



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 124 OF 2014.

BEATRICE MBONE MASERA PLAINTIFF

VERSUS

JOSEPH HERMAN MUKASA SSEMUJU DEFENDANT.

R U L I N G.

BEATRICE MBONE MASERA, hereinafter referred to as the Applicant, filed two applications dated 5th June, 2014 and 8th June, 2014 against **JOSEPH HERMAN MUKASA SSEMUJU**, hereinafter referred to as the Respondent. In the application dated 5th June, 2014, the Applicant inter alia prays for;

1. Temporary injunction to restrain the Respondent and those claiming under him from trespassing on Bukhayo/Bugengi/11113.
2. Eviction of Respondent and those claiming under him from the said land.
3. An order that "Civil case number 167 of 2014 be brought to this Honourable court for purposes of consolidating it with this particular matter."

The application is based on the seven grounds marked (a) and (g) on the face of the application and the supporting affidavit of Masera Beatrice Mbone sworn on 5th June, 2014.

In the application dated 8th June, 2014, the Applicant prays for an order to commit the Respondent to prison for a period the court determines or for Respondent to be fined or both for disobeying the court order of 6th June, 2014 that restrained him and those claiming from him from trespassing on the suit land. The application is based on four grounds marked (1) to (4) on the face of the application and supporting affidavit of Masera Beatrice Mbone sworn on 8th June, 2014.

The Respondent opposed the two applications through the two affidavits in reply sworn on 13th June, 2014.

When the matter came up for hearing on 18th June, 2014, both the Applicant and Respondent agreed that the applications dated 5th and 8th June, 2014 be heard at the same time. Both parties were in person and each made lengthy verbal submissions.

The court has considered the grounds on the two applications, the two supporting affidavits and the two affidavits in reply and the submission by both Applicant and Respondent and find as follows;-

1. That the Applicant became the registered proprietor of Bukhayo/Bugengi/11113 on 2nd May,

- 2014 as confirmed by the copy of the title deed and certificate of official search filed with the plaintiff.
2. That Bukhayo/Bugengi/11113 is one of the four parcels subdivided from Bukhayo/Bugengi/4735, then registered in the names of Grace Rael Mangala, as shown in the copy of the mutation form and certificate of official search dated 10.4.2014 and 2.5.2014 respectively.
 3. That the Applicant was stopped from taking possession of the land on 5th and 6th May, 2014 by the Respondent's agents from Unique Security Services. The Applicant subsequently locked the doors of the buildings on the premises and deployed officers from Rence Security Services but the Respondent still insisted that he had a right to the premises and hence the application dated 5th June, 2014.
 4. That when the application dated 5th June, 2014 was placed before the court on 6th June, 2014, Tuiyott J, certified the application urgent and granted prayer 2 pending the interpartes hearing. The essence of prayer 2 was to restrain the Respondent from trespassing onto the premises. It is important to note that prayer 3 for eviction was not considered at that stage though the Respondent was still in possession of the suit land.
 5. That the order of 6th June, 2014 was extracted on the same date and according to the affidavit of service of Sebastian Tikolo sworn on 9th June, 2014, the process server served it on one Mulungwe Sansio who claimed to be a cousin to the Respondent. The said process server did not effect personal service on the Respondent as required before the application dated 8th June, 2014 seeking to punish the Respondent for failure to obey the order was filed. Personal service on the Respondent was important and proof of such service imperative. The contents of paragraphs 7 and 8 of Masera Beatrice Mbone's supporting affidavit sworn on 8th June, 2014 is also not evidence of personal service on Respondent of the order dated 6th June, 2014. That the Respondent position that the order of 6th June, 2014 was not served upon him until on the "following Monday" 9th June, 2014 cannot therefore be farfetched. The Applicant cannot fault the Respondent for failing to obey an order that had not been brought to his personal attention through a personal service.
 6. That the Respondent's claim of right to a portion of Bukhayo/Bugengi/4735, from which the suit land was subdivided, is based on the Land Sale agreement between him and another as purchasers, and Grace Rael Mangala as the vendor. The subject matter of the agreement was sale of 1 ½ acres at Kshs.140,000/= . There has been several cases around issues to do with land parcel Bukhayo/Bugengi/4735 but the less the court say about those cases at this stage the better for all parties. It however suffices to say that the Respondent position is that he has been in lawful possession of that portion of the land under the said sale agreement and has not been lawfully evicted and therefore cannot be a trespasser as alleged by the Applicant, to that portion of the land.
 7. That a person in whose name a certificate of title is issued is protected under the Land Registration Act No. 3 of 2012. The specific provision is in section 26 (1) which states:

