



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 1018 OF 2014

RIFT VALLEY MACHINERY LTD..... PLAINTIFF

-VERSUS-

KINGS DEVELOPERS LIMITED.....1ST DEFENDANT

JOSHUA GITARI MWANGI..... 2ND DEFENDANT

MUTUA MULI..... 3RD DEFENDANT

GEORGE NGUGI..... 4TH DEFENDANT

ANDREW JACOB ONYANGO ONDIEKI.....5TH DEFENDANT

CHARLES ODHIAMBO AYORO..... 6TH DEFENDANT

ALFRED OMONDI MOLA7TH DEFENDANT

R U L I N G

The applications the subject of this ruling are the plaintiff's application dated 30th July 2014 filed in court on 31st July 2014 and the 1st Defendant's application dated 14th August 2014. The application by the plaintiff brought under Order 40 Rules 1, 2, 3 and Order 5 Rule 17 of the Civil Procedure rules and section 3A, 63 (c) and (e) of the Civil Procedure Act, interalia seeks the following substantive order:-

“3. That the Honourable court be pleased to issue an interlocutory injunction restraining the 1st Defendant by itself or through any of its agents, servants or howsoever, from selling charging, developing, disposing of or in any other way dealing with land parcel L.R.NO.22140 (Grant IR NO. 87670) also registered in favour of the 1st defendant as land parcel L.R.NO.29609, Grant I.R. 142826 pending the hearing and determination of this suit”.

The plaintiff's application was certified urgent by the Duty Judge on 31st July 2014 and directed to be served for hearing interpartes on 7th August 2014 before the vacation Judge. On the 7th August 2014 the

application was listed before me for hearing and on the date only the plaintiff's counsel attended. The 1st Defendant had been served as per the affidavit of service sworn on 6th August 2014 by one **Godfrey Omambia Mososi** filed in court on 7th August 2014. As the 2nd -7th Defendants had not been served the court granted an interim order of injunction in terms of prayer (2) of the Notice of Motion to last until the hearing and determination of the application. The court directed service on the 2nd to 7th Defendants by way of substituted service and fixed the plaintiff's application for hearing on 9th October 2014.

The 1st Defendant's response was to file the Notice of Motion dated 14th August 2014 stated to be brought under sections 80, 1A, 1B and 3A of the Civil Procedure Act and Order 45 Rule (1), Order 40 Rules 1,2 & 3 of the Civil Procedure Rules which inter alia sought the following orders:-

“3. That this Honourable court be pleased to review, vary and/or vacate its order given on 7th August, 2014 and issued on 11th August, 2014 to the extent that the order purports to restrain the 1st Defendant from trespassing on to or in any other way dealing with the suit property L.R. NO. 29609 (Grant NO. IR 142836).

4. That this Honourable court be pleased to order that the status quo prevailing before the issuance of its said order of 7th August, 2014 be maintained and, in particular, that the 1st Defendant be allowed to remain in possession of the suit property L.R. NO.29609 (Grant NO.142836) and to deal with the suit property save for selling, charging, developing and/or disposing of the said suit property.

5. That pending the hearing and determination of this application the Honourable court be pleased to restrain the plaintiff or any other person, whether acting by themselves, their employees, servants and/or agents from interfering with the 1st Defendant's title, ownership and possession of the suit property L.R.NO.29609 (Grant NO.142836)”.

The plaintiff's application is predicated on the grounds set out on the face of the application and on the annexed affidavit sworn in support thereof by one **Aram Mutema Mbuyi**. The plaintiff avers that he is the registered owner of **L.R. NO. 22140 of I.R.NO. 87670** having purchased the same from a company known as **Agro Complex (K) Limited** who were the registered owners. A copy of the grant annexed and marked “AM1” shows **Agro Complex (k) Ltd** to have been the registered owner and that a transfer of the property was on 4/10/2002 effected to **Rift Valley Machinery Services Ltd**, the plaintiff herein as per entry NO.2 made against the title (grant). That arising from acts by persons and/or parties who were claiming ownership of the suit property between the period 2006 to 2008 the plaintiff instituted a suit **HC ELC NO. 348 of 2008** to agitate its rights of ownership of the suit property and the court on 27/1/2010 granted orders for the maintenance and observance of the status quo where both the plaintiff and the defendants in that suit were ordered to ensure the suit property was preserved until the suit was heard.

The plaintiff avers that on or about 11th July 2014 some persons claiming to be agents of **Kings Developers Limited**, the 1st Defendant herein invaded the plaintiff's parcel of land in a bid to evict and/or cause the plaintiff to vacate the suit premises claiming the land was owned by the 1st Defendant. The plaintiff afterwards states he obtained a copy of the 1st defendant's title and other documents from the Lands Office from which he noted the 2nd to 6th defendants had somehow managed to get themselves unlawfully registered as proprietors of the plaintiff's parcel of land and caused the same to be subdivided and eventually sold to the 1st defendant who consolidated the sub titles to become **L.R.NO.29609** of certificate **I.R. 142826** as per the bundle of documents annexed and marked “AMM6”. The plaintiff avers that the 1st Defendant's agents have repeatedly sought to gain possession into the plaintiff's land but their attempts have been thwarted by the plaintiff's security guards which prompted the plaintiff to institute the present proceedings seeking the intervention of the court.

The 1st Defendant's response was to file the application dated 14th August 2014 referred to hereinabove. The position of the 1st Defendant is that it is the registered proprietor of the suit property herein being

L.R.NO.29609 following an amalgamation of the previous **L.R.NOS.15110, 15111, 15112 and 15113** and in respect of which certificate of title NO. **I.R.143836** dated 23rd February 2013 was issued. The 1st Defendant avers that it had all along been in possession of the suit property including during the period before the subtitles were amalgamated and states that as at 7th August 2014 when the plaintiff moved the court and obtained *ex parte* interim orders of injunction *inter alia* restraining the 1st Defendant from continuing to remain in possession or in any other way dealing with the suit property which in effect amounted to sanctioning the eviction of the 1st Defendant from the suit premises. The 1st Defendant contends that the plaintiff misrepresented the true state of facts to the court to obtain an injunction by misrepresenting to the court that the plaintiff was in possession and that there were strangers threatening to invade the premises when in actual fact it is the 1st Defendant who had been in possession of the suit premises since April 2011 and was at the time in the process of constructing a perimeter wall.

While the parties appear to be in agreement that the title held by the plaintiff and the title held by the 1st Defendant relate and represent the same land on the ground the bone of contention at the moment is who between the plaintiff and the 1st Defendant was in actual possession of the suit property as at 7th August 2014 when the court issued an interim order in favour of the plaintiff. The 1st Defendant insists it was in possession as at 7/8/2014 and that position ought to remain. For its part the plaintiff maintains the 1st Defendant violently invaded the property to gain possession and should not be allowed to remain in possession.

The court faced with the conflicting claims of possession by both the plaintiff and the 1st Defendant, on 25th August 2014 directed the Deputy Registrar of the court to visit the disputed property and ascertain what the status was on the ground and to the extent possible establish who was in possession of the suit premises during the period immediately before 7/8/2014 when the court issued its orders. The Deputy Registrar was to file a report on the finding within 30 days of the direction. The Deputy Registrar after visiting the site made and filed her report which *inter alia* recorded the following finding:-

“From the information gathered on the ground, the plaintiff appears to have been in ownership of the property since the year 2002. However in the year 2013 the first defendant obtained title to the property and put up the site office and the permanent perimeter wall. As at 7/8/2014, the first defendant was in actual possession having entered the property in the year 2013. This status was however disrupted on or about the 14/8/2014 by hooligan who went and evicted the occupants of the site office and brought down the permanent wall that had been constructed by the first defendant.

This paved way for the plaintiff to take possession of the property again. The plaintiff is currently in possession and is undertaking the construction of the permanent perimeter wall”.

