



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

H.C.C.C 20 OF 2009

KERIAKO TOBIKO PLAINTIFF/APPLICANT

AND

NASSIR RABI BALAYIAH DEFENDANT/RESPONDENT

RULING

1. The application dated 5/2/2009 seeks orders that:-

1. **“(Spent).**
2. **(Spent).**
3. **A temporary injunction do issue restraining the Respondent herein by himself, his servants, agents or any other person authorized by or claiming through him from trespassing into, depositing building materials, constructing, building or by any other means using the Applicant’s parcel of land known as LR No. 9923/142 situate at Kajiado Township and from interfering howsoever with the Applicant’s quiet possession and enjoyment of the said parcel of land pending the hearing and determination of the suit.**
4. **A temporary mandatory injunction do issue compelling and directing the Respondent by himself, his employees, servants, agents and/or any other person claiming through him to pull down and/or remove any structures erected on parcel of land known as LR No. 9923/142 situate at Kajiado Township pending the hearing and determination of this suit.**
5. **Cost of this application be provided for.”**

2. The Applicant’s case according to the affidavit in support and a further affidavit sworn by the Applicant is that the Applicant is the rightful owner of the premises known as **LR No. 9923/142 – Kajiado** (hereinafter plot). That vide a sale agreement dated 17/6/1999, the Applicant bought the suit plot from one **Amina Mohammed Osman** at the price of Kshs.235,000/=, that the said plot was allocated to the said **Amina Mohammed Osman** on the 5th October 1979 by the Commissioner of Lands as unsurveyed business plot No. **LR No. 9923/142 – Kajiado**. That it was a term of the letter of allotment that the title to the said plot would be issued under the **Registration of Titles Act Cap 28 Laws of Kenya** upon the fulfillment of the conditions set out in the said letter of allotment.
3. That the said **Amina Mohammed Osman** complied with the requirement set out in the Letter of Allotment and paid the requisite fees of Kshs.2,776. That the said **Amina Mohammed Osman** continued paying the requisite fees including land rates, conservatory fee and service charge.
4. That pursuant to special condition **No. 8** in the Letter of Allotment, the consent of the Commissioner to transfer the plot was applied for and the same given. That the requisite charges for the transfer were paid and the plot transferred from **Amina Mohammed Osman** to the

Applicant.

