



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO.949 OF 2012

CLAY MBUTU BENJAMIN Suing Thro' His Agent

MUMO MUTISYA MBOLE.....PLAINTIFF

VERSUS

SAJEM HOMES LIMITED.....1st DEFENDANT

RULING:

The applicant herein **Clay Mbutu Benjamin** (suing through his agent), **Mumo Mutisya Mbole** has brought this Notice of Motion dated 5th December, 2012 against the Defendant herein **Sanjem Homes Ltd** . The application is premised under **Order 40 Rules 1,2 3,4 and 7 of the Civil Procedure Rules , 2010 and Section 1A, 1B and 3A of the Civil Procedure Act, Article 159** of the Constitution of Kenya and all other enabling provisions of the law for Orders that:-

- i. *That the Defendant /Respondent by itself , its servant, agents (workmen) or persons acting for or claiming under it or otherwise howsoever be restricted from invading , trespassing , alienating , developing , alienating or in any other way howsoever interfering with the parcel of land known as Nairobi/Block 112/95 pending the hearing and determination of this suit .*
- ii. *That this honorable court be pleased to make an order of inhibition. Inhibiting the registration of any dealing with the land parcel known as Nairobi/Block 112/95 or any subdivisions emanating therefrom pending the hearing and determination of this suit.*
- iii. *That costs of this application be borne by the Defendant/Respondent*

*The application is based on the grounds stated on the face of the application and on the supporting affidavit of **Mumo Mutisya Mbole**. These grounds are:-*

- i. *The applicant is the registered proprietor of the leasehold interest comprised in the title number Nairobi/Block 112/95.*
- ii. *The Defendant/Respondent has begun trespassing on the suit premises without any color or right, consent and authority of the applicant.*
- iii. *The Defendant has been duly warned to cease the said trespass but is interested in continuing with the said trespass and is in fact now constructing a permanent structure thereon in violation of the applicant's property rights.*
- iv. *The Defendant desires unless restrained by this honourable court to continue with the said acts, further wasting, destroying and alienating the suit premises to the detriment of the applicant's property right and thereby occasioning him irreparable damages.*

In his Supporting Affidavit, **Mumo Mutisya Mbole** averred that he is the lawful Attorney and agent of **Clay Mbutu Benjamin** as per the Power of Attorney duly registered and marked **MMM1**. That the said **Clay Mbutu Benjamin**, purchased **LR No. Nairobi /Block 112/95** in 1994 through **Lloyd Masika Ltd** and the property was registered in his name on 18th July 1994 as per annexure **MMM2**. He further averred that the Plaintiff has been the registered owner of the suit land since then and records at City Council of Nairobi attest to that fact as evidenced by **MMM3**.

The applicant stated that on 28/9//2012, he visited the suit property which has been vacant and he found a signboard erected at the gate showing that the Defendant from constructing a house thereon as shown by annexure **MMM4**.

He further contended that the Defendant/Respondent has continued to trespass and construct on the suit premises and has denied the applicant access to the said suit land. He therefore asked this court to restrain the Defendant for further trespass on the suit premises.

The Defendant herein opposed the said Notice of Motion. One **Johnson Mukuha**, the Managing Director of the Defendant/Respondent swore a Replying Affidavit and averred that they are on the ground working on all that parcel of land known as Nairobi/Block 112/95 but he denied to have trespassed on the suit premises. He further averred that there is a House Development Company which was contracted by **Terar Ring Deng** to do a development on the suit property as per the copy of the contract agreement marked **JM 1**. He further contended that before they embarked on the development of the suit land, the said **Terar Ring Deng** verified his legal ownership of the suit land and they obtained the relevant approvals for Development. He stated that a search certificate **JM2** showed that **Terar Ring Deng** was the owner of the suit land since May 2012.

The Deponent denied that they were trespassing on the suit premises as claimed by the Plaintiff and averred that they are developing the suit land legally and with the consent of its owner **Terar Ring Deng**. He further alleged that the title documents are with the owner **Terar Ring Deng** who resides in South Sudan and they have called for the said documents. The Deponent prayed for dismissal of the plaintiff's application.

The parties herein consented to canvass this Notice of Motion by way of written submissions. I have now carefully considered the pleadings generally and the annexures thereto. I have also considered the Written Submissions and the relevant laws and I make these findings:

The applicant herein **Mumo Mutisya Mbole** is the agent for **Clay Mbutu Benjamin** as per the Power of Attorney duly registered and marked **MMM1**. The applicant therefore has legal capacity to act for his Principal **Clay Mbutu Benjamin**.

