



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 530 OF 2013

KULLOW ARABOW MOHAMED.....1ST PLAINTIFF

VERSUS

MOHAMMED KAHIYE OSMAN.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 7th May 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from encroaching on the property known as MANDERA/BLOCK 1/697 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit and that the costs of this Application be in the cause.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff herein Kullow Arabow Mohamed, sworn on 7th May 2013, in which he averred that the suit property was allocated to the Rural Village Tree Development Project in the year 1994 wherein he was an official. He further averred that in the year 2009, he obtained consents from the Town Council of Mandera as it then was for the transfer of the suit property to him after complying with their terms. He further averred that the Mandera Town Planning and Works Committee held a meeting and approved his application to be issued with a lease and that the same was confirmed by the then Ministry of Local Government in May 2011. He then averred that he is the registered owner of the suit property and has been paying land rates in respect thereof faithfully from the year 2010 to date. He further confirmed that he was issued with a title deed to the suit property by the Commissioner of Lands in February 2012. He exhibited a copy of the same.

The Application is contested. The Defendant/Respondent, Mohammed Kahiye Osman, filed his Replying Affidavit sworn on 11th June 2013 in which he averred that he is the lawful owner of all that parcel of land known as Mandera Township/Block 1/697 which the Plaintiff describes as Mandera/Block 1/697 (the suit property). He further averred that he was allocated the said parcel of land way back on 29th August 1998 by the Mandera Town Council vide the Council’s minutes ref no. ETC/COH/PA/29. He

further stated that on 16th July 1999, the Commissioner of Lands issued him with a Letter of Allotment, a copy of which he attached. He further stated that on 2nd September 1999 he paid the Mandera Town Council the requisite stand premium and rent as demanded for processing of his title deed in respect of the said property. He further averred that on 13th October 1999, he paid the Commissioner of Lands a total sum of Kshs. 6,217/- being for registration of title, conveyance, survey fees, stamp duty and approval fees. He further stated that on 16th January 2002, the Commissioner of Lands wrote to the District Land Registrar Nairobi through the Chief Land Registrar forwarding a Lease documents in respect of the suit property in his name duly signed and stamped for registration in his favour. He further stated that subsequently, on 25th January 2002, he was issued with a certificate of Lease in respect of the aforesaid property. He exhibited a copy of this document. Further, he stated that he embarked on paying the requisite Land Rent for the property and has been paying from 2004 to date. He further stated that recently, the Plaintiff started interfering with his property claiming that it belongs to him and that he reported the matter to the Divisional CID Headquarters, Mandera Division. He further averred that the DCIO Mandera wrote to the County Secretary for clarification on ownership of the suit property where upon one Mr. Diriye Haji Hassan, the community development officer of the Mandera Town Council confirmed to the CID that indeed the purported Plaintiff's documents in respect of the suit property are all forgeries and that the matter is currently under investigation. He also confirmed having sued the Plaintiff in the Principal Magistrates Court in Mandera where he was issued with interim orders restraining the Plaintiff from interfering with the property. He confirmed that the Plaintiff was claiming the same exact parcel of land that he has always had quiet, peaceful and uninterrupted possession since allocation of the same way back in 1998. He further averred that all the documents annexed to the Plaintiff's supporting affidavit are all forgeries as confirmed by Mr. Diriye Haji Hassan as follows:

- a. The annual rent payable is indicated as Kshs. 5,600/- while the annexed receipts show Kshs. 500/- per year.
- b. The Lessor is indicated as the Government of Kenya while his indicates the County Council of Mandera.
- c. The acreage is different
- d. The title number is different.
- e. The Plaintiff's lease was purportedly registered on 17th February 2012 while his was registered way back on 25th January 2002.

He further stated that he had carried out a recent official search which shows that Mandera Township/Block 1/697 belongs to him and that in view of all the above, he is indeed the bona fide duly registered proprietor thereof.

In response thereto, the Plaintiff filed his Further Affidavit sworn on 19th June 2013 in which he averred that the alleged letter of allotment dated 16th July 1999 is a forgery because the person who is alleged to have signed it died in the year 1994. He further averred that the stand premium on the allotment is for Kshs. 35,000/- yet the receipt marked "MKO3" was for Kshs. 15,400/- and also that the total amount due for the allotment was Kshs. 46,340/- but the attached receipt being "MKO4" was for Kshs. 6,217/-. He further pointed out that the search receipt was for payment in May 2013 while the search is dated September 2009. He also stated that he reported the matter to the Criminal Investigations Department for investigation.

In further response thereto, the Defendant/Respondent filed his Further Affidavit sworn on 1st July 2013 in which he averred that the Plaintiff/Applicant is not an officer of the Ministry of Lands to depone that his documents are forgeries and that such averments should be treated with the contempt they deserve. He further stated that the only person who can confirm the authenticity of the documents in respect to the suit property is the 2nd Respondent. He further stated that the Plaintiff/Applicant did not annex his letter of

allotment from the Commissioner of Lands which purportedly gave rise to this title document, if indeed it is a genuine document. He further responded that the payment for the search was dated 30th May 2013 and the official search was dated 23rd September 2013. He further reiterated that the search clearly showed the lawful owner to the suit property as being himself. He further stated that the Plaintiff/Applicant did not annex his official search from the Ministry of Lands but embarked on scrutiny of his documents yet he is not an expert in that field. He reemphasized that he has always had quiet, peaceful and uninterrupted possession of his said property since he was allocated the same way back in 1998.

The 2nd Defendant/Respondent also filed their Replying Affidavit sworn by Silas Mburugu on 16th July 2013 in which he stated that he is the Chief Lands Administration Officer working for the National Land Commission. He further averred that the suit property falls within Mandera Town is classified as a trust land. He further averred that prior to allocation of the land to the 1st Defendant/Respondent, recommendations were made by the Mandera County Council vide Plot Allocation Committee meeting held on 21st August 1998. He further averred that the plot was planned as an extension to the existing petrol service station and for approval on 7th May 1999. He further stated that a letter of allotment was issued to the 1st Defendant/Respondent on 16th July 1999 and that a follow up letter dated 24th September 1999 was sent to the officer of the Commissioner of Lands by the Town Clerk Mandera Town instructing the office to release title to the 1st Defendant/Respondent after the members of Rural Village Tree Development Project had been given an alternative plot. He further stated that upon allocation, file no. 218398 in the name of the 1st Defendant was opened and on 13th October 1999, he accepted the allotment by way of payment. He further indicated that on 6th April 2001, the Director of Survey was requested to amend the Registry Index Map which he did and a new survey number was given as Mandera/Block 1/697. Further, he stated that on 16th January 2002 a lease in the name of the 1st Defendant was prepared and forwarded for registration and on 12th January 2002, the lease was registered in the name of the 1st Defendant. He further stated that a certificate of lease was issued to the 1st Defendant/Respondent on 25th January 2002. He further averred that the title has never been registered in the name of the Plaintiff and further confirmed that the Rural Village Tree Development Project was given alternative land to allow extension of the petrol service station. He disowned the title document exhibited by the Plaintiff/Applicant.

The Plaintiff/Applicant filed a Further Affidavit sworn on 27th September 2013 refuting all the claims made by the 2nd Defendant/Respondent. The 1st Defendant/Respondent also filed a Further Affidavit sworn on 7th October 2013.

The Plaintiff and the 1st and 2nd Defendant filed their written submissions which have been read and taken into account in this ruling.

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.”

Looking at the facts of this case as enumerated above, it emerges quite clearly that there is a hot contest between the parties over the suit property. Both parties have produced certificates of lease in support of their claims of ownership to the suit property. As a result, the parties have asserted that the other party’s certificate of lease is a forgery and has no validity whatsoever. Overall, in light of the statement made by the 2nd Defendant/Respondent, I got the impression that the Plaintiff’s certificate of title may not be valid at all. However, this is an issue to be determined fully at the main trial of this suit after tested evidence is presented to the trial judge. As this is the Plaintiff’s case, at this point, I find that he has not made out a prima facie case with a probability of success at the main trial. Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application with costs to the Defendant.

SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2014

MARY M. GITUMBI

JUDGE