



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT NAIROBI

ELC APPEAL NO. E082 OF 2021

JOSEPHINE WAYEGO GITHUKU.....APPELLANT

-VERSUS-

KIAMBU DANDORA FARMERS CO.LTD.....1ST RESPONDENT

DEPUTY COUNTY COMMISSIONER, EMBAKASI SUBCOUNTY.....2ND RESPONDENT

HON.ATTORNEY GENERAL.....3RD RESPONDENT

ABDUL WAMALA.....4TH RESPONDENT

RULING

1. This is the Notice of Motion application dated 29th October 2021. It is brought under Order 51 Rule 1, Order 40 Rules 1 and 2 of the Civil Procedure Rules, Section 3A and section 63 (e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and all other enabling provisions of the law.

2. It seeks orders;

a. Spent

b. Spent

c. That the Honourable Court be pleased to issue an order of temporary injunction restraining the Respondents whether by themselves, their employees, servants, representatives or agents or through any other person claiming under them or otherwise howsoever, from trespassing into, constructing upon, and/or carrying out unlawful acts of violence, destruction or eviction against the Appellant/Applicant, or in any other manner interfering, further interfering and/or dealing in any other manner with the Appellant's parcels of land known as Land Reference Number 15400/73 and 15400/74 situated in Embakasi District in the Nairobi City County and/or interfering with the Appellant's/Applicant's right of occupation, quiet possession, use and ownership of the said properties pending the hearing and determination of this application and the appeal.

d. That the Honourable court be pleased to order the sub-county commander Kayole police Division and the ward Commander Soweto Police Station, to avail all necessary assistance and security at the parcels of land known as Land Reference Number 15400/73 and 15400/74 to prevent the ongoing invasion and trespass by the 1st and 4th Respondents and to supervise the removal of all structures, buildings, walls, beacons or things placed on the said property by the 1st and 4th Respondents or their authorized servants, directors and/or agents pending the hearing and determination of this application and the appeal.

e. That cots be provided for.

3. The grounds in support of the application are on the face of the Notice of Motion. The application is further supported by the Applicant/Appellant's affidavit sworn on 29th October 2021.

4. Her case is that she is the legal, legitimate and exclusive owner of **Land Reference Numbers 15400/73 and 15400/74** situate in Embakasi,

having purchased the same from Amboseli Court Limited on 30th November 2008 and took vacant possession. She added that she was issued with a title to **L.R No. 15400/73** and has been in exclusive and uninterrupted peaceful occupation and possession of the two (2) suit plots since the time of the purchase.

5. She deponed that on 12th March 2021, the 4th Respondent in the company of the 1st Respondent and police officers drawn from Kayole Police station and administration police officers drawn from the 2nd Respondent's office invaded and trespassed onto and purported to survey and subdivide the suit property and erected beacons.

6. She further deponed that that she has established that that the 1st Respondent purported to sell the suit property to the 4th Respondent who has taken up possession forcefully and is digging trenches preventing her from erecting a residential house on **Land Reference Number 15400/73** despite having obtained the necessary approvals.

7. She deponed that immediately after the commencement of the trespass, she filed an application for injunction at the Magistrate's court but the learned magistrate dismissed her application vide the ruling dated 17th September 2021. She has appealed against the said ruling.

8. She also deponed that the 2nd Respondent has facilitated the trespass by providing armed security to the 1st and 4th Respondents and their agents thereby superintending, facilitating and legitimizing the acts of trespass and invasion by the 1st and 4th Respondents.

9. She also deponed that the suit plots were originally part of the land forming the parcel of land known as **Land Reference Number 11379/3**; which was compulsorily acquired by the Government of Kenya from the 1st Respondent in 1974 and as such, the 1st Respondent no longer holds any claim over the property.

10. She added that attempts to review dispositions issued to individuals and entities by the government over **Land Reference Number 11379/3** by the National Land Commission were thwarted by the court in **Republic v National Land Commission & another; Samuel Wachira Wanja & 2 others (Ex-parte); Kiambu Dandora Farmers Co Ltd & another (Interested parties) [2021] eKLR** where the court found that the National Land Commission had no jurisdiction to purport to review dispositions over the land.