The applicant has sought for injunctive relief. These are equitable remedies which are granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of **Hasmukh Khetshi Shah Vs Tinga Tranders Ltd, Civil Appeal No. 326 of 2002**, where the court held

that :-

“ The granting of interim injunction is an exercise of judicial discretion and an appellate court will not therefore unless it is shown that the discretion has not been exercised judicially”.

For an applicant to succeed in an application for injunction , he must establish certain conditions or threshold as has been held in various cases. In the case of **Kibutiri Vs Kenya Shell, Nairobi High Court , Civil Case No. 3398/1980 (1981) LR 390** the court held that:-

***“ The conditions for granting a temporary injunction in East Africa are well known and these are; First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be 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”.* (See also Giella Vs Cassman Brown & Co Ltd (1973) EA 358.**

The applicant herein therefore needed to satisfy the above conditions to warrant these court to grant him the orders sought. Has the applicant fulfilled the above conditions?.

Firstly, the applicant needed to establish that he has a prima-facie case with high probability of success) See **E.A Industries Vs Trufoods (1972) EA 420.** Prima-facie case was described in the case of **Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125.** by the Court of Appeal as:-

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

The applicant stated that it is the registered owner of the suit premises ***Nairobi/Block 112/95, MMM2 a letter of Offer*** dated 30th May 1994 from ***LLoyd Masika Ltd*** shows that ***Clay Mbutu Benjamin*** , the Principal herein was offered the above suit property to purchase for ***Kshs.1,200,000/.*** The transfer of lease by ***Littlewoods Investments Ltd*** on 12th July 1995 confirms that the said parcel of land was transferred to ***Clay Mbutu Benjamin*** . There is also a Certificate of Lease dated ***18th July 1994.*** The said certificate of lease shows that the parcel of land Nairobi /Block 112/95 was registered to ***Clay Mbutu Benjamin.*** This *Registration Certificate of Lease is Prima-facie evidence of ownership as per Section 26(1) of the Land Registration Act* which provides that:-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

The Respondent alleges that it is constructing a house for one ***Terar Ring Deng*** who is the registered owner of the suit premises. The Respondent attached JM2 which is a certificate of official search from the Ministry of lands. However, the Respondent did not attache the certificate of lease to confirm that the said ***Terar Ring Deng*** is the registered owner of the suit land.

Applicant has evidence of ownership of the Suitland. The applicant has therefore established that he has a ***prima-facie case*** with probability of success.

The other issue is that applicant needed to prove is that he will suffer irreparable loss which cannot be compensated by an award of damages.

The applicant alleges that the Defendant trespassed on the suit premises and has commenced construction of a house on the said suit premises. The Defendant has not denied being on the suit premises. The

Defendant only averred that being a House Development Company, it was contracted by one **Terar Ring Deng** to construct a house for him. There is indeed a construction intended on the suit premises as per the copy of signboard showing a proposed development on **LR No. Nairobi /Block 112/95**. If the Respondent is not restrained, it will carry on with the development. The said development will change the substratum of the suit premises and/or waste the same.

Due to the said wasting or change of substratum, the applicant would definitely suffer loss and damages which might not be compensated by an award of damages. The applicant will have lost his legitimate expectation to own and keep the said suit premises.

The court finds that the applicant has also been able to establish that if the Defendant is not restrained, he will suffer irreparable loss.

Though the Respondent alleged that the suit land is owned by one **Terar Ring Deng**, the Defendant is the one at the site and carrying out the proposed Development. It is the Defendant to be restrained from dealing in whatever way with the suit premises.

The applicant has established that he has a proprietary right and interest over the suit premises and any infringement on the suit premises must be restrained as was held in the case of **Amstrong Vs Sheppard and Short (1995) 2 QB Page 395** (quoted by the applicant).

“ A proprietor who establishes a proprietary right is ex debito justitiae entitled to injunction”.

The upshot of the foregoing is that the applicant herein is entitled to an injunction.

Having now considered the Notice of Motion dated 5/12/2012 and the submissions herein, I find that the said application is merited. I allow it entirely and costs in the cause.

It is so ordered.

Dated, signed and delivered this **23rd** day of May , 2014

L.GACHERU

JUDGE

In the Presence of:-

Mr. Mathuva for the Plaintiff/ Applicant

Mr Nzioka holding brief Kimamo for the Defendant/Respondent

Lukas: Court Clerk

L.GACHERU

JUDGE

23/5/2014