



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT

ELC NO 74 OF 2015

**JOHN KAHANYA GATHIRU.....
.....PLAINTIFF**

VERSUS

**KISII COUNTY GOVERNMENT.....1ST
DEFENDANT**

**EXECUTIVE COMMITTEE MEMBER FORLAND, KISII COUNTY GOVERNMENT..2ND
DEFENDANT**

RULING

1. What I have before me is the plaintiff’s Notice of Motion application dated 23rd February, 2015 brought under Order 40 Rules 1,2,4 & 10 of the Civil Procedure Rules,Sections 1A,1B,3A & 63 of the Civil Procedure Act,Sections 24,25 &26 of the Land Registration Act and Articles 40(6),159 and 165 of the Constitution.The Plaintiff is seeking an order of temporary injunction to restrain the defendants either by themselves or through their agents,servants,employees and/ or anyone claiming under them from entering onto,re-entering, trespassing onto, depositing building materials,building structures,interfering with,fencing and /or in any other manner dealing with all that parcel of land known as **LR No Kisii Municipality/Block II/215**(hereinafter referred to as “**the suit property**”) and/ or any portions thereof save for purposes of conducting the statutory inspections in accordance with the provisions of the Physical Planning Act pending the hearing and determination of this suit.

2. The application was premised on the grounds set out on the face thereof and in the plaintiff’s affidavit sworn on 23rd February, 2009. The plaintiff stated that the Commissioner of Lands issued him with a letter of allotment on or about October, 2002 in respect ofunsurveyed commercial plot- Awithin Kisii Municipality.He complied with the terms of the said letter of allotment and aPart Development Plan was prepared together with the Registry IndexMap for the said plot which was thereafter assigned parcel number **LR No Kisii Municipality/Block II/215**(“the suit property”).He was subsequently issued with a lease which lease was duly registered at the Kisii Land Registry. After the registration of the said lease, he was issued with a certificate of lease in confirmation of his ownership of the suit property. He annexed to his affidavit, copies of the lease dated 19th December, 2002 and certificate of lease dated 23rd December, 2002 that were issued in his favour as aforesaid. The plaintiff contended that by virtue of being the registered proprietor of the suit property, he was entitled to occupy and develop the same.He stated that on or about January, 2007, he sought and obtained consent and approval from the defunct Municipal Council of Kisii to develop the suit property. He subsequently submitted the requisite building plans to the said council for approval and the same were duly approved. He was however unable to

commence the intended developments within 12 months and had to resubmit the said building plans for approval by the 1st defendant which approved the same unconditionally. The plaintiff contended that before he could commence development on the suit property following the approval of the said plans by the 1st defendant, the defendants through their agents deposited building materials on the suit property and commenced construction of a building thereon. The plaintiff has contended that the said construction by the defendants has restricted and limited his rights over the suit property and has thereby dispossessed him of the property. He also contended that the said activities by the defendants on the suit property are bound to affect the character of the suit property owing to the nature of the development being carried out by them on the said property.

3. The application was opposed by the defendants through a replying affidavit sworn by the County Secretary of the 1st defendant, Johnstone O Ndege on 20th March, 2015. In this affidavit, the defendants contended that the plaintiff acquired the suit property irregularly as there are neither minutes nor resolutions of the former Kisii Municipal Council approving the allocation of the suit property to the plaintiff. The defendants contended further that the plaintiff has not provided evidence of compliance with the terms of the letter of allotment and of the existence of an amended Registry Index Map from the director of surveys in respect of the suit property. They contended further that the whole process of submission and re-submission by the plaintiff of the building plans for the developments that he intended to carry out on the suit property did not meet the terms of the special conditions 2 and 4 of the Lease and as such the same was time barred, fraudulent, null and void. The defendants contended that the plaintiff was under a contractual duty to submit building plans for approval within six(6) months and to complete the construction of the said building on the suit property within 24 from the date of registration of the lease. The defendants contended further that the submission and payment by the plaintiff for the said building plans could not validate the illegal acquisition of the suit property by the plaintiff. The defendants contended that the said payment was a deliberate conspiracy and a fraudulent attempt to circumvent the special conditions 2 and 4 of the lease.

4. The defendants contended further that the approval per se of the said building plans without the carrying out of any development on the suit property within the stipulated 24 months could not accord the plaintiff any reprieve from the said express conditions of the lease. The defendants admitted that they have entered the suit property and are in occupation thereof. They contended that they cannot be restrained from entering a property in respect of which they are in possession. The defendants contended that the suit property is among the properties whose titles they had referred to the National Land Commission for revocation. The defendants contended further that the suit property is situated within an area that was reserved for recreation and/or public open space which user has not been changed to commercial /residential as required by the law. In a rejoinder, the plaintiff filed a further affidavit in which he reiterated that he acquired the suit property lawfully. He contended that even if the property was irregularly acquired, that could not act as a license for the defendants to forcefully enter the suit property in the manner they did.