“ 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-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.”

8. That flowing from the finding in (7) above the Applicant as the registered proprietor of Bukhayo/Bugengi/11113 would be expected to enjoy the rights of a proprietor as set out under

Section 25 of the Land Registration Act. The Applicant could however not enjoy those rights due to the acts of the Respondent and was prompted to file this suit under which the application under certificate of urgency dated 5th June, 2014 is based. It is apparent the Respondent was in possession of a portion of Bukhayo/Bugengi/4735 claiming some right under the land sale agreement dated 23rd July, 2007. The vendor under that agreement appear to be the same person who subdivided the land and transferred a portion thereof to the Applicant herein. If the portion comprising of Bukhayo/Bugengi/11113 includes the same portion Respondent claims under the land sale agreement, then it means the vendor, Grace Rael Mangala disposed of that portion of the land without sorting out the Respondent's claim over the same and could not therefore have given the Applicant herein vacant possession.

9. That even though under the principles set out in the celebrated case of **Giela -vs- Cassman Brown co. Ltd.**, a registered proprietor to a land would, on the face of it, be taken to have an indefeasible title and therefore a prima facie case with a probability of success, this is not an appropriate case where temporary injunction should issue at this stage as the Respondent is in possession. There is also a possibility that the other cases relating to Bukhayo/Bugengi/4735 which are pending in the Lower court may be consolidated with this case after the courts is properly moved and those other parties accorded a hearing in the matters.

10. That the damages the Applicant is likely to suffer for not getting the injunction orders at this stage cannot be said to be irreparable as it can be assessed into monetary terms and appropriate orders issued. The balance of convenience also tilts to allowing the person who has been in possession by the time the subdivision of Bukhayo/Bugengi/4735 and transfer of one of the portions arising therefrom, Bukhayo/Bugengi/11113 to Applicant occurred. The person reported to have been in possession before subdivision is the Respondent and not the Applicant.

11. That the attempt by the Respondent to introduce other parties to this suit by including their names in his affidavits in reply is insufficient to make them substantive parties in this suit. The court need to be moved formally for orders and appropriate notices served on the party or parties to be enjoined so as to afford them an opportunity to be heard. The Respondent has not complied with the procedure and the inclusion of those names is of no legal consequence.

12. That prayer (4) in the application dated 5th June, 2014 is for case number 167 of 2014 to be consolidated with this case. The copy of an order issued in that case has a total of ten (10) parties. The Applicant did not exhibit an affidavit of service to show that all other eight (8) parties not included in the current case had been served with the application. The court cannot therefore consider issuing such an order that has the possibility of affecting the other parties without giving those other parties the notice of the application and a chance to be heard on the matter.

The court, for reasons set out above, find no merit in the two applications dated 5th and 6th June, 2014 and issue the following orders;-

1. That the application dated 5th June, 2014 is dismissed.
2. That the exparte order issued on 6th June, 2014 is hereby vacated.
3. That the application dated 8th June, 2014 is dismissed.
4. That the costs in respect of the applications dated 5th and 8th June, 2014 will be costs in the cause.

It is so ordered

S. M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 17th DAY OF JULY, 2014.

IN THE PRESENCE OF; M/S. Mmbone for Kigamia for plaintiff

JUDGE.