



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 119 OF 2013

P.N MASHRUPLAINTIFF

V E R S U S

1. MUMBAI KIJWE

2. BEPIA KAJIWE

3. MKAUMA SAHADEFENDANTS

RULING

1. On 30th, September 2013, this Court certified the plaintiff's Notice of motion Application dated 17th September , 2013 and granted prayers one and two of the application and ordered the same to be served upon the defendants and be heard within fourteen days failing which the orders shall lapse.
2. The only prayers left for determination in the Notice of Motion dated 17 September ,2013 are prayers number three and five . These are;-

3 THAT this Honourable Court be pleased to issue temporary injunction restraining the Defendants whether by themselves or through their servants, employees and /or agents from entering,upon, interfering with and/or having any dealings of adverse nature with the piece of land known as MGUMO PATSA/MAZERAS/1454 pending the hearing and determination of the suit .

5 THAT cost of this suit be provided for.

3. The application is premised upon the grounds appearing on the face of the application and the Supporting Affidavit of Jumaan Abeid Said sworn on 17th September 2013 . He is the General Manger of the Plaintiff/Applicant Company and swears he has authority to swear the affidavit in support of this application. He avers that the Plaintiff is the registered and absolute owner of all that piece of land known as Mgumo Patsa /Mazeras /145. He annexed a copy of Title deed. He further avers that the defendant's have trespassed into the said piece of land and are constructing structures and their activities have not been sanctioned by the plaintiff.
4. The Respondents filed his replying affidavit dated 16th October 2013 and oppose the application . The Respondents argue they are the children of the late Tsuma Washe Kajiwe who passed on on 28th October 1993 intestate and was survived by 10 wives and 51 children. Its further alleged that

the respondents where minors and the wives of the deceased were illiterate. That upon the demise of the Tsuma Washe Kajiwe their uncle Said Washe Guro, and who is the younger brother of the deceased, and who had no colour of right to inherit the estate of the deceased. Inherited the properties of the deceased among them the suit property.

5. It is the Respondents case that the said Said Washe Guro, without permission and or consent from the family members of the deceased fraudulently sold and or transferred plot known as **MGUMO PATSA/MAZERAS/1454**. to the Plaintiff's.
6. The court has carefully considered the Affidavits on record, the written submissions ,oral highlights and the authorities relied on and the principles in *Giella vs. Cassman Brown & Co. Ltd. (1973) E.A 358*. these principles are that an applicant must establish a prima facie case with a probability of success and must also demonstrate that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt as to the above, the application would be determined on a balance of convenience.

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.”

Looking at the facts of this case, the Plaintiff has produced a copy of title deed to support their claim of ownership of the Suit Property.

Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

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

“The Certificate of Title issued by the Registrar upon registration ... 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.”

7. From the foregoing, the plaintiff has proved on a prima facie basis that he is the owner of the suit property. In the face of evidence that the plaintiff is the owner of the suit property, anyone occupying the suit property without the consent or authority of the plaintiff is doing so unlawfully and is a trespasser. the plaintiff has established a prima facie case against the defendant with a probability of success at the trial. This court is also satisfied that the plaintiff stands to suffer irreparable harm unless the orders sought are granted. The plaintiff as the proprietor of the suit property has a right to access, occupy and use the suit property. Due to the foregoing, the prayer 1 and 2 in the application dated 1st November, 2013 is granted and the Plaintiff has made out a case for a temporary injunction in his application which is allowed with costs.

Dated and delivered in open Court at Mombasa this 10th day of April, 2014

S. MUKUNYA

JUDGE

10.4.2014