The 4th Respondent's response

11. The 4th Respondent opposed the application vide his replying affidavit sworn on 29th November 2021. He deponed that he bought Plot **No.s 97 and 98 zone 11 Sossian** on 1st March 2021 from Margaret Gathoni Maina.

12. He further deponed that he visited the offices of the 1st Respondent together with the previous owner and from the 1st Respondent's records, he established that Margaret Gathoni Maina was the beneficial owner and he was escorted to the site by the 1st Respondent's surveyor who pointed out beacons and he immediately took up possession, fenced off the property and immediately commenced construction as he was in urgent need of a residential house for his family.

13. He deponed that in August 2021, he learnt through his contractor that he had been sued over the property and that he went to the 1st Respondent's offices where he was supplied with a copy of title to L.R 11379/3 from which plots 97 and 98 Zone II Sossian had been excised from together with the deed plan and a copy of the decision of the National land commission dated 28th April 2017 and he was assured by the 1st Respondent that M/s Amboseli Court Ltd was a trespasser.

14. He also deponed that that the suit plot was vacant when he took possession and that he was never assisted by officers of the 2nd Respondent as alleged. He asked the court to dismiss the application.

15. On the 1st December 2021, the counsel with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

The Appellant's submissions

16. They are dated 17th February 2022. Counsel for the Appellant framed the following issues for determination;

a. Whether an order of temporary injunction should be granted to the Applicant.

b. Whether The Title deed issued to the 4th Respondent is valid.

17. He relied on Order 40 of the Civil Procedure Rules and the case of **Wild Living Company Limited v Varizon Limited [2019] e KLR** to submit that a temporary injunction should be granted to the Appellant to prevent further wasting and damage of the suit property.

18. It was his submission that the Appellant has a prima facie case which is required for the granting of an injunction as she holds a certificate of title to **Land Reference Number 15400/73** and is the legal/beneficial owner of **Land Reference Number 15400/74** and should be accorded protection under Section 24, 26 and 30 of the Land Registration Act, 2012.

19. He submitted that owing to the fact that **L.R No. 11397/3** which was the original title was compulsorily acquired by the government, the 1st Respondent had no authority to pass any good/valid title in the suit property and that as such, it could not have passed title to Margaret

Gathoni Maina who in turn could not pass to the 4th Respondent.

20. He cited the case of **Rhoda S. Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited [2019] e KLR** to submit that the 4th Respondent's actions of trespass and the excavation and construction works being carried out will not be repairable or capable of being compensated by an award of damages.

21. He relied on the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai[2018] e KLR** to submit that the balance of convenience tilts in the Appellant's favour since she has been in occupation of the suit property since 2009 and the 4th Respondent's actions and constructions will adversely affect the value of the suit property.

The 4th Respondent's submissions.

22. They are dated 10th February 2022. Counsel for the Defendant framed the following issues for determination: -

a. Has the Appellant established a case for issuance of orders of injunctions restraining the 4th Respondent from continuing with the construction of his 2 parcels of land?

b. Whether the 4th Respondent's occupation and use of plot Nos.97 and 98 being subdivisions of Title No.11379/3 is lawful.

c. Has the Appellant withheld material facts from the court and therefore not entitled to any discretionary orders by the court?

d. Whether the Appellant has misled the court with material which was not available by the subordinate court.

23. He submitted that the Appellant has failed to make out a prima facie case for issuance of injunction sought since her Certificate of Title is strongly challenged by the 1st and 4th Respondents.

24. He further submitted that the 1st Respondent being the registered owner of title **No.11379/3** is the legitimate owner of the subdivisions of the parcels of land sold to the 4th Respondents thus the 4th Respondent's plots were lawfully acquired and as such the Appellant's claim has no merit. The learned trial Magistrate analyzed the evidence placed before the lower court and found that the Appellant's case was not merited.

