



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 332 OF 2013

YUNIAH MORAA JANAI ALIAS YUNIAH MORAA OMBESE1ST PLAINTIFF

JUSTUS MATARA KEMUMA 2ND PLAINTIFF

VERSUS

JOHN JOSEPH MOKAYA 1ST DEFENDANT

JAMES ONDUKO ONSANDO AKA BONSANDO 2ND DEFENDANT

DAVID AMENYA MOTUKA 3RD DEFENDANT

THE COUNTY EXECUTIVE COMMITTEE – KISII COUNTY 4TH DEFENDANT

RULING

1. The plaintiffs brought this suit against the defendants on 31st July 2013 seeking; a permanent injunction to restrain the defendants from entering, occupying, fencing or developing, transferring or transacting over Plot Nos. 21D(A) and 21D(B) Daraja Mbili Market Kisii County (hereinafter referred to as **“the suit properties”**), a declaration that proprietorship interests in the suit properties are vested in the plaintiffs, a declaration that the ground location of Plot No. 43 purportedly owned by the 1st, 2nd and 3rd defendants if at all it exists, cannot be superimposed on the current location of the suit properties within Daraja Mbili, Kisii town and costs of the suit and any other relief the court may deem it to grant.
2. Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 29th July 2013 under certificate of urgency seeking; a temporary injunction to restrain the defendants from encroaching upon, interfering with, taking possession, developing or transferring the suit properties pending the hearing and determination of this suit. The plaintiffs’ application was supported by affidavit and supplementary affidavit sworn by Justus Matara Kemuma, the 2nd plaintiff on 29th July, 2013 and 16th August, 2013 respectively. The plaintiffs’ application was brought on the grounds that the plaintiffs are the owners of the suit properties while the defendants are intruders therein who are working in concert in a bid to dispossess the plaintiffs of the said properties. It is the plaintiffs’ contention that in the circumstances, it is necessary for the orders sought to issue so as to protect the plaintiffs’ interest in the suit properties pending the hearing and determination of this suit. In the said affidavits sworn by the 2nd plaintiff in support of the application, the plaintiffs contended that they purchased the suit properties from the original owner thereof one, Bathseba Nyaboke Nyanoti on 9th October, 2000 for Plot No.21D(B) owned by

- the 2nd plaintiff and on 19th November 2001 for Plot No.21D(A) owned by the 1st plaintiff. The plaintiffs annexed to the two affidavits among others, copies of; the agreements for sale of the suit properties that they entered into with Bethseba Nyaboke Nyanoti, receipts for the land rent paid to Gusii County Council and Kisii Municipal Council from the year 2002 to 2013, Plot Cards issued to them by Kisii Municipal Council on 16th April 2007, the minutes of the meeting of the Municipal Council of Kisii Town Planning Works and Housing Committee held on 29th March 2007 in which the issuance of the said Plot Cards to the plaintiffs was approved and a letter dated 1st July 2013 that was addressed to the 1st defendant by the 4th defendant to the effect that the 1st defendant had fenced the suit properties illegally without the owner's consent.
3. The plaintiffs contended that when they purchased the suit properties, they were supplied by the Municipal Council of Kisii with a copy of a survey plan which showed the location, shape and size of the suit properties. The plaintiffs contended that when they visited the suit properties in the month of June, 2013, they learnt that some third parties had entered into the said properties and laid a claim to the same. On making inquiries with the 4th defendant as to what was happening, the plaintiffs were informed that the 2nd and 3rd defendants had presented themselves to the 4th defendant claiming that they had purchased the suit properties from the 1st defendant. The plaintiffs thereafter checked and confirmed from the 4th defendant's records that they are still the owners of the suit properties. They then proceeded with the assistance of the 4th defendant's employees to uproot a temporary fence that had been erected around the suit properties by the 2nd and 3rd defendants before they instituted these proceedings.
 4. The plaintiffs' application was opposed by the defendants. The 2nd defendant swore a replying affidavit, a further affidavit and a supplementary affidavit on 12th August, 2013, 20th August 2013 and 25th November, 2013 respectively in opposition to the application. The 2nd defendant swore the said affidavits on his own behalf and on behalf of the 1st and 3rd defendants. On its part, the 4th defendant filed grounds of opposition dated 14th August 2013 and a replying affidavit sworn by one, Francis Benson Otachi on 2nd December, 2013 in opposition to the application. In his said affidavits, the 2nd defendant contended that he is the owner of Plot Nos. 43A and 43B Daraja Mbili Market (hereinafter referred to as "**Plot Nos. 43A and 43B**") which plots he purchased from the 1st and 3rd defendants on 6th February 2013 for Plot No. 43A which he purchased from the 3rd defendant and on 8th July 2013 for Plot No. 43B which he purchased from the 1st defendant. The 2nd defendant annexed the two (2) agreements for sale that he entered into with the 1st and 3rd defendants to his affidavit sworn of 12th August, 2013 as exhibits.
 5. The 2nd defendant contended that the 1st and 3rd defendants were duly registered as the proprietors of Plot Nos. 43B and 43A respectively before the same were sold to the 2nd defendant. The 2nd defendant contended that Plot Nos. 43A and 43B are different and distinct from the suit properties the subject of the plaintiffs herein. The 2nd defendant contended that soon after he purchased Plot Nos. 43A and 43B he commenced development thereon after obtaining the necessary development permission from the relevant authorities. The 2nd defendant contended that when he purchased Plot Nos. 43A and 43B the same were occupied by the 1st and 3rd defendants and that he plaintiffs had never laid any claim to the same prior to the date of his purchase of the said properties. The 2nd defendant contended that Plot Nos. 43A and 43B and the suit properties are situated in different blocks and as such there is a possibility that the plaintiffs are not aware of the ground location of the suit properties which they are claiming.
 6. The 2nd defendant also annexed to his affidavit sworn on 12th August 2013 copies of; a letter dated 17th July 2013 addressed to him by the 4th defendant granting him permission to commence development on Plot Nos. 43A and 43B, a letter dated 10th July 2013 addressed to him by the 4th defendant authorizing him to fence the said plots, Rates and Other Charges Clearance Certificate dated 13th February 2013 for Plot No. 43A, a letter dated 28th June 2013 by National Environment Management Authority to the 2nd defendant acknowledging receipt of the Environmental Impact Assessment Report for the proposed development on Plot No. 43B, Plot Cards for Plot Nos. 43B and 43A in the names of J. B. O Kebati and David Omenya Otuka & Bros both dated 14th August

