

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIROMENT & LAND COURT CASE NO. 389 OF 2013

1. HITESH KUMAR HEMRAT GOSRANI

2. NILESHBHAI RAVJIBHAI PATEL..... PLAINTIFFS

VERSUS

1. DISMAS NYAKUNDI MAGEKA

2. SALOME GESARE ONCHARI..... DEFENDANTS

RULING

1. The plaintiffs are the registered proprietors of all that parcel of land known as **LR. No. Central Kitutu/Daraja Mbili/2231** (hereinafter referred to only as “**the suit property**”). The plaintiffs brought this suit against the defendants on 20th September, 2013 seeking a mandatory injunction for the eviction of the defendants and a permanent injunction restraining the defendants from trespassing into the suit property. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 18th September, 2013 under certificate of urgency seeking interlocutory injunction to restrain the defendants from (further) trespassing into the suit property and a mandatory injunction for the eviction of the defendants from the portion of the suit property presently in the defendants’ occupation. The plaintiffs’ application was supported by the affidavit of the 2nd plaintiff sworn on 18th September, 2013 in which the 2nd plaintiff stated that they are registered as tenants in common of the suit property. He annexed to his affidavit a copy of a certificate of official search dated 18th June, 2013 in respect of the title of the suit property which shows that they were registered as proprietors of the suit property on 18th June, 2013. He stated further that in violation of their proprietary rights over the suit property, the defendants without any lawful cause or authority from them entered the suit property in the month of August, 2013 and have remained in occupation thereof. The 2nd plaintiff stated that the plaintiffs reported the defendants’ said act of trespass to the provincial administration to prohibit the defendants from further acts of trespass but the defendants refused and/or declined to heed counsel from the said officers and continued with the said acts of trespass over the suit property. The 2nd plaintiff stated that as a result of the defendants’ said acts of trespass, the plaintiffs are unable to put the suit property to any reasonable use.

2. The plaintiffs’ application was opposed by the defendants who appeared in person. They filed separately what they referred to as “Statement” in opposition to the application. When the application came up for hearing on 5th December, 2013, the plaintiff’s advocate informed the court that he had no objection to the defendants relying on their said statements in opposition to the application. In his statement dated 11th October, 2013 which was filed in court on the same day, the 1st defendant claimed that in the year 1980 or thereabouts the 2nd defendant who is his mother had sold to one, Henry Nyanduncha and one, Oliver Onserio a portion measuring 200 feet by 70 feet of the suit property which was initially owned by the 2nd defendant. The 1st defendant claimed that instead of the said Henry Nyanduncha and Oliver Onserio transferring to their names only a portion measuring 200 feet by 70 feet of the suit property which was sold to them by the 2nd defendant, they transferred the entire property into their names thereby leaving the 2nd defendant landless and a squatter. The 1st defendant claimed that there is a clear boundary on the ground separating the portion of the suit property that was sold to Henry Nyanduncha and Oliver Onserio and what remained for the 2nd defendant. The 1st defendant claimed that the plaintiffs herein who acquired their title from the said Henry Nyanduncha and Oliver Onserio did not

acquire good title as a portion of the land that is comprised in the suit property rightfully belongs to the 2nd defendant.

3. In her statement, the 2nd defendant claimed that she is residing on the suit property and also deriving her livelihood therefrom. She claimed that it is on the suit property where he buried his deceased husband and her other family members. The 2nd defendant corroborated the 1st defendant's statement that she had sold to Henry Nyanduncha only a portion measuring 200 feet by 70 feet of the suit property and that to her surprise she discovered in the year 2007 that Henry Nyanduncha had transferred her entire parcel of land to his name. The 2nd defendant contended that she reported the matter to the area chief who came with the village elders to arbitrate on the dispute and it was resolved that Henry Nyanduncha sticks to the portion of the suit property measuring 200 feet by 70 feet that was sold to him by her. The 2nd defendant contended that that the said Henry Nyanduncha and his son Oliver Onsario had no right to sell to the plaintiffs the portion of the suit property that was not sold to them by the 2nd defendant. The 2nd defendant contended that on 25th June, 2013, the plaintiffs came to the suit property and fenced off the entire parcel of land including the portion on which the 2nd defendant had planted maize, Napier grass, bananas and trees. The 2nd defendant claimed that she had no alternative but to cut part of the plaintiffs' fence so that she may gain access to the maize that she had planted on the disputed portion of the suit property. The 2nd defendant contended that the plaintiffs have now taken away her entire parcel of land and she has nowhere to live.

