



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 402 OF 2014

HABIBA ABDULLAH SHANKO PLAINTIFF

VERSUS

PHILIP MACHUKI NYANUMBA 1ST DEFENDANT

THOMAS MAONCHA ANISETI 2ND DEFENDANT

LAND REGISTRAR – KISII COUNTY 3RD DEFENDANT

RULING

1. What I have before me is the plaintiff's application that was brought by way of Notice of Motion dated 21st October 2014 in which the plaintiff sought; a temporary injunction to restrain the defendants from cutting down more trees or in any way interfering with all that parcel of land known as **LR No. West Kitutu/Bomatara/5853** (hereinafter referred to as "**the suit property**") pending the hearing and determination of this suit. The application was brought on the grounds set out on the face thereof and in the affidavit sworn by the plaintiff on 21st October 2014.
2. In her affidavit in support of the application, the plaintiff stated that she is the registered owner of the suit property which she purchased from the 2nd defendant in the year 2001. She stated that upon entering into an agreement for sale with the 2nd defendant, she took possession of the suit property and planted trees thereon. This was before the property was transferred to her in the year 2014. The plaintiff stated further that the 1st defendant in collusion with the 2nd and 3rd defendants created a title for a non-existent parcel of land namely, **LR No. West Kitutu/Bomatara/5836** (hereinafter referred to as "**Plot No. 5836**") and superimposed the same on the ground location of the suit property. The plaintiff averred that the 1st defendant entered the suit property with the assistance of the 2nd defendant following the creation of the said title and cut down the trees that she (the plaintiff) had planted thereon and started preparing the ground for construction. The plaintiff stated that Plot No. 5836 was created fraudulently with the intention of depriving her of the suit property.
3. The plaintiff annexed to her affidavit in support of the application; a copy of her title deed for the suit property, a copy of the mutation form that gave rise to the suit property, a copy of the instrument of transfer of land dated 20th June 2014 through which the suit property is said to have been transferred to her by the 2nd defendant and a copy of agreement for sale dated 30th June 2001 between the 2nd defendant and one, Enock Nyabuto Obi Bwayora. The plaintiff contended in conclusion that it would only be fair and just in the circumstances that the orders sought be granted.
4. The plaintiff's application was opposed by the 1st and 2nd defendants through grounds of

opposition dated 27th October 2014 and replying affidavit sworn by the 2nd defendant on 3rd November 2014. In their grounds of opposition, the 1st and 2nd defendants (hereinafter referred to only as “**the defendants**” where the context so admits) contended among others that the plaintiff’s application has not met the conditions for granting interlocutory injunction. In his affidavit in reply to the application, the 2nd defendant denied that he had entered into an agreement for sale with the plaintiff with respect to a portion of all that parcel of land known as **LR No. West Kitutu/Bomatara/4948** (hereinafter referred to as “**Plot No. 4948**”) which has since been sub-divided. The 2nd defendant also denied that the plaintiff has been in occupation of a portion of Plot No. 4948 or the suit property as claimed by the plaintiff. The 2nd defendant stated that he entered into an agreement for sale of a portion of Plot No. 4948 measuring 50feet by 102feet with the 1st defendant on 10th June 2014 after which, Plot No. 4948 was sub-divided into two (2) portions. One of the portions that came about following the said sub-division was Plot No. 5836 that he transferred to the 1st defendant. The 1st defendant was thereafter issued with a title deed for the said parcel of land thereby making him the lawful and legitimate owner of the same.

5. The 2nd defendant contended that after the sub-division of Plot No. 4948 which gave rise to among others Plot No. 5836, Plot No. 4948 ceased to exist and could not have been sub-divided again to give rise to the suit property. The 2nd defendant contended that the origin of the suit property is shrouded in mystery and the same must have been created in dubious circumstances. The 2nd defendant contended that the suit property does not exist on the ground and denied that the 1st defendant is occupying the same. He contended that the 1st defendant is occupying Plot No. 5836 on which he is constructing a storey building. The 2nd defendant contended that the plaintiff has no legitimate or valid interest on the ground location of Plot No. 5836 on which the 1st defendant is carrying out the said construction. The 2nd defendant termed the plaintiff’s title over the suit property as fraudulent and fictitious and the application herein as devoid of any merit. The 2nd defendant annexed to his affidavit; a copy of the agreement for sale between the 1st and 2nd defendants dated 10th June 2014, a copy of the title deed for Plot No. 5836 dated 30th June 2014, a copy of a certificate of official search dated 25th September 2014 in respect of Plot No. 5836 and a copy of an instrument of transfer of land that was registered on 4th July 2014.
6. On 29th October 2014, I directed that the plaintiff’s application be heard by way of written submissions. The plaintiff and the defendants filed their submissions on 3rd November 2014 and 10th November 2014 respectively. I have considered the plaintiff’s application together with the grounds of opposition and replying affidavit filed by the defendants in opposition thereto. I have also considered the parties’ respective submissions and the authorities cited in support thereof. In the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the court of appeal held that; **“The principles for granting an interlocutory injunction are that:**
 - a. **The applicant must show a prima facie case with a probability of success.**
 - b. **An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.**
 - c. **If the court is in doubt, it will decide the application on a balance of convenience.”**

In the same 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 dispute herein revolves around the validity of the titles for two parcels of land namely, Plot No. 5853(the suit property) which is registered in the name of the plaintiff and Plot No. 5836 which is registered in the name of the 1st defendant. Both parcels of land are said to have

- originated from Plot No. 4948 which, was at all material times registered in the name of the 2nd defendant. Both the plaintiff and the 1st defendant claim to have purchased their respective parcels of land from the 2nd defendant. The 2nd defendant is said to have sub-divided Plot No. 4948 into two (2) portions. There is a dispute as to what portions of land resulted from the sub-division of Plot No. 4948. The plaintiff has contended that the sub-division of Plot No. 4948 gave rise to Plot No. 5853 (“the suit property”) and Plot No. 5852, and that the 2nd defendant transferred Plot No. 5853 (“the suit property”) to her(the plaintiff) and retained Plot No. 5852 in his name. The defendants on the other hand have claimed that the sub-division of Plot No. 4948 gave rise to Plot No. 5836 and another parcel the particulars of which they have not provided. The 2nd defendant thereafter sold and transferred Plot No. 5836 to the 1st defendant. At the core of the dispute between the parties are twin issues namely; whether the suit property and Plot No. 5836 are sub-divisions of Plot No. 4948 and, whether both parcels of land exist on the ground.
8. The plaintiff has contended that Plot No. 5836 is not a sub-division of Plot No. 4948. She has claimed that Plot No. 5836 was crated fraudulently by the 1st and 2nd defendants with the collusion of the 3rd defendant and superimposed on the ground location of the suit property which is a lawful sub-division of Plot No. 4948. The plaintiff has contended that Plot No. 5836 does not exist on the ground and has no mutation to support its alleged origin from Plot No. 4948. The plaintiff has exhibited a copy of the mutation form through which Plot No. 4948 is said to have been sub-divided into Plot No. 5852 and Plot No. 5853 (“the suit property”). The said mutation form was registered at the land registry on 20th June 2014 and gave the sizes of Plot No. 5852 and Plot No. 5853 (“the suit property”) as 0.18ha. and 0.05ha. respectively. The said mutation does not show the existence of Plot No. 5836. A copy of the title deed for the suit property exhibited by the plaintiff and the defendants shows that the register for the suit property was opened on 20th June 2014 which is the same day when the mutation for the sub-division of Plot No. 4948 aforesaid was registered. The said title deed considered together with the said mutation form supports the plaintiff’s contention that the suit property is a sub-division of Plot No. 4948 and that the title for the suit property came into being on 20th June 2014 upon the registration of the said mutation. They also support the plaintiff’s contention that the title for Plot No. 5836 could not have originated from Plot No. 4948.
 9. As I have stated above, the defendants have contended that Plot No. 5836 is a sub-division of Plot No. 4948 and that the suit property is fictitious the same having been created fraudulently. Apart from copies of the title deeds for Plot No. 4948 and Plot No. 5836, the defendants have not placed any other material before the court to show the origin of Plot No. 5836. The defendants who have contested the mutation form that has been relied upon by the plaintiff as the foundation of the suit property have not furnished the court with a copy of the mutation form that gave rise to Plot No. 5836. If the defendants are certain that Plot No. 5836 is a sub-division of Plot No. 4948 nothing would have been easier than placing before the court a copy of the mutation form through which Plot No. 4948 was sub-divided to give rise to among others, Plot No. 5836. It is instructive to note that the defendants have also not given the particulars of the other parcel or parcels of land that arose from the sub-division of Plot No. 4948. As stated above, they have claimed that the sub-division of Plot No.4948 gave rise to among others, Plot No. 5836. The details of the other parcels of land that arose from the sub-division of Plot No.4948 have not been given.
 10. A copy of the title deed for Plot No. 5836 that is exhibited in the 2nd defendant’s affidavit sworn on 3rd November 2014 as annexure TMA4 (a) shows that the register for Plot No. 5836 was opened on 30th June 2014. This was some days after the register for the suit property had been opened on 20th June 2014. This shows that the sub-division that gave rise to the suit property was first in time to that if any which gave rise to Plot No. 5836. The only evidence regarding the sub-division of Plot No. 4948 that is before me is the mutation form that was exhibited by the plaintiff. According to this mutation form that was registered on 20th June, 2014, Plot No. 4948 was sub-divided into Plot No. 5852 and 5853 (“the suit property”). I have no evidence of the mutation form if any that gave rise to Plot No. 5836. Interestingly, I have noted from a copy of the title deed for Plot No. 5836 that it was initially indicated that Plot No. 5836 was a sub-division of “**Plot No. 5852**”. Later on, Plot No. 5852 was rubbed out and replaced with “**Plot No. 4948**”. This shows that Plot No.5852 which the plaintiff has claimed to be the other portion of Plot No. 4948 was in

- existence when Plot No. 5836 was being created. In the circumstances, the plaintiff's submission that Plot No. 5836 is a sub-division of Plot No. 5852 however strange and abnormal it may look, is not farfetched.
11. Due to the foregoing, it is my finding on the material before me that the plaintiff has established on a prima facie basis that Plot No. 5836 which is owned by the 1st defendant is not a sub-division of Plot No. 4948 and as such, its origin, location on the ground and the validity of its title is questionable. The plaintiff has also demonstrated that she is the registered proprietor of the suit property. In this regard, the plaintiff has exhibited a copy of her title deed and a certificate of official search on the title of the suit property. The 2nd defendant had denied selling the suit property to the plaintiff. The plaintiff having produced before court a copy of her title over the suit property and a certificate of official search on the title of the suit property which shows that she is the registered proprietor thereof, the issue as to whether or not she acquired the suit property lawfully can only be determined at the trial of the plaintiff's main suit and the defendants' counter-claim against the plaintiff. I have no evidence before me on which I can say that the plaintiff acquired title over the suit property through acts of fraud. The apparent non attestation of a copy of the instrument of transfer through which the suit property is said to have been transferred by the 2nd defendant to the plaintiff and the failure by the plaintiff to exhibit a copy of the agreement for sale of the suit property between her and the 2nd defendant, are not in my view prima facie evidence of fraud.
 12. The upshot of the foregoing is that the plaintiff has established a prima facie case with a probability of success against the defendants. On whether the plaintiff stands to suffer irreparable harm unless the orders sought are granted, the plaintiff has stated that she had taken possession of the suit property and planted trees thereon which trees were cut down by the 1st and 2nd defendants when they entered the suit property and started making preparations for the construction of a building thereon. The defendants have not denied the plaintiff's contention that she had planted trees on the suit property. They cannot say therefore that the plaintiff had never been in possession of the suit property. In the text, **Words and Phrases, Judicially defined, by Roland Burrows, K.C., Volume 4 at page 307**, it is stated that **"Possession is a word that, perhaps like a great many words, is incapable of an entirely precise and satisfactory definition. Possession of a house is essentially different from possession of a gold watch. One has to look at the property possessed."**
 13. I am satisfied in the circumstances of this case, that planting of trees on the suit property by the plaintiff amounted to possession of the suit property by the plaintiff. The defendants' acts of entering the suit property and cutting down the trees that were planted thereon amounted to dispossessing the plaintiff of the suit property. It follows therefore that if the injunction sought by the plaintiff is not granted, the plaintiff would remain dispossessed of the suit property and she will no doubt suffer irreparable harm. The 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 defendants supports this position.
 14. The 1st defendant has contended that since he is in possession of the suit property, an injunction if granted would result in his eviction from the property. The 1st defendant has contended that the prevailing status quo should be maintained. I do not think that a party can be allowed to maintain a status quo that he has created unlawfully. As was stated in the case of **Aikman –vs- Muchoki [1984] KLR 353**, equity will not assist law breakers and a wrong doer cannot be allowed to keep what he has unlawfully taken just because he can pay for it.
 15. In conclusion, I am satisfied that the plaintiff has met the conditions for granting interlocutory injunction. Consequently, the application dated 21st October 2014 is allowed in terms of prayer (c) thereof. The plaintiff shall have the costs of the application.

Delivered, Signed and Dated at Kisii this 17th day of April, 2015.

S. OKONG'O

JUDGE

In the presence of:

N/A for the plaintiff

Mr. Moracha h/b for Oguttu for the 1st and 2nd defendants

N/A for the 3rd defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE