



IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.322 OF 2013

PHERAN O. KENANI PLAINTIFF

VERSUS

ALFRED M. O. MICHIRA DEFENDANT

RULING

1. The plaintiff is the registered proprietor of all that parcel of land known as **LR No. Kisii Municipality/Block I/499** (hereinafter referred to as “**the suit property**”). The suit property is leasehold. The same was allocated to the plaintiff by the Government of the Republic of Kenya on 14th January 1998 through a letter of allotment of the same date. Upon accepting the terms of allotment and payment on 3rd May 1999 of the fees and other charges that were set out in the said letter of allotment, the plaintiff was issued with a lease dated 14th July 2004 in respect of the suit property for a term of 99 years with effect from 1st January 1998. The said lease was registered at the lands registry, Kisii on 9th August 2004 after which the plaintiff was issued with a certificate of lease on the same date. The plaintiff’s signature in the said lease is shown to have been witnessed on 5th August 20—(sic) by one, G. J Mainye Advocate of Kisii who identified the plaintiff through the plaintiff’s identity card No.26694776.
2. The plaintiff brought this suit against the defendant on 23rd July 2013 claiming that between 21st June 2013 and 25th June 2013 the defendant trespassed on the suit property, laid a claim thereto and commenced to dig a foundation for the purposes of constructing a permanent building thereon. The plaintiff averred that the defendant’s entry into the suit property was without the plaintiff’s permission or any lawful excuse and that the said acts of trespass has denied and/or deprived the plaintiff of the right of usage and/or development of the suit property. The plaintiff sought judgment against the defendant for; a declaration that the plaintiff is the registered and/or lawful owner of the suit property, an order for eviction of the defendant from the suit property, a permanent injunction to restrain the defendant from trespassing onto and/or interfering in any other manner with the suit property and general damages for trespass.
3. Together with the plaint the plaintiff filed an application by way of Notice of Motion dated 1st August 2013 under order 40 rules 1, 2, 4 and 10 of the Civil Procedure Rules seeking a temporary injunction to restrain the defendant from entering, trespassing onto, depositing building materials, digging and/or sinking foundation, building structures, interfering with and/or in any other manner whatsoever dealing with the suit property or any portion thereof pending the hearing and determination of this suit. In his affidavit in support of the application sworn on 1st August 2013 the plaintiff reiterated the contents of the plaint that I have highlighted hereinabove. The plaintiff contended that the defendant’s act of entering the suit property and commencing construction thereon are criminal in nature and requires intervention by the court. The plaintiff contended that the defendant’s forcible entry into the suit property, the taking of possession thereof and commencement of construction amounts to taking of the law into own hands and that the plaintiff has been deprived of the suit property together with the benefits attendant thereto.

4. The plaintiff contended that the defendant's activities aforesaid are bound to affect the character and/or texture of the suit property and as such it is necessary for the injunction sought to issue so as to preserve the suit property. The plaintiff annexed to his affidavit in support of the application copies of letter of allotment dated 14th January 1998, receipt dated 3rd May 1999 for Kshs. 11,340/=, Part Development Plan (PDP), instrument of lease dated 14th July 2004, certificate of lease dated 9th August 2004, certificate of official search dated 27th January 2012, a certified copy of the register for the suit property and a photograph taken on the suit property. The plaintiff's application was opposed by the defendant who filed a replying affidavit sworn on 21st August 2013. In his response to the application, the defendant contended that the plaintiff acquired the suit property fraudulently and that the documents of title on which the plaintiff has based his claim herein are forged, fake and fraudulent.
5. The defendant contended that according to the information obtained from the registrar of persons, the plaintiff was born on 25th May 1989 and as such the plaintiff could not have been allocated land and registered as the leasehold proprietor of the suit property when he was a minor aged 9 years old. The defendant contended that the PDP that the plaintiff has exhibited was prepared for National Housing Corporation, Nyanchwa Site and Service Scheme plots and that the parcel of land shown in the said PDP as Plot No. 499 claimed herein by the plaintiff is Nyanchwa Site and Service Scheme Plot No. 7 (hereinafter referred to only as "**Plot No.7**"). The defendant contended that he purchased Plot No. 7 from the original allottee thereof one, Nyabuto Momanyi who was allocated the said plot on 23rd March 1977. The defendant stated that he has been in possession of the said plot since he purchased the same in the year 1993 and has been paying land rates and rent to the Municipal Council of Kisii over the years in addition to paying the loan to National Housing Corporation for the plot. The defendant stated that he has obtained development approval from the Municipal Council of Kisii and has commenced development on the said plot. The defendant stated that the leases for Nyanchwa site and service scheme are in the process of being issued and that Plot No. 7 is the same parcel of land referred to as Plot No. 499 ("the suit property") in the PDP and the survey map which have been exhibited by the plaintiff in his affidavit in support of the application herein.
6. The defendant contended that the plaintiff has not met the conditions for granting a temporary injunction. The defendant annexed to his replying affidavit copies of; a letter of allotment dated 23rd March 1977 issued to Nyabuto Momanyi for Plot No. 7 Kisii Site and Service Scheme Phase 1, a letter of consent to transfer dated 29th January 1993 issued by Kisii Municipal Council to Nyabuto Momanyi in respect of Plot No. 7, Municipal Council of Kisii Building Inspection Card dated 24th January 2013, rates clearance certificate for Plot No. 7 dated 19th December 2012 and, a letter dated 18th January 2013 by Municipal Council of Kisii to National Housing Corporation to the effect that the defendant has paid rates in full for Plot No. 7 and asking that the defendant be facilitated to acquire of a lease for the said plot from the commissioner for lands. The defendant filed a further replying affidavit in response to the plaintiff's further supporting affidavit sworn on 21st August 2013. In his further replying affidavit, the defendant reiterated that the PDP and the survey map on the basis of which the plaintiff was purportedly allocated the suit property were prepared for Kisii Town Council and National Housing Corporation for the purposes of Nyanchwa Site and Service Scheme. The defendant annexed to this affidavit a copy of a letter dated 27th August 2013 from National Housing Corporation ("NHC") to the Commissioner of Lands confirming that the defendant had paid the loan for Plot No.7 in full and should be issued with a title.
7. The defendant reiterated also that the plaintiff was a minor when he was allegedly issued with a lease for the suit property. The defendant contended further that Mr. G. J. Mainye Advocate who is alleged to have attested the plaintiff's signature in the said lease has denied the signature and stamp appearing in the said lease document purporting to be his. The defendant annexed a copy of an affidavit sworn by Gilbert Joel Mainye on 2nd September 2013 to the effect that Gilbert Joel Mainye advocate never attested to the execution of the instrument of lease in respect of the suit property that was registered on 9th August 2004. The defendant also annexed a copy of identification report on the plaintiff from the National Registration Bureau dated 3rd September 2013 to the effect that the plaintiff was born on 25th May 1989 and as such was a minor as at 14th