- 1971, agreement for sale dated 30th September 1975 between John B. Onyango K. Kebati and the 1st defendant with respect to Plot No. 43B, land rent payment receipts dated 8th August 2013 and 13th February 2013, receipt dated 30th April 2013 for payment made for plan approval, a receipt dated 9th July 2013 for the payment made for application for consent to transfer, application to transfer Plot No. 43B by the 1st defendant to the 2nd defendant dated 9th July 2013 and, letters of no objection to transfer dated 12th February 2013 and 19th July 2013 issued by the 4th defendant.
7. The 2nd defendant contended further in his supplementary affidavit that Plot Nos. 43A and 43B do not share a common boundary with the suit properties. The 2nd defendant annexed to the said affidavit a copy of a part development plan (PDP) dated 5th June 1999 for Daraja Mbili area which shows that Plot No. 43 and Plot No. 21 exist independently and that the same do not share a boundary. In his further affidavit, the 2nd defendant contended that following the inquiries that he made regarding the location of the suit properties, he came to learn that the suit properties are next to Daraja Mbili market Plot Nos. 44, 45 and 46. The 2nd defendant contended that he stands to suffer substantial loss and damage if the injunction sought is granted on account of the fact that he had already commenced development on Plot Nos. 43A and 43B. The 2nd defendant also took issue with the fact that the plaintiffs have not given any undertaking as to damages which to the 2nd defendant claimed is a mandatory requirement before an injunction can be granted.
 8. In his affidavit, Francis Benson Otachi who is an administrator with the 4th defendant stated that the only practical way in which the dispute between the parties herein can be resolved is to engage the services of a surveyor to identify the location of the suit properties and Plot Nos. 43A and 43B on the ground. The 4th defendant's said administrator stated further that the 4th defendant's assistance was not sought to identify the respective locations of the said parcels of land on the ground. The said administrator contended that the mere fact that the 4th defendant gave permission to the parties to transfer or fence the said parcels of land does not mean that they did ascertain the ground location of the said parcels of land. In its grounds of opposition, the 4th defendant contended that the plaintiffs have not met the threshold for obtaining an injunctive relief.
 9. On 25th November 2013, I directed that the plaintiffs' application be argued by way of written submissions. The plaintiffs filed their written submissions on 19th December 2013 while the 1st, 2nd and 3rd defendants filed their written submissions on 10th March 2014. The 4th defendant did not comply with the order on filing of written submissions. I have considered the plaintiffs application together with the affidavits filed in support thereof. I have also considered the various affidavits filed by the defendants in opposition to the application. Finally, I have considered the written submissions filed by the advocates for the plaintiffs and the advocates for the 1st, 2nd and 3rd defendants. In the Court of Appeal case of **Mureithi –vs- City Council of Nairobi [1981] KLR 332** the court held that:

“The conditions for grant of an interlocutory injunction are, existence of probability of success, likelihood of irreparable harm which would not be adequately compensated for by damages and balance of convenience.”