Quite clearly the primary issue in this matter is who between the plaintiff and the 1st defendant is entitled to be decreed the owner of the suit property. The plaintiff is staking claim to the property by virtue of the transfer effected in its favour in 2002 which transfer is shown to have been duly registered at the Lands office as the endorsement against the title that the plaintiff holds attests. The plaintiff claims that it has never surrendered and/or transferred its title so that the land could be available for subdivision and subsequent sale to the 1st defendant. The 1st defendant's claim to the suit property is by virtue of the title it holds over the suit property issued and registered in 2013. The title held by the plaintiff and the title held by the 1st Defendant are different though it is agreed they relate to the same property on the ground. **Who between the two holds the genuine and valid title?** This is not an issue that the court can determine at this interlocutory stage as evidence would require to be led and the witnesses cross examined in regard to how the respective titles came into being. The plaintiff and the 1st defendant are engaged in a tussle to determine who was in possession as at 7th August 2014 when the court issued the interim order of injunction. Possession *per se* does not and cannot denote proof of ownership. The court will have to eventually determine who the owner of the property is and that will only be possible after the trial.

In the circumstances of this case the court is of the view that its primary duty is to ensure that the property the subject of the suit is preserved and conserved such that at the conclusion of the trial the party who is adjudged as the rightful owner of the property will have access to the property. As the situation stands now the court is of the view that no party should be handed a position of advantage by being handed possession and that the parties should await the determination by the court as to who is entitled to ownership of the suit property. As matters stand now it would appear both the plaintiff and the 1st defendant have each posted guards to secure the property. This is more or less to prevent the opposing party from taking possession.

Hon. Justice Mbogholi Msagha on 27th day of January, 2010 while delivering a ruling in **HC ELC NO. 348 of 2008** where the plaintiff in the instant suit had sought an order of injunction against the defendants therein who like the defendants herein were claiming title to the property claimed by the plaintiff observed thus:-

“Most of the observation made by counsel in their respective submissions relate to issues that shall be decided during the hearing of the main suit where evidence is yet to be adduced. As this point, I only have affidavit evidence that has not been tested under cross-examination. It is clear to me that, the best order that commends itself at this stage is to preserve the subject matter. In that regard therefore, I order that, both the plaintiff and the defendants shall preserve the subject matter pending the hearing of the main suit.

The impact of this order is that both parties shall not deal with the subject matter to the detriment of the other. As there is a risk of alienation, the order shall apply in equal measure to both parties and the same shall be registered against the title until the final orders of this court”.

I find myself in a similar situation as my learned brother Judge where both the plaintiff and the 1st Defendant have competing interests where until there is a full determination of the issues surrounding the issuance of the two titles in respect of the same parcel of land it is not possible to determine the ownership of the suit land. Like **Mbogholi, J** I am satisfied that the order that commends itself at this stage is to require that the status quo be maintained and the property be preserved until the suit is heard and determined.

As the issue of possession has been contentious I will equally order that no party shall remain in possession of the suit property until the suit is determined and therefore both parties are hereby directed to withdraw any security guards they may have posted to the suit property forthwith. The property is to remain vacant and no party shall engage in any activity of whatever nature in the suit property until the suit is heard and/or the court orders or directs otherwise. The order for status quo and preservation of the suit property made herein means that no party shall use and/or carry on any activities in the suit property and that there will be no alienation, disposition, subdivision, sale or transfer of the suit property pending the hearing and determination of the suit.

Having regard to the circumstances and the nature of this case, the parties are with a view to expediting the finalization of the matter by way of trial directed to within the next 60 days from the date of this ruling comply with the provisions of Order 11 of the Civil Procedure Rules and thereafter fix the matter for pretrial directions.

That the costs of the applications by the plaintiff and the 1st defendant be in the cause.

Orders accordingly.

Ruling dated, signed and delivered this 17TH day of **April**, 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

- For the Plaintiff
- For the 1st Defendant
- For the 2nd Defendant
- for the 3rd Defendant
- For the 4th Defendant
- For the 5th Defendant
- for the 6th Defendant
- For the 7th Defendant