- January 1998 when the suit property was allocated to him and on 14th July 2004 when the suit property was leased to him.
8. On 22nd August 2013, I directed that the plaintiff's application be heard by way of written submissions. The plaintiff filed his submissions on 11th October 2013 while the defendant did the same on 17th March 2014. I have considered the plaintiff's application together with the two (2) affidavits filed in support thereof. I have also considered the affidavits filed by the defendant in opposition to the application. Finally I have considered the parties respective submissions in writing filed herein and the authorities cited. In the case of **Aikman –vs- Muchoki [1984] KLR 353** that was cited by the plaintiff, the Court of Appeal held that the conditions for granting interlocutory injunction are; the probability of success of the applicant's claim, the likelihood of irreparable harm which would not be compensated for by damages and if the court is in doubt the matter should be decided on a balance of convenience. The plaintiff's case is that he is the registered proprietor of the suit property and that the defendant has entered thereon without his permission or authority and commenced construction of a permanent structure thereon.
 9. In proof of his ownership of the suit property, the plaintiff placed before the court a copy of a letter of allotment of the suit property to the plaintiff dated 14th January 1998, a copy of a lease between the Government of Kenya and the plaintiff in respect of the suit property dated 14th July 2004 and a certificate of lease in respect of the suit property in the name of the plaintiff. The defendant has challenged the plaintiff's claim to the suit property. The defendant has contended that he is the owner of the suit property. The defendant has contended that the suit property is a plot within NHC Nyanchwa Site and Service Scheme that was allocated to one, Nyabuto Momanyi by Kisii Town Council on 23rd March 1977 as Plot No. 7. The defendant has contended that he purchased Plot No.7 from Nyabuto Momanyi in the year 1993 with the consent of the Municipal Council of Kisii and that he had been in possession since then. The defendant has contended that the construction works on the suit property which the plaintiff is complaining about is an approved development being carried out by the defendant. The defendant has contended further that the plaintiff has acquired title to the suit property fraudulently and that the documents of title presented to court by the plaintiff are forgeries and fraudulent.
 10. In proof of his ownership of the suit property, the defendant placed before the court a copy of a letter of allocation of Plot No. 7 by Kisii Town Council to one, Nyabuto Momanyi dated 23rd March 1997, a copy of a letter dated 29th January 1993 by Kisii Municipal Council to Nyabuto Momanyi through which Kisii Municipal Council consented to the transfer of Plot No. 7 by Nyabuto Momanyi to the defendant, copies of rates clearance certificates for the years 2012 and 2013 issued to the defendant by Kisii Municipal Council and a copy of a letter dated 27th August 2013 by the National Housing Corporation(NHC) confirming that the defendant had purchased Plot No. 7 and that he had completed the loan repayment and should be issued with title document. In support of his contention that the plaintiff had acquired the suit property fraudulently, the defendant placed before the court a report from the National Registration Bureau dated 3rd September 2013 to the effect that the plaintiff was born on 25th May 1989 and was only 9 years as at 14th January 1998 when he is alleged to have been allocated the suit property and 15 years old when he was issued with a lease in respect of the suit property on 14th July 2004. The defendant also placed on record a copy of an affidavit sworn by G. J. Mainye Advocate in which the said advocate denied that he witnessed the execution of the lease dated 14th July 2004 by the plaintiff.
 11. Having looked at the PDP and survey map exhibited by the plaintiff in his affidavit in support of the application herein and the site map for Nyanchwa Site and Service Scheme exhibited by the defendant in his replying affidavit, I have no doubt in my mind that LR No. Kisii Municipality/Block I/499 and Plot No. 7 are one and the same parcel of land on the ground (I will hereinafter refer to both Kisii Municipality/Block I/499 and Plot No.7 as "the suit property" where the context so admits). The plaintiff and the defendant are therefore claiming ownership of the same property. Whereas the plaintiff has a letter of allotment, an instrument of lease and a certificate of lease in support of his ownership claims, the defendant has a letter of allocation for the same parcel of land dating back to 1977. The defendant also has evidence that the processing of a title in his favour for the said parcel of land is in progress. Under section 24 (b) of the Land

Registration Act, 2012, the registration of the plaintiff as the leasehold proprietor of the suit property confers upon the plaintiff the leasehold interest in the suit property together with all rights and privileges appurtenant thereto subject only to implied or express agreements, liabilities or incidents of his lease. Section 26 (1) of the Land Registration Act, 2012 provides that the certificate of title issued by the registrar shall be taken as a prima facie evidence that the person named therein is the absolute and indefeasible owner of the land and such title shall not be challenged except on the grounds of fraud or misrepresentation to which the holder of such title is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

12. From the foregoing, it is clear that the plaintiff has proved on a prima facie basis that he is the owner of the suit property. The plaintiff's ownership of the suit property is however subject to challenge on account of fraud, misrepresentation and corruption. The defendant has challenged the plaintiff's title on account of fraud. The defendant has placed evidence before the court which shows that the suit property is situated in an area that was set aside by the Kisii Town Council in 1970's as a site and service scheme for development of houses through National Housing Corporation (NHC) and the defendant's predecessor in title was allocated the suit property on 23rd March 1977. The suit property was then known as Plot No. 7. The plaintiff has contended that the plot number for the suit property changed to the current Plot No. 499 after the preparation of the PDP in 1985. It is not clear to me how the parcel of land in dispute herein which is said to have been owned by Kisii Town Council (predecessor to Kisii Municipal Council) could have changed hands and became available for allocation by the Government of Kenya. I have also noted from the material on record that the plaintiff was only 9 years old when he was allocated the suit property in the year 1998 and that the plaintiff already had an identity card at the age of 15 years when the suit property was leased to him in the year 2004.
13. I am aware that at the material time, allocation of Government land was done pursuant to an application made for that purpose. I am at a loss as to how the plaintiff would have applied to the Government of Kenya to be allocated land within Kisii Municipality at the age of 9 years. It is also elementary law that at the age of 15 years, the plaintiff who was a minor had no capacity to enter into a contract with the Government of Kenya in the form of a lease agreement that was purportedly executed by the plaintiff on 5th August 2004 or thereabouts. To add to these many lingering questions, the advocate who is said to have witnessed the execution of the said lease by the plaintiff has denied that he did so. He has termed his purported signature and stamp on the document as forgeries. The plaintiff did not respond at all to these issues concerning his age and the denial by Mr. G. J. Mainye advocate that he attested the plaintiff's signature in the instrument of lease dated 14th July 2004. I am in agreement with the holding in the case of **Virani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Co. Ltd** [2004] 2 KLR 269 that was cited by the plaintiff that fraud requires more than proof on a balance of probability though not beyond reasonable doubt.
14. At this stage, I am not required to determine whether the plaintiff's title to the suit property was acquired fraudulently or not. That is a determination that can only be made at the trial upon taking of evidence. What I can say on the material before me is that the defendant has raised serious doubts on the validity of the plaintiff's title over the suit property. The plaintiff has submitted that the defendant has nothing to show for his claim over the suit property save for "pieces of paper" and in this regard the plaintiff cited the Court of Appeal case of **Akiba Investment Ltd –vs- Kenya Ports Authority, Court of Appeal, Civil Appeal No. 255 of 2003** (unreported). I do not think that this contention by the plaintiff is correct. The defendant cannot be said to have presented to court only pieces of paper in proof of his interest in the suit property. My analysis of the defendant's case above shows otherwise. The defendant has demonstrated sufficient interest in the suit property which deserves consideration and protection by the court.
15. Due to the foregoing, I am not fully satisfied that the plaintiff has a prima facie case with a probability of success against the defendant. I am also doubtful whether the plaintiff would suffer irreparable injury if the orders sought are not granted. The plaintiff who claims to have acquired the suit property in the year 2004 has not developed the suit property to date contrary to condition 2 of the special conditions of the lease dated 14th July 2004. Although the plaintiff has contended that the defendant forcibly entered the suit property and commenced development thereon, there is no evidence before me that the plaintiff has at any one time been in possession of the suit property

which the defendant has also claimed to have been in his possession since the year 1993. Unlike in the case of **George Orango Orango –vs- George Liewa Jagalo & 4 Others, Court of Appeal, Civil Appeal No. 62 of 2009** (unreported) that was cited by the plaintiff, there is no evidence that the plaintiff herein was in possession of the suit property when the defendant commenced the construction complained of. It cannot be said therefore that the plaintiff would be dispossessed of the suit property if the injunction sought is not granted.

16. Having expressed my doubts on the merit of the plaintiff's case against the defendant and the possibility of the plaintiff suffering irreparable injury if the injunction sought is not granted, the plaintiff's application falls for consideration on a balance of convenience. I have noted that neither the plaintiff nor the defendant has developed the suit property. The defendant's intended construction of a permanent building on the suit property was at the foundation level when the plaintiff came to court. I am of the view that justice would be best served if the status quo is maintained pending the hearing and determination of this suit. I am of the view that none of the parties would be prejudiced by such order.

17. In conclusion therefore, I decline to grant the prayers sought in the plaintiff's application dated 1st August 2013. In place thereof, I hereby order that pending the hearing and determination of this suit neither party shall carry out any form of construction or development on the suit property. The cost of the application shall be in the cause.

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 defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE