



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 280 OF 2013

BEATRICE WACHATHA MAINA.....PLAINTIFF/APPLICANT

VERSUS

PURITY KANANA1ST DEFENDANT/RESPONDENT
FESTUS MWANGA.....2ND DEFENDANT/RESPONDENT
SAMUEL MWANGI.....3RD DEFENDANT/RESPONDENT
JOSEPH MUNGUTI.....4TH DEFENDANT/RESPONDENT
SAIDA BORIS5TH DEFENDANT/RESPONDENT
WILLIAM KAMUTI.....6TH DEFENDANT/RESPONDENT
PURITY GATUA.....7TH DEFENDANT/RESPONDENT
CHARLES OGALLO.....8TH DEFENDANT/RESPONDENT
STELLA MAUNDU.....9TH DEFENDANT/RESPONDENT
LOICE OLOO.....10TH DEFENDANT/RESPONDENT
DANIEL MEMBA.....11TH DEFENDANT/RESPONDENT
JANE KAGAI.....12TH DEFENDANT/RESPONDENT
DAVID MWANGI.....13TH DEFENDANT/RESPONDENT

RULING

Coming up before me for determination are two applications seeking similar orders both filed by the Plaintiff/Applicant. The first is the Notice of Motion dated 30th May 2011 and filed on 8th August 2011 in

which the Plaintiff/Applicant seeks for the following orders:

1. That this suit be heard together with the Defendant's Originating Summons in **ELC No. 383 of 2010**;
2. That pending the hearing and determination of this Application and suit the Defendants be restrained from carrying out further construction or in any way dealing with the parcel of land known as Land Reference No. 9042/124 situate in Embakasi (hereinafter referred to as the "suit property");
3. That the Defendants' Defence, Counterclaim and Originating Summons be struck out; and,
4. That the costs of this Application be provided for.

This Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Beatrice Wachatha Maina, sworn on 30th May 2011 in which she averred that she is the registered proprietor of the suit property. She annexed a copy of her title deed. She further averred that in January 2004, she together with surveyors of the Ministry of Lands visited the suit property and put up concrete pillars to make the boundaries thereof and that the suit property was vacant at the time. She further stated that in September 2009, while on a visit to inspect the suit property, she discovered some people had put up temporary structures on part of the land which encroachment she reported to the area chief. She further averred that the area chief convened a meeting between her and the trespassers where she agreed to sell the suit property to the Defendants at a sum of Kshs. 8,400,000/-. She further stated that the offer fell through when the Defendants made a counter offer to her which was unacceptable. She stated that she subsequently decided not to sell the suit property to the Defendants and requested them to vacate the same which demand the Defendants refused to adhere to hence this suit.

This Application is contested. The Defendants filed their Grounds of Opposition dated 1st September 2011 in which they stated as follows:

1. That the present suit is commenced by way of Plaint while **HCCC No. 383 of 2010** is an Originating Summons and these are two totally different procedures under the law and cannot be conveniently heard together.
2. That the Defendants have been in occupation of the suit property peacefully, openly and as of right for over 12 years and have over the years constructed permanent houses at enormous cost and that this suit should be stayed so that their claim based on adverse possession can be heard first and determined.
3. That the Defence and Counterclaim should not be struck out as they raise triable issues which ought to be determined after hearing both parties.

The 1st Defendant also filed her Replying Affidavit sworn on 1st September 2011 in which she averred to the issues raised in their Grounds of Opposition.

The issues that arise for determination from the first Application therefore are as follows:

1. Whether I should consolidate this suit with **HCCC No. 383 of 2010**;
2. Whether I should issue a temporary injunction in favour of the Plaintiff;
3. Whether I should strike out the Defence and Counterclaim filed herein as well as the Originating Summons in **HCCC No. 383 of 2010**; and,
4. Who should be awarded the costs of this Application.

The Plaintiff subsequently filed her second Application being Notice of Motion dated 14th May 2014 filed on the same date in which she seeks orders of an interim injunction or status quo order restraining the 11th Defendant from constructing, excavating, carrying out permanent development or dealing in any manner with the suit property pending the hearing and determination of the first Application or further orders of the court. This second Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff sworn on 14th May 2014 in which the Plaintiff made similar averments as in her earlier Supporting Affidavit in support of her first Application. In my

estimation, the second Application does not raise any new issue for determination, being centered mainly on the issuance of a temporary injunction which was already raised in the first Application.