25. He put forward the case of **Barclays Bank of Kenya Ltd v Banking Insurance Finance Union (Kenya)[2019]e KLR** and submitted that the Appellant did not demonstrate a prima facie case nor that irreparable injury would be suffered if a temporary injunction is not granted. He added that the balance of convenience lies not in the Appellant's favour.

26. I have considered the notice of motion and the affidavit in support. I have considered the response thereto, the written submissions filed and the authorities cited. The issues for determination are:-

i. Whether the Appellants' Application has met the threshold for grant of temporary injunction.

ii. Who should bear costs of this application.

27. The disputed plots are subdivisions of **L.R No. 11397/3** referred to as the original title. It was compulsorily acquired by the government in the 1970's. There is a dispute pending in **Nairobi ELC Petition No. 47 of 2011, Abdulahi Muiruri & others v Attorney General & others** over whether the acquisition took place, whether in the said acquisition, compensation was awarded and whether it was awarded to the rightful owners.

28. Once the government acquired the original title, it allocated portions thereof to various entities and individuals. One of the beneficiaries of the portions of the original parcel was Amboseli Court Limited who sold the two (2) disputed plots to the Appellant.

29. On 18th August 2015, the 1st Respondent entered into an agreement with the National Land Commission whereby the commission agreed to undertake a review of all grants and dispositions issued arising from the original title. In a letter dated 10th May, 2018, the National land commission stated that it had finalized the review of grants and dispositions in respect of various properties and that it had resolved to uphold **L.R No. 11379/3** and ordered revocation of all grants and dispositions it had issued to individuals and entities.

30. In **Republic v National Land Commission & another; Samuel Wachira Wanja & 2 others (Ex-parte); Kiambu Dandora Farmers Co Ltd & another (Interested parties) [2021] eKLR** the court found that the National land commission had no jurisdiction to review the grants and dispositions and declared its decision to review titles unconstitutional, illegal, null and void.

31. The principles of injunctions were enunciated in the case of **Giella v Cassman Brown (1973) EA 358**. Further in **Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR** the court held that the discretion to grant a temporary injunction pending appeal is guided by the following principles;

a. An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous

- b. The discretion should be refused where it would inflict greater hardship than it would avoid
- c. The applicant must show that to refuse the injunction would render the appeal nugatory
- d. The court should also be guided by the principles in **Giella v Cassman Brown [1973] EA 358**

32. Numerous suits involving the original parcel have been filed in court and are still ongoing. However; the position of the courts as it stands is that the original title was compulsorily acquired and allocated to several entities and individuals, one of them being Amboseli Court Limited whom the Appellant claims from.

33. The Appellant; having acquired title to the suit plots from Amboseli Court Limited has established a prima facie case. She established that she bought the plots in 2008 and has already been issued with certificate of title for land **Reference No.15400/73** which ought to be protected under Section 24 of the Land Registration Act.

34. On the other hand, the 4th Respondent's claim is pegged on the 1st Respondents claim over the original title and the decision by the National land commission upholding the original title; which decision was declared unlawful as earlier stated.

35. Has the Appellant demonstrated that she will suffer irreparable injury if the orders are not granted? She has demonstrated that she had obtained approval to commence construction of a residential house. On the other hand; the 4th Respondent has engaged a contractor to erect two (2) residential buildings. The said contractor is on site digging trenches; altering the suit plots. The Appellant has established that she would suffer irreparable damage in the circumstances.

36. Further, the Appellant's appeal which is arguable would be rendered nugatory if the orders are not granted.

37. The balance of convenience tilts in favour of the Appellant who has been on the suit land since 2008 as opposed to the 4th Respondent who entered the suit property in March 2021 and immediately commenced construction and who has no title to any of the properties. Further; his claim is based on a decision of the National Land Commission that was declared unlawful.

38. I find merit in the notice of motion and I grant orders in terms of prayer numbers (c) and (d) of the notice of motion dated 29th October 2021. The costs do abide the outcome of the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 17TH DAY OF MARCH, 2022

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Appellant

Mr. Were for the 1st Respondent

No appearance for the 2nd and 3rd Respondents

Mr. Mogire for the 4th Respondent

Steve - Court Assistant