



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

E.L.C. NO. 563 OF 2013

DANIEL NGANGA KARUMA.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH KIPNGETICH BOR.....1ST DEFENDANT/ RESPONDENT

JAMES CHESRWA KIMAYO.....2ND DEFENDANT/ RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated **15th October, 2013**. It is taken out by **Daniel Nganga Karuma** the plaintiff herein, seeking the following orders *inter alia*:

- a) **That this application be certified urgent and heard ex-parte in the first instance.**
- b) **The Defendants, their servants, employees and/or agents, families or otherwise whomsoever be and are hereby enjoined and restrained jointly and severally from occupying, constructing, trespassing and or in any way from dealing adversely with plaintiff's parcel of land known as Nakuru/ Olenguruone/ Chepakundi/ 1401 pending hearing of this application**
- c) **The Defendants, their servants, employees and/or agents, families or otherwise whomsoever be and are hereby enjoined and permanently restrained jointly and severally from occupying, constructing, trespassing and or in any way from dealing adversely with plaintiff's parcel of land known as Nakuru/Olenguruone/Chepakundi/ 1401 pending hearing of this suit.**
- d) **The officer commanding Molo Police station to ensure compliance of this honorable court's order.**
- e) **The costs of this application be borne by the defendants.**
- f) **Any other relief that this court deems fit and just to grant**

2. The application is supported by the affidavit of **Daniel Nganga Karuma**, and is based on the grounds stated on the face thereof.

3. The Plaintiff/ applicant deposes that he is the registered owner of the suit property measuring 2.4 hectares. That in 1992 he was forced to flee from Nakuru /OleNnguruone /Chepakundi /1401 (hereafter referred to as the suit property) due to tribal clashes. When he went back to the suit land in 1995, he found

that the 2nd defendant/ 2nd respondent had trespassed therein and occupied the dwelling houses, had planted crops, was harvesting firewood and picking tea.

4. On or about 2010 the 2nd respondent purported to illegally sell and transfer the suit property to the 1st defendant/ 1st respondent using an illegal title. They were charged and convicted of a criminal offence and were advised by the court to vacate the property. They did not heed the advise and the applicant is apprehensive that the continued stay by the defendants on the suit property will deprive him peaceful and quiet enjoyment of the suit property and the further planting of tea bushes will alter the topographical and environmental structure of the suit property.

5. The application is opposed vide the 1st respondent's replying affidavit dated 28th November, 2013. He contends that he has been in occupation of the suit property since 2010 and holds a title to the same having bought the property from the 2nd respondent herein who had in turn purchased the same from the bonafide owner Paul Kiprono. He contends that this application is brought in bad faith and meant to confuse the court. He seeks that the Land Registrar Nakuru be enjoined in the suit to explain the existence of the two titles.

6. On 2nd December, 2013 parties agreed that the application be disposed of by way of written submissions. The applicant filed his submissions on 20th December, 2013 whilst the Respondents' submissions were filed on 21st January, 2014.

7. The Applicant submitted that the decision in **Giella V Cassman Brown & Co. (1973) EA 358**, laid down the principles for granting an injunction. Firstly, the applicant must show a *prima facie* case with a probability of success. To this, counsel submitted that the plaintiff is the registered owner of the suit property and annexed a title deed issued to him on 28th September, 1987.

8. The second principle enunciated in the **Giella** case is that an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury. It was the submission of counsel that the continued restriction to access the suit property and develop the same for gain has caused the applicant to lose opportunities and economic gain which cannot be ameliorated adequately.

9. Counsel for the respondents filed written submissions in opposing the application. He submitted that the applicant seeks a permanent injunction against the respondents to have them restrained from entering their land and cultivating the same. He further submitted that both parties had title deeds to the suit property but the balance of convenience tilted towards the respondents as they had been in occupation of the suit land for twelve years and had developed the same therefore granting the orders sought at this stage would render them homeless and would conclude the suit without giving the respondents an opportunity to be heard.

