



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.202 OF 2013

DENNIS ROGERS NYABUTO PLAINTIFF

VERSUS

DAVID OTEMA MOKAMBA DEFENDANT

RULING

1. The dispute between the parties herein revolves around the ownership of a parcel of land known as **Plot No. 34, Gekomu Market** (hereinafter referred to as “**the suit property**”). The suit property was at all material times owned by one Jacob Miyaki and Kwamboka Kiage both deceased. Jacob Miyaki and Kwamboka Kiage died on 25th July 1991 and 24th February 1998 respectively. Jared Nyamwaya Miyaki and Yunes Moraa Nyachoti were appointed on 22nd February 2012 as the administrators of the estate of Jacob Miyaki while Jared Nyamwaya Miyaki was appointed on 27th April 2012 as the administrator of the estate of Kwamboka Kiage. The plaintiff has claimed that he purchased the suit property from one, Florence Moige Miyaki and Kwamboka Miyaki on 6th June 1994 at a consideration of kshs. 300,000/= and that before the suit property could be transferred and registered in his name, the defendant fraudulently and without any lawful cause caused the suit property to be registered in the name of the defendant.
2. The plaintiff has claimed that in the month of October 2012 the defendant without any lawful cause or basis entered the suit property demolished the structures that were standing thereon and started fencing the entire parcel of land thereby denying the plaintiff the right to use and develop the suit property. The plaintiff has in addition to filing the plaint herein also lodged an application by way of Notice of Motion dated 26th April 2013 under order 40 rules 1, 2, 4 and 10 of the Civil Procedure Rules, 2010 seeking a temporary injunction to restrain the defendant from entering, re-entering, trespassing onto, demolishing the structures standing thereon, fencing, digging trenches, building onto, interfering with and/or in any manner whatsoever dealing with the suit property or any portion thereof pending the hearing and determination of this suit. The plaintiff’s application that was supported by the plaintiff’s affidavit sworn on 26th April 2013 was brought on the grounds that the plaintiff is the lawful and legitimate owner of the suit property and as such entitled to exclusive possession and/or occupation thereof and that the defendant’s action of entering upon and taking possession of the suit property amounts to trespass and as such a violation of the plaintiff’s rights and interest in the suit property.
3. The defendant filed a statement of defence and counter-claim on 3rd June 2013 in response to the plaintiff’s claim herein. The defendant also filed an affidavit in reply sworn on 3rd June 2013 in opposition to the plaintiff’s application for injunction. In addition, the defendant also filed a parallel application under Order 40 rules 1, 2, 3 and 4 of the Civil Procedure Rules seeking a temporary injunction to restrain the plaintiff from entering, wasting, trespassing onto or interfering with the defendant’s peaceful and quiet occupation and possession of the suit property pending the hearing and determination of this suit. The defendant’s application was supported by the

defendant's affidavit sworn on 3rd June 2013. In his defence, the defendant denied that the plaintiff had entered into a legally binding agreement with Florence Moige and Kwamboka Kiage for the purchase of the suit property. The defendant denied further that he caused the suit property to be transferred and registered into his name fraudulently. In the counter-claim the defendant contended that he purchased a half share of the suit property from Kwamboka Kiage on 17th November 1996 and the other half of the suit property from one, Jared Nyamwaya Miyaki who was a beneficiary to the estate of Jacob Miyaki Nyakundi on 21st September 2010.