5. When the application came up for hearing on 4th May, 2015, the advocates for the parties agreed to canvass the same by way of written submissions. The plaintiff filed his submissions on 12th May 2015 while the defendants did not file any submission. I have considered the plaintiff's application together with the two affidavits filed in support thereof. I have also considered the defendants' affidavit in opposition to the application. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1975] E.A. 358**, an applicant for interlocutory injunction must show that he has a prima facie case against the respondent with a probability of success and that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt, the application would be determined on a balance of convenience. In the Court of Appeal case of **Mrao vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 that was cited by the plaintiff in his submissions, a prima facie case was defined** as, “A case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter”.

6. The suit property was registered under the Registered Land Act, Cap. 300, Laws of Kenya (now

repealed). Section 27 (a) of the Registered Land Act, Cap. 300 Laws of Kenya (hereinafter referred to as “**the Act**”) provides that, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land with all rights and privileges belonging or appurtenant thereto. On the other hand, section 28 of the Act, provides that the rights of a proprietor acquired on first registration or subsequently for valuable consideration shall not be liable to be defeated save as provided in the Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims subject only to the limitations set out under that section. The said provisions of the Act were reproduced in sections 24 and 25 of the Land Registration Act, 2012. Section 143 of the Registered Land Act provides that, the court may order the rectification of the register by directing the cancellation thereof if it is satisfied that the same (save for first registration) was obtained by fraud or mistake. This section is reproduced in section 80(1) of the Land Registration Act, 2012. Section 26(1) of the Land Registration Act, 2012 provides that the certificate of title issued by the registrar upon registration, or to a purchaser of land upon transfer shall be taken as prima facie evidence that the person named therein is the absolute and indefeasible owner thereof and that the title of such proprietor shall not be defeated except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

7. The Plaintiff has demonstrated that he is the registered proprietor of the suit property. He has annexed to his affidavit, copies of the lease dated 19th December, 2002 between him and Gusii County Council in respect of the suit property and the certificate of lease that was issued to him by the land registrar on 23rd December, 2002. The plaintiff has also shown that the defendant has entered on the suit property and started putting up a building thereon without his permission. This fact is admitted by the defendant. From the foregoing, the plaintiff has established on a prima facie basis that he is the owner of the suit property and that the defendant has entered onto and occupied the same. In the face of the evidence and material that the plaintiff has placed before the court in proof of his ownership of the suit property, the burden shifted to the defendant to justify his entry and occupation of the suit property.

8. As I have stated earlier in this ruling, the defendant has contended that the plaintiff acquired the suit property fraudulently and illegally. The defendant has contended further that the plaintiff has breached the terms of the lease agreement that the plaintiff entered into with the 1st defendant’s predecessor, Gusii County Council by failing to present building plans for approval within 6 months and to commence development on the suit property within 24 months of registration of the suit property in its name. The burden of proof was upon the defendant to prove these claims. The defendant has contended that the suit property was reserved as an open space for public recreation and as such was not available for alienation to the plaintiff. The defendant has also claimed that the alienation of the suit property to the plaintiff was not approved by the members of Gisii County Council in accordance with the provisions of the Trust Land Act, Cap.288 Laws of Kenya. The defendants have not placed any material before me in proof of their allegation that the suit property was reserved for public use. A copy of the purported Kisii Development Plan for 1971 which is annexed to the defendants’ replying affidavit does not show that the suit property is situated in an area reserved for public recreation. On the issue of the approval of the alienation of the suit property to the plaintiff, I am in agreement with the defendant that under section 13(2) of the Trust Land Act, Cap.288 Laws of Kenya, the alienation of the suit property had to be approved by a resolution passed by the members of Gusii County Council. That said, I have nothing before me to show that the alienation of the suit property was not approved. What I have is the plaintiff’s statement that all necessary procedures relating to the alienation of the suit property to the plaintiff were complied with including the necessary approval by the County Council and the statement by the defendants to the contrary. I am aware of the Court of Appeal case of **Munyu Maina vs. Hiram Gathiha Maina, Civil Appeal number 239 of 2009, where the court stated that, “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register’.** I am of the view however that this burden can only be discharged by the plaintiff at the trial.

9. On the issue of breach of the lease agreement that the plaintiff entered into with Gusii County Council,

I am in agreement with the defendants that the plaintiff has indeed breached the terms of the said lease. It was a standard condition in leases involving trust land that where the user of the leased premises was residential, the lessee had to submit for approval plans for the building to be erected on such property within 6 months from the date of registration of the lease and to have the said building constructed within 24 months failure to which the County Council being the lessor was entitled to forfeit the lease by re-entering the premises and taking possession thereof. In the lease agreement between the plaintiff and Gusii County Council, this condition was set out in Clause 2 of the special conditions. I have noted with shock and consternation that in the copy of the lease that is attached to the plaintiff's affidavit in support of the present application, these time lines within which the plaintiff was supposed to present building plans for approval and subsequently construct a building on the suit property have been erased using a white out. This kind of conduct cannot be taken lightly by the court as it must have been intended to conceal material facts to the court with a view to defrauding the court. It will receive an appropriate reprimand later in this ruling. As for now, I wish to state that the court takes judicial notice of these timelines which the plaintiff has tried to conceal on realizing that he has breached them. Clause 2 of the special conditions of the lease that the plaintiff entered into with Gusii County Council allowed the said Council to re-enter the suit property and take possession thereof in case the same was not developed by the lessee within 24 months. It is not in dispute that the plaintiff has not developed the suit property since the same was registered in his name on 23rd December, 2002. It follows that the plaintiff has breached said development covenant in the lease and as such the 1st defendant who is the successor in title to the suit property was entitled to re-enter the same and forfeit the plaintiff's lease. In the circumstances, the defendants' entry on the suit property cannot be faulted as it has a contractual backing.

10. The plaintiff has contended that even if it is true that the suit property was alienated to him unlawfully or that he has breached the terms of the lease as aforesaid, the defendants were not entitled to forcefully enter the suit property and take possession thereof. In support of this submission, the plaintiff has cited the case of **Aikman-vs-Muchoki [1984] KLR 353**, where it was held that, a wrong doer cannot be allowed to keep what he has unlawfully taken. I am also aware of the decision in the case of **Kamau Mucuha-vs- The Ripples Ltd.(Civil Application No. Nai. 186 of 1992)(unreported)**, where Cockar, J.A as he then was stated that, “ **A party , as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.....**” I am fully in agreement with the foregoing statements of the law. In my view however, the same are not applicable to this case. The plaintiff annexed to his affidavit in support of the present application, photographs said to have been taken on the suit property. The said photographs show that the suit property was vacant before the defendants entered therein and started putting up the contested building. There is no evidence and the plaintiff has not contended that at the time of the defendants' entry on the suit property, he was carrying out any activity thereon. There is also no evidence that the defendants used any force to enter the suit property or that their entry was resisted. The plaintiff has submitted that if the orders sought herein are not issued, the court would have sanctioned a criminal act by the defendants. The defendants' entry on the suit property has a contractual basis as I have stated above and was carried out peacefully. It cannot therefore be termed criminal.

11. I have said enough to show that the plaintiff has not satisfied me that he has a prima facie case against the defendants. Although I am not obliged to consider whether the plaintiff would suffer irreparable injury if the orders sought are not granted, my take on the issue is that I am not satisfied that that would be the case. As I have stated above, the plaintiff has not developed the suit property since the year 2002 when he acquired the same contrary to the contract that he entered with the 1st defendant's predecessor that he would do so with 24 months. The suit property has remained idle for nearly 13 years. The defendants' contention that the plaintiff must have acquired the suit property for speculative purposes is irresistible in the circumstances. As I have stated above, the plaintiff was not carrying out any activity on the suit property as at the time the defendants entered on the same and started putting up a building thereon. I cannot see an injury which the plaintiff would suffer if the injunction sought is not granted. The plaintiff's title to the suit property is intact. He will get back the property if he succeeds at the trial.

12. The upshot of the foregoing is that the plaintiff's application dated 23rd February, 2015 is not for granting. I wish to add that even if the plaintiff had satisfied the conditions for granting interlocutory injunction, I would still not have allowed the application herein on account of the fact that the plaintiff

had altered the lease that he presented to court in support of the application by erasing some parts thereof with a view to mislead the court into granting him the orders sought.

Injunction being an equitable remedy is not available to persons with unclean hands and those who deliberately conceal facts to the court. The plaintiff's application is dismissed with costs to the defendants.

Signed at Nairobi this 18th day of September, 2015.

S.OKONG'O

JUDGE

Delivered and Dated at Kisii this 25th day of September, 2015.

J. M. MUTUNGI

JUDGE

In the presence of

N/A For the Plaintiff

N/A For the Defendant