacho which have been highlighted by the defendant arose due to typing errors that occurred during the preparation of the instrument of transfer dated 2nd December, 2013 that was typed by a copy typist at Kisii town. The plaintiff annexed to her affidavit a copy of the identity card for Petiro Ongwacho Ongwacho which bears his correct name and identification number. The plaintiff contended that the errors aforesaid do not go to the root of her title to the suit property. She accused the defendant of clinging on straws.
- 10. The application came up for hearing on 23rd February 2015 when the advocates for the parties made oral submissions in support of their respective cases. I have considered the defendant's application together with the replying affidavit filed by the plaintiff in opposition thereto. I have also considered the submissions that were made before me by the parties' respective advocates. The defendant's application was purportedly brought under section 19 (3) (f) of the Environment and Land Court, Act, 2011. With due respect to counsel for the defendant who had put so much emphasis on this section, this section does not exist. The same was repealed by the Statute Law (Miscellaneous Amendments) Act, 2012 which also amended section 19 (2) of the Environment

and Land Court Act, 2011 and provided that this court shall be bound by the procedure laid down in the Civil Procedure Act. The defendant's application being one for review should have been brought under section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 45 of the Civil Procedure Rules, 2010.

11. Order 45 rule 1 (1) of the Civil Procedure Rules allows any person aggrieved by a decree or order to apply to court for a review of the same on the grounds that; after the decree or order was made, he has discovered new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The defendant's application before me is grounded on; the discovery of new and important matter or evidence. As I have stated earlier in this ruling, the new and important matter that the defendant has discovered is that, the name and identity card number for Petiro Ongwacho Ongwacho who is said to have sold the suit property to the plaintiff as they appear in the assignment of lease dated 11th November 2013 and certificate of lease dated 11th August 2011 which the plaintiff had relied on in support of her application for injunction are different from the way they appear in the instrument of transfer of lease dated 2nd December 2013 which the plaintiff had also relied on in support of the said application.
12. The defendant has contended that in the said assignment of lease and certificate of lease, the name of the person who is said to have sold the suit property to the plaintiff appear as Petiro Ongwancho Ongwacho and his identity card number is given as 4119371 while in the instrument of transfer, his name is given as Petiro Ogowancho Ogowancho of identity card number 4113371. The defendant has contended that the person who sold the suit property to the plaintiff and the person who executed the transfer in her favour seem to be different going by the names and identity card numbers that I have referred to above. This to the defendant is evidence of fraud in the acquisition by the plaintiff of the suit property. The defendant has contended that he only discovered this anomaly when his advocates on record made inquiries at the office of the Registrar of Persons.
13. I am unable to agree with the defendant's contention that the anomalies that he has pointed out in the name and identity card number of the person who is said to have sold the suit property to the plaintiff is a new and important matter or evidence that he has just discovered. As I have stated at the beginning of this ruling, the plaintiff had annexed to her affidavit in support of the application for injunction copies of; the assignment of lease dated 11th November 2013, certificate of lease dated 11th August 2011 and instrument of transfer of lease dated 2nd December 2013 in which the defendant has now claimed to have discovered the alleged anomalies. The alleged anomalies were apparent on the face of the said documents when the plaintiff's application for injunction was argued. It did not require the defendant to seek the assistance of the Registrar of Persons to point out to him that the names Ongwacho and Ogowancho appear to be different and that identity card numbers 4113971 and 4113371 are also different. In the circumstances, I am not satisfied that the matter or evidence which the defendant claims to have discovered is new and that the defendant could not have brought the same to the attention of the court when the plaintiff's application for injunction was being argued. Even if it is assumed that the matter or evidence that the defendant has pointed is new, I don't think that the same would have been important in the determination of the plaintiff's application for injunction. The same cannot therefore be a basis for review of the orders that were made herein on 14th November 2014. I am of the view that a new matter or evidence on account of which the court can be called upon to review its decree or order should be a matter or evidence that could have had some impact on the determination of the case or application in which the order or decree sought to be reviewed was made.
14. I do not think that the discovery of any new matter or evidence should entitle a party to seek review. In the present case, the defendant has contended that the discovery of the new matter or evidence that I have referred to above fortifies his contention that the plaintiff's title was obtained fraudulently. In my ruling on the plaintiff's application for injunction, I stated that I had no evidence before me that the plaintiff's title was obtained fraudulently. When I made that finding, what the defendant calls new and important matter or evidence was before me. I did not stop there. I made a further finding that even if the plaintiff's title to the suit property was acquired fraudulently, that could not have justified the forceful repossession of the suit property by the defendant from the plaintiff. It follows from the foregoing that even if the defendant had convinced me on a prima facie basis that the plaintiff's title was acquired fraudulently, I would