10. In the case before me, the plaintiffs have claimed that they are the owners of the suit properties and that the 2nd defendant has entered the suit properties with the assistance of the 1st, 3rd and 4th defendants and commenced development thereon in pretext that the said activities are being carried out on Plot Nos. 43A and 43B owned by the 2nd defendant. On the material before me, I am satisfied that the plaintiffs are the owners of the suit properties. If the plaintiffs are the owners of the suit properties then the defendants have no right to enter into the suit properties and to commence development thereon. The 2nd defendant has denied entering the suit properties as claimed by the plaintiffs. The 2nd defendant has contended that the developments complained of by the plaintiffs are being carried out on the 2nd defendant's own parcels of land known as Plot Nos. 43A and 43B. The 2nd defendant has placed before the court adequate material which prima facie shows that the 2nd defendant is the owner of Plot Nos. 43A and 43B. The fact that the

- plaintiffs and the 2nd defendant own different parcels of land is therefore not in dispute. The question that this court must answer is whether the activities being undertaken by the 2nd defendant are being undertaken on the suit properties or on Plot Nos. 43A and 43B.
11. From the various affidavits filed herein by both parties, there is no doubt that the plaintiffs and the 2nd defendant are claiming the same parcels of land on the ground. From the material before court, the suit properties and Plot Nos. 43A and 43B do exist on the ground but in different locations. Both parties herein have however insisted that the disputed location on the ground is where their respective parcels of land are situated. The 4th defendant has not helped the situation either. The 4th defendant has contended that the dispute between the parties herein should have been resolved with the use of a surveyor and that it was not necessary at all to bring these proceedings.
12. The 4th defendant who is the custodian of the records for the suit properties and Plot Nos. 43A and 43B and who has over the years been receiving land rent in respect thereof from both parties has not given any clue as to whether it is the suit properties or Plot Nos. 43A and 43B which are located on the ground which is claimed by both the plaintiffs and the 2nd defendant. The 4th defendant has proposed that a surveyor be appointed at the cost of the plaintiffs to resolve the issue. For the purposes of the present application, what I can say is that the issue as to the ground location of the suit properties and Plot Nos. 43A and 43B cannot be determined on the material before the court. It will have to await the trial. In the circumstances, I am doubtful whether the plaintiffs have established a prima facie case with a probability of success against the defendants. On the issue as to whether the plaintiffs would suffer irreparable harm unless the orders sought are granted, I am equally doubtful. It is not clear to me on the material on record as to what activities if any the plaintiffs have been carrying out on the suit properties since they acquired the same in the year 2002. I am unable therefore to evaluate the plaintiffs' possible loss to be able to say whether it can be compensated by way of damages or not.
13. In view of the findings that I have arrived at above, the plaintiffs' application falls for consideration on a balance of convenience. I have noted on the material before me that the parcel of land in dispute is not developed. It is interesting to note that even the 1st and 3rd defendants who are said to have acquired the properties in dispute in 1970's have never developed the same. I am of the view that justice would be well served if the status quo is maintained. In the **Court of Appeal Case of Ougo & Another -vs- Otieno (1987)KLR 364**, it was held that,

“The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”

14. For the foregoing reasons, I will dismiss the plaintiff's application dated 29th July 2013 which I hereby do. I will however pursuant to the provisions of section 13 (7) of the Environment and Land Act, 2011, and section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya order that pending the hearing and determination of this suit, neither the plaintiffs nor the defendants shall interfere with, take possession of, develop, sell or transfer all those parcels of land situated at Daraja Mbili, within Kisii town referred to as Plot Nos. 21D (A) and 21D(B) by the plaintiffs and as Plot Nos. 43A and 43B by the 1st, 2nd and 3rd defendants. Either party shall be at liberty to apply to court for the preservation or protection of the said properties. The costs of the application shall be in the cause.

Delivered, signed and dated at KISII this 7th day of August, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Ondicho h/b for Mose Nyambega for the plaintiffs

Mr. Ombachi h/b for Nyambati

for the 1st, 2nd and 3rd defendants

N/A

for the 4th defendant

Mr. Mobisa

Court Clerk.

S. OKONG'O

JUDGE