5. The Applicant's complaint is that the Respondent has trespassed into the said plot and erected a perimeter fence thereon. That despite demands made to the Respondent to stop the encroachment, the Respondent has continued with the alleged acts hence this suit.
6. The Applicant avers that he stands to suffer irreparable loss and damage if the Respondent is not restrained and compelled to remove the structures he has constructed therein. The Applicant's position is that his plot is not developed and that any subsequent allocation of the plot by the **Commissioner of Lands** or any other body is illegal, null and void.
7. The application is opposed. The Respondent, **Nassir Rabi Balayiah** swore a replying affidavit and a further replying affidavit. It is the Respondent's case that he is the duly registered and legal Lessee of plot **No. Kajiado/Township/block 1/72**, the suit property herein as per the Certificate of Lease issued on 22nd September 2004. That plot **No. LR 9923/142 Kajiado Township** was allocated to one **J.S. Polong** on 29/8/1996. That the Respondent bought the said plot from the said **J.S. Polong** in the year 2004. That the said **J.S. Polong** transferred the plot to him after obtaining the Clearance Certificate. That thereafter the Respondent embarked on developing the plot after obtaining all the necessary approvals from the relevant authorities. The Respondent denies having trespassed into the Applicant's plot.
8. In the further replying affidavit, the Respondent has annexed a Certificate of Official Search for Title **No. Kajiado/Township/Block 1/72** as proof that he is the registered owner of the said plot. The Respondent has further contended that plot **LR. No. 9923/142** which the Applicant claims to be his does not in any way relate to the Respondent's plot. That his plot **Title No. Kajiado/Township/Block 1/72** is therefore completely different from the Applicant's plot **No. LR No. 9923/142**.
9. An affidavit by **Amina Mohammed Osman** sworn on 19/11/2010 has also been exhibited by the Respondent. In the said affidavit **Amina Mohammed Osman** depones that she sold to the Applicant the property known as **LR No. 9923/142 Kajiado** (also known as **unsurveyed Business Plot No. 1 -Kajiado**). According to the said affidavit by **Amina Mohammed Osman** the property she sold to the Applicant is not **No. Kajiado/Township/Block 1/72** and neither is the **Land Reference No. 9923/142** related in any way to **Title No. Kajiado/Township Block 1/72**.
10. The application was canvassed by way of written submissions which were highlighted to the court by the counsels for the respective parties. I have duly considered the submissions and the authorities cited.
11. The Applicant on the one hand lays claim on the plot known as **LR 9923/142** situate at **Kajiado Township**. The claim is based on a letter of allotment of the said plot to **Amina Mohammed Osman** in the year 1979. On the other hand, the Respondent traces his rights to his plot **No. 9923/142 Kajiado Township** to a letter of allotment of the plot to one **J.S. Polong** in the year 1996 but in the further affidavit gave what he stated was the correct number of his plot as **Title No. Kajiado/Township/Block/1/72** which he has stated is a different plot from the one claimed by the Applicant. The Applicant has annexed a letter of allotment (annexture "**KT1**") which reflects a reference **No. 4491/V/172** and the rates clearance certificate (annexture "**KT3**") and the receipts for payment of requisite fees to the counsel refer to LR No 9923/142 (annexture "**KT3**").
12. Although the Certificate of Official Search and the Certificate of Lease exhibited by the Respondent shows that **Kajiado/Township/Block 1/72** belongs to the Respondent, the Letter of Allotment of the plot to **J.S. Polong** dated 29/8/1996 which has also been annexed by the Respondent reads plot **L.R. 9923/42 Kajiado Township**. Whatever else is reflected in the subsequent documents, that Letter of Allotment to **J.S. Polong** cannot be wished away. Other documents issued to **J.S. Polong** which have been annexed to the Respondent's affidavits which bear **LR No. 9923/142** include the Rates Clearance dated 12/7/2004 (annexture "**NRBS**") and the consent to transfer (annexture "**NRB5**").
13. The affidavit sworn by **Amina Mohammed Osman** stating that she sold **LR 9923/142** to the Applicant and not **LR No. Kajiado/Township/Block 1/72** cannot be taken to set the record straight as she is not an expert who can shed light on the issue of the allocation **No. LR 9923/142 Kajiado/Township**.
14. It is only expert evidence on the issue of the Letters of Allotment and Title documents thereof and physical identification of the plot (s) on the ground that can put to rest the question as to whether the parties herein are talking about the same plot or not. At this stage of the case, the Applicant

has shown the court a letter of allotment which reflects that his letter of allotment for plot **No. 9923/142** was first in time. In my view the Applicant has met the threshold for a grant of prohibitory injunctive orders as per the principles set out in the case of **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358**. I m satisfied that the Applicant has shown a *prima facie* case with a probability of success. The Applicant stands to suffer irreparable damage as the subject matter herein is land and therefore monetary compensation may not be sufficient remedy. Even if this court were to entertain any doubts on the above, the balance of convenience favours the maintenance of the *status quo* while the suit goes to a full hearing.

15.However, on the prayer for interlocutory mandatory injunction, the same can only be granted sparingly and only in exceptional circumstances. Proof required for the issuance of mandatory injunctive orders is much higher than expected in prohibitory injunctions. (See for example **Kenya Hotels Lts –vs- KCB 2004 1 KLR**). The case at hand cannot be termed as straight forward. As stated above, evidence is required to establish who was the legitimate allottee and whether the Respondent has a good title or not. The question of whether to issue a mandatory injunction can best be handled in the main suit.

16.With the foregoing, I will exercise the court’s discretion and allow prayer No. 3 of the application. For the avoidance of doubt, the *status quo* to remain as reflected in the court record for the 31/3/2009 when the application dated 11/3/2009 seeking orders for committal to prison for disobedience of court orders was marked as settled by the consent of the parties herein. Costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 19th day of June 2014.

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B. THURANIRA JADEN

JUDGE