4. The defendant contended that after purchasing the entire parcel of land comprised in the suit property as aforesaid, the suit property was with the consent of the Municipal Council of Kisii transferred and registered in his name which registration was confirmed by a plot card that was issued to him by the Municipal Council of Kisii. The defendant contended that on 8th March 2011, he sought and obtained development permission from Municipal Council of Kisii and has since then commenced development on the suit property. The defendant counter-claimed against the plaintiff for a declaration that the defendant is the lawful proprietor of the suit property and in the alternative a declaration that the defendant has acquired title over the suit property by adverse possession. The defendant also sought an order of injunction to restrain the plaintiff from entering, wasting, trespassing onto or interfering with the defendant's peaceful and quiet occupation and possession of the suit property.
5. The defendant's application for injunction against the plaintiff was brought on the grounds that the plaintiff unless restrained is likely to interfere with the defendant's peaceful and quiet occupation and enjoyment of the suit property although the plaintiff has no legal or equitable interest in the suit property which is now under development by the defendant after obtaining all the necessary approvals for the propose. In his reply to the plaintiff's application for injunction, the defendant reiterated that he purchased the suit property from Kwamboka Kiage and Jared Nyamwaya Miyaki who was a son to Jacob Miyaki who together with Kwamboka Kiage owned the suit property jointly. The defendant contended that he followed the due process before the suit property was transferred to his name and a plot card issued to him. The defendant contended that he is the legitimate owner of the suit property and that he is in the process of developing the same and not wasting it as claimed by the plaintiff.
6. The plaintiff filed a replying affidavit sworn on 16th December 2013 in opposition to the defendant's application for injunction in which he reiterated the contents of the plaint and the affidavit that he had sworn in support of his own application for injunction. The plaintiff contended that the suit property was not transferred to him due to the illness and subsequent death of Kwamboka Kiage. The plaintiff contended further that when he learnt that the defendant had been issued with a plot card he lodged a complaint with the Municipal Council of Kisii which complaint led to the cancellation of the defendant's said plot card. The plaintiff contended that the defendant who seeks possession and/or entry to the suit property on the basis of fraudulent documents is not entitled to equitable relief of injunction.
7. On 22nd October 2013 the advocates for the parties agreed that the two applications; one by the plaintiff and the other by the defendant be consolidated and argued by way of written submissions. Both parties filed their written submissions and the same are on record. I have before me two applications one by the plaintiff and the other by the defendant both seeking temporary injunction. In other words, the parties are seeking temporary injunction against each other. The law on temporary injunction is now well settled. The applicant must establish a prima facie case with a probability of success and must also show that he/she will suffer irreparable injury unless the order sought is granted. If the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. See the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**. The plaintiff and the defendant herein have to satisfy the foregoing conditions before the temporary injunction that they have sought against each other can issue. As I have stated at the beginning of this ruling, the dispute between the parties herein is over the ownership of the suit property.
8. The plaintiff has claimed that he is the lawful and legitimate owner of the suit property and has sought a declaration to that effect and a permanent injunction to restrain the defendant from interfering with the suit property. The defendant on his part has also claimed that he is the legitimate and lawful owner of the suit property and has lodged a counter-claim against the

plaintiff in which he has sought a declaration of his ownership of the suit property and a permanent injunction to restrain the plaintiff from interfering with his quiet and peaceful occupation and enjoyment of the suit property. I have considered the two applications and the affidavit filed in support of and in opposition thereto. I have also considered the respective submissions filed by the advocates for the parties. This is the view that I take of the application and cross application before me. I am unable to determine at this state as to who between the plaintiff and the defendant is the legitimate owner of the suit property. This is an issue which will have to be determined at the trial. The plaintiff has claimed that he purchased the suit property from Florence Moige Miyaki and Kwamboka Kiage on 6th June 1994 at a consideration of kshs. 300,000/=. It is not in dispute that the suit property was at the material time registered in the names of Jacob Miyaki and Kwamboka Kiage as joint proprietors.

9. It is not clear to me in what capacity Florence Moige Miyaki had executed the agreement for the sale of the suit property to the plaintiff. I have also noted that the suit property has not been transferred and registered in the name of the plaintiff by Kisii County Government. The plaintiff has contended that this step was not taken due to the demise of Kwamboka Kiage. The plaintiff has however not joined the administrators of the estates of Jacob Miyaki and Kwamboka Kiage in this suit to secure the said transfer. The plaintiff has also not placed evidence before the court in proof of the payment of the purchase price for the suit property. The agreement that was entered into by the plaintiff on the one hand and Florence Moige Miyaki and Kwamboka Kiage on the other hand provided that the plaintiff was to pay a deposit of kshs. 60,000/= and then the balance of the purchase price by December, 1994. There is no evidence that he plaintiff paid this balance by December, 1994 or at all. I have seen in the plaintiff's bundle of documents a breakdown of how the plaintiff is said to have paid the purchase price to Florence Moige Miyaki and Kwamboka Kiage. The total payments made do not add up to kshs. 300,000/= and of the sum of kshs. 255,000/= which is said to have been paid only kshs. 110,000/= is acknowledged to have been received.
10. Furthermore, the payments are indicated to have been made upto 12th April 1997. It follows that by the time the plaintiff wrote to the Municipal Council of Kisii on 2nd August 1996 seeking to have the suit property transferred to his name in which letter he stated that "I have cleared with the owner", the plaintiff had not completed paying the purchase price. The same applies to the purported application to transfer the suit property to the plaintiff that the plaintiff has referred to in his submission. As at 31st December 1996 when the said application was purportedly made, the plaintiff had not finished paying the purchase price for the suit property. I have also noted that the said application is not signed by Kwamboka Kiage. It was only signed I presume by Florence Moige. Due to the foregoing, there exists serious doubt on the merit of the plaintiff's claim against the defendant over the suit property.
11. Like the plaintiff, the defendant has also claimed to have purchased the suit property from Kwamboka Kiage and Jared Nyamweya Miyaki who is said to be a son of Jacob Miyaki who owned the suit property jointly with Kwamboka Kiage. The agreement for sale with Kwamboka Kiage was made on 17th November 1996 while that with Jared Nyamweya Miyaki was made on 27th September 2010. Like I have observed above concerning the capacity in which Florence Moige had executed the agreement for sale in favour of the plaintiff, it is not clear also here as to the capacity in which Jared Nyamweya had executed an agreement for sale of a property that did not belong to him. Again, when Kwamboka Kiage was purporting to sell the suit property to the defendant she had already entered into an earlier agreement for sale of the suit property with the plaintiff in which agreement Jared Miyaki who also purported to sell a portion of the suit property to the defendant was one of the witnesses.
12. I don't think that Kwamboka Kiage could validly sell for the second time a property that she had already sold. I also doubt the validity of the sale that was conducted by Jared Nyamweya Miyaki. I have noted that the defendant did enter into another agreement with the legal representatives of the estates of Kwamboka Kiage and Jacob Miyaki for the purchase of the suit property on 30th April 2012. According to the defendant, this agreement was entered into so as to "regularize" the earlier agreements that the defendant had entered into with Kwamboka Kiage and Jared Nyamweya Miyaki. This is an acknowledgment that the said earlier agreements were irregular. Whether this new agreement of 30th April 2012 can cure the said irregularities can only be

determined at the trial. The much I can say at this stage is that the purported purchase of the suit property by the defendant from Kwamboka Kiage and Jared Nyamweya Miyaki was marred with a lot of irregularities which casts doubt on its legitimacy and validity.

13. In view of the findings that I have reached above, I am not satisfied that either of the parties herein has established a prima facie case against the other to warrant the grant of the injunction sought in their respective applications. That being my view on the matter, I am not obliged to consider whether either party would suffer irreparable harm if the injunction sought is not granted. I would therefore dismiss which I hereby do the plaintiff's application dated 26th April 2013 and the defendant's application dated 3rd June 2013 with no order as to costs. In exercise of the powers conferred upon this court under section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 1 rule 10 of the Civil Procedure Rules, 2010 and section 13 (7) of the Environment and Land Court Act, 2011, I hereby make the following further orders:

- i. **Pending the hearing and determination of this suit, the status quo as of the date hereof in relation to the suit property as relates to title, possession and use shall be maintained by the parties save that no other or further development shall be carried out thereon by either party.**
- ii. **Jared Nyamweya Miyaki in his capacity as the legal representative of Kwamboka Kiage shall be added to this suit as the 2nd defendant.**
- iii. **Jared Nyamweya Miyaki and Yunes Moraa Nyachoti in their capacities as the legal representatives of Jacob Miyaki Nyakundi shall be added to this suit as 3rd defendant.**
- iv. **The plaintiff shall amend the plaint within thirty (30) days from the date hereof to give effect to the orders in (ii) and (iii) above.**

Delivered, signed and dated at KISII this 15th day of August, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ochwang'i for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE