



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1001 OF 2014

RUBEN MAHINDU SILUNYA.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....1ST DEFENDANT

ELIAS OTIENO OKUMU.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 30th July 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants from entering remaining on, trespassing, encroaching, dealing with, alienating, transferring or interfering with the Plaintiff's peaceful enjoyment of the parcel of land known as L.R. No. 209/3041 (hereinafter referred to as the "suit property") pending the hearing and determination of this suit, that the Officer commanding Station Kileleshwa do assist in the enforcement of the court orders and that the costs of this Application be awarded to the Plaintiff/Applicant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Ruben Mahindu Silunya, sworn on 30th July 2014 in which he averred that he is the registered owner of the suit property. He annexed a copy of his title document as proof of his assertion. He further averred that he has been in occupation of the suit property since the year 1999 after acquiring the same from one Mohamed Hussein Alibhai Daya. He further averred that the suit property is developed with a house in which he resides with his family. He then averred that on the morning of 29th July 2014, he was woken up by commotion at around 5 am when he encountered a group of about 100 people carrying an assortment of crude weapons who introduced them as agents of the 1st Defendant and who said that they had orders on behalf of the Governor of the Nairobi City County to evict him, his family and tenants from the suit property. He further averred that the said people did not have any court order authorizing the said eviction and that they were accompanied by the 2nd Defendant, a majority leader in the Nairobi City County Assembly, thus giving the intended eviction a political dimension. He further indicated that the agents were very violent and even demolished part of the house that stands on the suit property thereby causing loss, injury and damages to his property. He confirmed that he never received any demand or notice from the 1st Defendant in respect of any alleged indebtedness or liability and that he is the rightful owner of the suit property and the Defendants are acting illegally and are therefore trespassers.

The Application is contested. The 2nd Defendant/Respondent, Elias Otieno Okumu, filed his Replying Affidavit sworn on 7th August 2014 in which he averred that he was not present and did not accompany the intruders who accosted the Plaintiff/Applicant at the suit property as alleged but was instead engaged in a campaign strategy meeting at Serena Hotel at that same time. He further denied knowing the Plaintiff/Applicant and expressed his surprise at being involved in this matter. He further stated that he has no interest in the suit property and added that it is clear that the Plaintiff/Applicant was merely maligning his name by enjoining him in this suit.

The 1st Defendant did not file any response to the Application. Both the Plaintiff/Applicant and the 2nd Defendant/Respondent filed their respective written submissions.

The issue I am called upon to determine is whether to grant the Plaintiff/Applicant a temporary injunction restraining the Defendants/Respondents from trespassing into the suit property pending the hearing and determination of this suit. In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“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.”

The Plaintiff/Applicant claims to be the duly registered proprietor of the suit property and in support of that assertion, he produced his title document. This is Grant No. I.R. 22608 transferred to the Petitioner on 8th June 1999. The title is issued under the provisions of the **Registration of Titles Act** Cap 281 Laws of Kenya (now repealed). **Section 23(1)** of the **Registration of Titles Act** (repealed) provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer ... shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof ... and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

The **Land Registration Act No. 3 of 2012** under **section 26(1)** more or less reproduces the provisions of **section 23(1)** of the **Registration of Titles Act** (supra) save that it extends the grounds on which a registered title could be challenged to include where the title has been acquired illegally, unprocedurally or through a corrupt scheme.

Section 26(1) of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

As noted earlier, none of the Defendants have challenged the Plaintiff/Applicant's title to the suit property. The 1st Defendant failed to make a response to this Application while the 2nd Defendant responded by stating that he does not know the Plaintiff/Applicant and has no interest whatsoever in the suit property. At this interlocutory stage, my finding is that the Plaintiff/Applicant has succeeded in establishing that he has a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff? Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

In whose favour does the balance of convenience tilt? On this point, I take note that the Plaintiff/Applicant has asserted that he has lived and continues to live on the suit property together with his family and tenants from the year 1999 to date. In light of this, I consider that the balance of convenience tilts in favour of the Plaintiff/Applicant to continue to occupy the suit property pending the hearing and determination of this suit.

The upshot of the above findings is that I do allow the Application. Costs shall be in the cause.

It is so ordered.

SIGNED AND DELIVERED IN NAIROBI THIS 18TH

DAY OF SEPTEMBER 2015.

MARY M. GITUMBI

JUDGE