The first issue is whether this suit should be consolidated with **HCCC No. 383 of 2010** which is an Originating Summons. In **David Ojwang' Okebe & 11 Others v South Nyanza Sugar Company Limited & 2 Others CA Kisumu Civil Appeal (Appl) No. 139 of 2008 (2009) eKLR**, the Court of Appeal discussed the main object of consolidation, that is,

“to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. Thus where it appears to the court that there are common questions of law or fact; that the right to relief is in respect of the same transaction or serious of transactions; or that for some other reason, it was desirable to make an order for consolidation of one or more cases, then the court will do so.”

Both this suit and **HCCC No. 383 of 2010** relate to the competing claims of ownership over the suit property by the parties thereof. There is no question therefore that this suit as well as **HCCC No. 383 of 2010** share common questions of law and fact and the right of relief in either is in respect of the same transaction. The two suits qualify for consolidation as stated by the Court of Appeal in the above cited case. The only issue is whether a suit commenced by plaintiff may be consolidated with a suit commenced by way of an originating summons. Though the manner of commencing the two suits differs, I see no particular reason why this can be a barrier to the two suits being consolidated because a suit commenced by way of an originating summons can be heard orally with the calling of witnesses and production of documentary evidence in the same way as a suit commenced by way of plaintiff. I therefore proceed to consolidate the two suits.

The second issue is whether I should issue to the Plaintiff a temporary injunction. In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

To support her claim of ownership of the suit property, the Plaintiff has produced a copy of her title deed. The Defendants on their part also lay claim on the suit property on the basis of the principle of adverse possession. They have filed an Originating Summons in **HCCC No. 383 of 2010** to pursue that claim in court. That case is yet to be heard and determined. As matters stand therefore, the Plaintiff's claim to the suit property remains unchallenged. Where title to land is concerned, the law is clear as to the duty of a court where a title document is produced.

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”**

To that extent therefore, I find that the Plaintiff has established that she has a prima facie case with high chances of success at the main trial. The Plaintiff must also satisfy the court that an award of damages will not suffice. Land is unique and no one parcel can be equated in value to another. The value of the suit property can be ascertained. However, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**. Where the court is in doubt, it is guided to consider in whose favour the balance of convenience tilts. In this particular case, I do harbor doubt regarding issuing the sought after temporary injunction. This is informed by the fact the Plaintiff has delayed in pursuing the suit property the result of which is that the Defendants have gone ahead and constructed permanent dwellings on the suit property. Their occupation of the suit property is the basis of their suit claiming adverse possession thereof. Granting the sought after temporary injunction shall therefore cause great distress and hardships upon the Defendants. In making this decision, I am bearing in mind that the Plaintiff filed the first Application way back on 30th May 2011 which is more than 31/2 years ago. Much has transpired on the suit property over that duration of time with no action on the part of the Plaintiff. She has certainly slept on her rights. At this stage, I must take cognizance of the activities on the suit property as at today’s date and this leads me to make the finding that the balance of convenience tilts in favour of the Defendants. On this issue therefore, I find that the Plaintiff has failed to satisfy all the requirements for the grant of a temporary injunction and decline to issue the same.

Should I strike out the Defence and the Counterclaim as well as the Originating Summons in **HCCC No. 383 of 2010**? First of all, it is a no brainer that I cannot in this suit issue an order to strike out the Originating Summons in **HCCC No. 383 of 2010**. As to striking out the Defence and Counterclaim, the applicable law is to be found in **Order 2 Rule 15(1)** of the **Civil Procedure Rules, 2010** which states as follows:

“At any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that –

- a. It discloses no reasonable cause of action or defence in law; or**
- b. It is scandalous, frivolous or vexatious; or**
- c. It may prejudice, embarrass or delay the fair trial of the action;**
- d. It is otherwise an abuse of the process of the court,**

And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

The Plaintiff contends that the Defence and Counterclaim filed by the Defendants discloses no reasonable defence in law. The Defendants have challenged the legality of the Plaintiff’s title to the suit property on the grounds of fraud and have made a counterclaim seeking the revocation of the same. On those grounds, I am convinced that the Defence and Counterclaim raise triable issues that require to be subjected to a full hearing before a just conclusion can be arrived at. To that extent therefore, I decline to strike out the Defence and Counterclaim.

In light of the foregoing, I find that apart from my order consolidating the two suits, the two Applications

are unmerited and proceed to dismiss them. Costs shall be in the cause. The Plaintiff is now directed to set the consolidated suit down for hearing with no further delay.

DELIVERED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2014.

MARY M. GITUMBI

JUDGE