10. It is not in dispute that the respondents in the instant case had earlier been charged with the offence of forcible detainer in the Senior Principal's Magistrates court. In defence the 2nd respondent testified that he had purchased the suit land from Paul Kiprono Kipkwai and he had subsequently sold part of the land to the 1st respondent. During the hearing of the case, a land Registrar John Mwaura testified that he had examined the two titles held by both the applicant and the respondents and found that the title held by the respondents in the name of Paul Kiprono Kipkwai was not genuine. He had found the title in the name of the applicant to be genuine. The trial magistrate found the respondents guilty of the offence and directed that they make arrangements to vacate the suit property and advised the plaintiff to file a civil suit to obtain eviction orders. There is no indication from either of the parties that there was an appeal against this judgement.

11. Could Paul Kiprono Kipkwai validly enter into an agreement to dispose off property without a genuine title deed? Could he confer any proprietary rights? I do not think so and neither could the 2nd respondent. Since the lower court had already established that the title was not genuine, any perceived rights Paul Kiprono Kipkwai thought he had while purportedly executing the sale agreement dated 4th

August, 1998 between him and the 2nd respondent were illusory and non-existent at the time. He therefore conferred no rights to the 2nd respondent and the 2nd respondent had no rights to confer to the 1st respondent when he entered into the sale agreement with him dated 18th January, 2010.

12. Having made the findings as I have, the question that comes to the fore is this, should this court grant an interlocutory mandatory injunction? There is no doubt in my mind that the answer is in the affirmative. What then is the criteria for the grant of this kind of relief seeing as it appears, that such orders will have the effect of substantially concluding the suit? Fortunately for us, the East African Court of Appeal and our very own court of Appeal have dealt with this kind of situation before; see for instance, *The Despina Pontikos (1975) 1E.A.-38*; *Mucuha –vs.- Ripples Ltd (1990-1994) 1 EA 338*.

13. In the case of *Kenya Breweries Limited –vs.- Okeyo (2002) 1EA 109 CAK* the court held that the test for grant of a mandatory injunction was correctly stated in *Vol. 24 Halsbury Laws of England, 4th Edition para 948* that provides: **“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard that was required for a prohibitory injunction.”**

14. These decisions and others have reiterated that an interlocutory injunction shall only be granted in very special cases and in very clear circumstances. Our High Court has followed this principle for grant of interlocutory mandatory injunction; see for instance, *Bojani –vs.- Mwaghoti (2002) 2 KLR 774*; *John Kirika Kimani & Another –vs. Hannah Njeri Nganga (2006) eKLR*.

15. Do the circumstances of this case satisfy the criteria repeatedly reiterated by the above cases and others? In my view they do. The applicant has a title deed that was authenticated by the land Registrar as genuine. This has not been challenged on appeal. He is therefore entitled to protection by the Law under the terms of **Section 26 (1)** of the Land Registration Act, 2012 which provides;

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon 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;

- 1. on the grounds of fraud or misrepresentation to which the person is proved to be a party or**
- 2. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ”**

16. Since the issue of ownership of the suit property has already been determined, to allow the respondents to continue in occupation of the “suit property” a minute longer will be an affront to the rights of the applicant as conferred to him by Law. I think I have said enough to show that this application must succeed.

17. Now, the applicant is effectively seeking an interlocutory mandatory injunction. He requires the respondents to cease being present on the suit property. That means that the respondents must vacate the suit property and thereafter not interfere with the plaintiffs’ quiet occupation of the same. The court of Appeal in; *KIG Bar Grocery & Restaurant Ltd vs Gatabaki & Another(1972)1EA 503*, held inter alia that, **“an order for mandatory injunction should be couched in positive terms rather than negative terms”**.

18. In that regard, the order of this court shall be that the Defendant is hereby ordered to vacate the suit property within the next forty five **(45)** days from the date of this ruling and hand over the same to the applicant. Should the respondents fail to do so, the applicant is at liberty to evict them from the suit property. In doing so the applicant should enlist the assistance of the officer commanding Molo Police Station.

19. Costs of the application are awarded to the applicant.

Dated, Signed and delivered at Nakuru this 16th day of May 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Njuguna holding brief for Mr Mwangi for the Applicant

N/A for Respondents

Emmanuel Maelo : Court Assistant

L N WAITHAKA

JUDGE