4. When the application came up for hearing on 5th December, 2013, Mr. Nyamurongi advocate appeared for the plaintiffs while the defendants appeared in person. In his submission in support of the application, the plaintiffs' advocate relied entirely on the 2nd plaintiff's affidavit filed in support of the application and urged the court to allow the application as prayed. On their part, the defendants also relied entirely on their statements that I have referred to above and urged the court not to allow the application. I have considered the plaintiffs application together with the affidavit filed in support thereof. I have also considered the statements that were filed by the defendants in reply and in opposition to the plaintiff's application. The principles of law to be applied in applications for interlocutory injunction are settled. As was stated in the case of **Giella -vs- Cassman Brown & Company Ltd. [1975] E.A. 358**, an applicant for interlocutory injunction must show that he has a prima facie case against the respondent with a probability of success and that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt, the court will determine the application on a balance of convenience. For a temporary mandatory injunction to issue however, the applicant must demonstrate that he has a clear and a very strong case against the respondent with overwhelming chances of success at the trial. The courts would grant mandatory injunction at interlocutory stage only in exceptional circumstances. The plaintiffs have demonstrated with sufficient proof that they are the registered proprietors of the suit property. The plaintiffs' title to the suit property is therefore not in dispute. What is in dispute is whether or not the defendants have trespassed on the suit property. This is what the plaintiff was supposed to demonstrate or establish before the court on a prima facie basis. As I have stated above, the 1st defendant is the son of the 2nd defendant. The defendants have claimed that at all material times, the suit property was owned by the 2nd defendant and that the 2nd defendant had sold only a portion of it measuring 200 feet by 70 feet to third parties (Henry Nyanduncha and his son Oliver Onserio). The 2nd defendant has claimed that, there is a clearly marked boundary between the portion of the suit property which she sold to the said third parties and the portion thereof which remained for her and which she has occupied and cultivated over the years until June, 2013 when the Plaintiffs came in after the third parties aforesaid sold to them the suit property and fenced off the entire parcel of land including that portion that she never sold to the said third parties. The defendants' contention is that the third parties who sold the suit property to the plaintiffs acquired the entire parcel of land comprised in the suit property fraudulently and that they are entitled to continue occupying the portion of the suit property that the 2nd defendant never sold to the said third parties. I have noted that the plaintiffs' acquired the suit property on 18th June, 2013. It is not clear from the record how the plaintiffs acquired the suit property. The only document annexed to the plaintiff's affidavit in support of the application is a certificate of official search. There is no agreement for sale, transfer or a copy of the register. The history of the suit property is in the circumstances not clear. The plaintiffs have not

disputed the 2nd defendants claim that she was the initial proprietor of the suit property and that she sold only a portion of it and remained with the other portion which is now in dispute for her own use. The plaintiffs have also not disputed the 2nd defendant's claim that she has all along been in occupation of the disputed portion of the suit property. I am inclined to believe the 2nd defendant in her contention that when the plaintiffs purchased the suit property, she was in possession of the disputed portion thereof.

5. I am satisfied on the basis of the foregoing that the plaintiffs have demonstrated that they have a prima facie case against the defendants with a probability of success. The plaintiffs have demonstrated that they are the registered proprietors of the suit property and that the defendants are in occupation of the suit property without their consent. I am not satisfied however in view of the fact that the plaintiffs purchased the suit property while the defendants were in possession of the disputed portion thereof that the Plaintiffs have demonstrated a clear case with overwhelming chances of success that would entitle the plaintiffs to an order of a mandatory injunction against the defendants at this interlocutory stage. I am of the opinion that the defendants have in their opposition to the plaintiffs' application shown that they may have a genuine claim over the portion of the suit property under their occupation which claim this court may need to interrogate at the trial of this suit. It would not be prudent therefore to order the eviction of the defendants from the disputed portion of the suit property before their claim aforesaid is investigated further. Apart from showing a prima facie case with a probability of success, the plaintiffs were also under a duty to show that they stand to suffer irreparable harm unless the orders sought are granted. As the registered proprietors of the suit property, the plaintiffs would no doubt suffer irreparable harm for being kept out of the suit property. I am persuaded therefore that the Plaintiffs have made out a case for a prohibitory injunction. The plaintiffs' application dated 18th September, 2013 is therefore allowed in terms of payer (c) thereof. The injunction granted herein shall however not extend to that portion of the suit property which has been under actual occupation and use by the defendants or any of them. The plaintiffs shall have the costs of this application.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for plaintiffs

Defendants present in person

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE