



No. 311

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 215 OF 2013

JARED BENSON KANGWANA PLAINTIFF

VERSUS

KENYA AGRICULTURAL RESEARCH INSTITUTE DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 13th May 2013 seeking a permanent injunction restraining the defendant, its employees, servants and/or agents from stopping, barring, interrupting and/or interfering in any manner whatsoever with the plaintiff's possession, ownership and/or development of all that parcel of land known as LR No. 17666, Kisii Municipality (hereinafter referred to as "**the suit property**"). In his plaint of the same date, the plaintiff averred that he is the registered proprietor of the suit property pursuant to a Grant of lease that was issued in his favour by the Government of Kenya in respect thereof for a term of 99 years with effect from 1st September, 1992. The plaintiff averred further that in April, 2013, he engaged a private surveyor to identify the beacons of the suit property for the purposes of fencing the same with a view to commencing development thereon when the defendant's employees, servants and/or agents stopped the said surveyor from carrying out the said work on allegation that the suit property belongs to the defendant.
2. Together with the plaint the plaintiff brought an application by way of Notice of Motion dated 13th May 2013 under order 40 rule 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya seeking a temporary injunction to restrain the defendant from stopping, barring, interrupting and/or interfering in any manner whatsoever with the plaintiff's possession, ownership and development of the suit property pending the hearing and determination of this suit. The plaintiff's application was brought on the grounds that the plaintiff is the registered proprietor of the suit property and that the defendant has without any lawful cause stopped the surveyor who had been engaged by the plaintiff to identify the beacons of the suit property from continuing with the work. The plaintiff wanted to identify the said beacons so that he may have the suit property fenced before commencing development thereon.
3. The plaintiff has contended that the plaintiff would suffer irreparable loss if the defendant is not stopped from its said acts of trespass. The plaintiff annexed to his affidavit sworn on 13th May 2013 in support of the application, a copy of Grant No. I.R 58488 dated 8th April 1993 through which the suit property was granted to the plaintiff on a lease by the president of Republic of Kenya for a term of 99 years with effect from 1st September 1992 at annual revisable rent of kshs. 60,000/= and on other terms and conditions that were set out in the said Grant. The said Grant was registered at the land titles registry in Nairobi on 13th April 1993. The plaintiff also annexed to his affidavit, a copy of the rent clearance certificate dated 2nd May 2013, in proof of the fact

that the plaintiff had paid land rent for the suit property in full up to 31st December 2013. Finally, the plaintiff annexed a copy of an agreement dated 10th April 2013 that the plaintiff had entered into with a company known as Aghen Enterprises Ltd. for the fencing of the suit property at a cost of kshs. 4,170,826.40. The plaintiff contended that it would only be fair and just in the circumstances of this case that the defendant is restrained from interfering with the plaintiff's possession, ownership and developments on the suit property.

4. The plaintiff's application for injunction was opposed by the defendant through a replying affidavit sworn on 21st June, 2013 by the defendant's Centre Director, Kisii Branch one, Oscar Magenya. In the said affidavit, the defendant contended that the suit property was allocated to the defendant for public use at a meeting that was held on 20th February 2001 at the Kisii District Commissioner's office. The defendant contended that when the suit property was allocated to the defendant as aforesaid, the same was vacant. The defendant contended that the defendant caused a caution to be registered against the title of the suit property in the year 2011 when it noted that some people were trying to encroach thereon which caution has remained in place to date. The defendant contended that the suit property is under investigation by the commission of inquiry into irregular/illegal allocation of public land and that the defendant had written to the permanent secretary Ministry of Lands to have the title deed of the suit property which was issued irregularly cancelled. The defendant contended further that it had written to the commissioner of lands to have a title deed issued in its favour for the parcel of land in its occupation which includes the suit property and that a similar request had been made on its behalf by the District Commissioner, Kisii in the year 2001.
5. The defendant contended that whereas the commissioner of lands failed to issue it with a title deed pursuant to the request aforesaid, it proceeded irregularly to issue the same to the plaintiff over the suit property. The defendant contended that the suit property was reserved for public use and that the same was never been allocated to the plaintiff. The defendant annexed to its affidavit; a copy of minutes of the meeting that was held at the District Commissioner's office, Kisii on 20th February 2001 on allocation of land, a copy of a part development plan (PDP) showing the extent of the defendant's land within Kisii, a copy of the Caution said to have been registered against the title of the suit property on 11th March 2011, copies of various letters written to the commissioner of lands by the defendant, a copy of a letter dated 8th January 2001 addressed to the commissioner of lands by the District Commissioner, Kisii on the issue of the recovery of the defendant's land which had been allocated to private entities and, a copy of page 481 of the report of the commission of inquiry on illegal/irregular allocation of public land ("the Ndungu Report")
6. On 24th July 2013, I directed that the plaintiff's application be heard by way of written submissions. The plaintiff filed his submissions on 30th July 2013 while the defendant's submissions was filed on 7th November 2013. The advocates for the parties highlighted the said submissions on 24th March 2014. I have considered the plaintiff's application and the affidavit in reply filed by the defendant in opposition thereto. The law on temporary injunction is now well settled. In the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, it was held that for a temporary injunction to issue, the applicant must establish a prima facie case against the respondent with a probability of success and must also demonstrate that unless the order is granted he/she will suffer irreparable injury. If the court is in doubt as to the above, the court would determine the application on a balance of convenience. The plaintiff's case is that he is the registered proprietor of the suit property and that in the month of April, 2013 when he was in the process of establishing the boundaries of the suit property with a view to fence the same and commence development thereon, the defendant through its servants, agents or employees without any lawful cause prevented the plaintiff's surveyor who had been engaged to carry out the exercise from proceeding with the work on the allegation that the suit property is part of the defendant's land. The plaintiff's contention is that the defendant's action aforesaid is unlawful in that the defendant has no interest in the suit property. The plaintiff exhibited a copy of the Grant of lease through which the suit property was alienated to the plaintiff by the president of the Republic of Kenya on 8th April 1993.
7. The said Grant was registered on 13th April 1993. The defendant has not disputed the fact that the plaintiff is the registered proprietor of the suit property. The defendant's contention is that the suit

property was reserved for the defendant to use for public purposes and that the same was allocated to the defendant irregularly. As evidence of reservation of the said parcel for the defendant for public use, the defendant exhibited a copy of the minutes of the meeting that was held on 20th February 2001 at the office of the District Commissioner, Kisii in which it was agreed that some 32ha. of land in Kisii be allocated to the defendant. The defendant also exhibited several letters that the defendant wrote to the commissioner of lands seeking to have the titles that had been issued to third parties in respect of a portion of the defendant's land revoked and for the defendant be issued with a title deed for the entire parcel of land that was allegedly allocated to it by the District Commissioner Kisii at the meeting that was held on 20th February 2001 aforesaid. The defendant has contended that it is as a result of the fault on the part of the commissioner of lands that the defendant has not been issued with a title deed for the land that it owns at Kisii a part of which was allocated to the plaintiff and is now comprised in the suit property.

8. To demonstrate that the suit property was allocated irregularly, the defendant has pointed out the fact that the suit property was mentioned in the Ndung'u report on irregular/illegal land allocations and recommended for investigation. There is no dispute that the suit property was government land before the same was allocated to the plaintiff and a Grant issued in his favour and registered under the Registration of Titles Act, Cap 281 Laws of Kenya. Under Section 3 (a) of the Government of Lands Act, Cap 280, Laws of Kenya (now repealed), the president of the Republic of Kenya had power to make a grant or disposition of any interest in unalienated Government Land. As I have stated above, the Grant in respect of the suit property was issued to the plaintiff on 8th April 1993. I have no evidence before me that as at that date the suit property had been alienated already or had been reserved for any public purpose to be undertaken by the defendant or any other person. The defendant claims to be the owner of a large parcel of land measuring 32ha. from which the suit property which measures 2.032ha. or thereabouts was curved out irregularly. The defendant has not indicated when it acquired ownership of the said 32ha. of land. Infact no document of title has been exhibited by the defendant.
9. The only document that has been placed before the court by the defendant as the basis of its claim to the said 32ha. of land is the minutes of a meeting that was held at the Kisii District commissioners Office on 20th February 2001 at which meeting the defendant claims to have been allocated the land. It should be noted that the District Commissioner has no power to allocate public land. Secondly, when the defendant was purportedly allocated the said 32ha. of land from which he claims the suit property has been illegally curved out, the suit property had already been alienated to the plaintiff by the president way back in 1993. Under section 23 (1) of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed), a certificate of title issued under the Act is not subject to challenge except on the ground of fraud or misrepresentation to which the holder of such title is proved to be a party. Under section 26 (1) of the Land Registration Act, 2012, a certificate of title issued by a registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor is supposed to be taken by all courts as a prima facie evidence that the person named as the proprietor is the absolute and indefeasible owner of such land and that the title of the property or cannot be challenged except, on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. Article 40 of the Constitution of Kenya also protects right to property save for property that has been found to have been unlawfully acquired.
10. I have no evidence of any nature before me that the plaintiff acquired the suit property unlawfully, fraudulently, by misrepresentation or through a corrupt scheme. I have no evidence before me that before the suit property was allocated to the plaintiff and a grant issued to him in 1993, the same was reserved for the defendant for public purposes. A copy of the Ndung'u report that was exhibited by the defendant is of no assistance. Whereas the titles of the other parcels of land in that report were recommended for revocation, for the suit property, the recommendation was that the title thereof be investigated. No information was placed before the court of any further investigation that has been done on the title of the suit property following that recommendation. I cannot therefore on the basis of that recommendation make a finding that the suit property was allocated to or acquired by the plaintiff irregularly or illegally. I have considered the authorities that were cited before me by the advocate for the defendant. I find all of them distinguishable.
11. In the case of **Samson Kagengo Ongeru –vs- Greenbays Holdings & 2 Others [2011]eKLR**,

evidence that was placed before the court showed clearly that the parcel of land that had been allocated to Samson Kagengo Ongeru was public land and that the same had been reserved for recreational purposes by the public. The defendant has not placed any form of evidence or material before me which suggests that the suit property was reserved for public purposes before it was allocated to the plaintiff. There is even no evidence that the defendant was in occupation of the property as at the time the same was allocated to the plaintiff. In the case of **Republic –vs- Land Registrar, Kilifi & Another, Ex parte Daniel Ricci [2013] eKLR**, there was also evidence before the court that the parcel of land that was in dispute was allocated illegally because it was public land that was duly gazetted as “a fish landing site”. As I have stated above there is no similar evidence before me.

12. I am of the view that I have said enough to show that the plaintiff has established a prima facie case against the defendant with a probability of success. On the issue of irreparable loss, the defendant has not denied the plaintiff’s claim that the defendant’s employees prevented the plaintiff from accessing the suit property. If the orders sought are not granted, the plaintiff would continue to be kept out of the suit property a situation which will no doubt subject the plaintiff to loss and damage which is irreparable. For the foregoing reasons, I am satisfied that the plaintiff has met the conditions for granting a temporary injunction. The plaintiff’s application dated 13th May 2013 is allowed in terms of prayer (iii) thereof. In exercise of the powers conferred upon this court under section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, and section 13(7) of the Environment and Land Act, 2011, I hereby make a further order that pending the hearing and determination of this suit the plaintiff shall not sell, transfer, lease or charge the suit property or any part or portion thereof. This order shall ensure that the suit property is preserved pending the hearing and determination of this suit. The plaintiff shall have the costs of the application.

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

S. OKONG’O

JUDGE

In the presence of:-

Mr. Mageto h/b for Masese for the plaintiff

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG’O

JUDGE