



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. E45 OF 2021

ISAAC MUSYOKI KOMONI.....PLAINTIFF/APPLICANT

VERSUS

SAMMY KAUMBULU MBUVI..... DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 20th of December 2021 brought under the Judicature Act Cap 8, The High Court (Practice and Procedure Rules (Part 1 Rule 3) and all other enabling rules, the Applicant is seeking for the following orders: -

1) Spent.

2) Spent.

3) That an interim order of injunction do issue prohibiting the Defendant/Respondent from trespassing into, grazing, cultivating/ploughing, encroaching or in any other manner interfering with the Plaintiff's lawful use and occupation of parcel of land measuring four (4) acres comprised in LR Nzau/Kilili/738 pending the hearing and determination of the suit herein.

4) That costs be provided for.

2. The application is premised on the grounds on the face of the application and on the supporting affidavit of the Applicant sworn on the same day.

3. A summary of the grounds and the averments is that the Respondent is the registered owner of the suit land. The Applicant averred that on 08/05/1996 he entered into a sale agreement with the Respondent for the sale of three acres of land which were to be hived off from the suit land. That on 15/06/1996 he entered into a sale agreement with the Respondent for the sale of half an acre at a consideration of Kshs. 10,000/= and on 29/08/1997 he entered into an agreement with the Respondent for the sale of a half acre for a consideration of Kshs 10,000/=.

4. That sometime in December 2021, the Respondent without any colour of right entered into the Plaintiff's land and burnt the live fence which marked the boundary and closed the gate used by the Plaintiff to access his land. The Applicant further averred that the Respondent had denied him from accessing the water point and cultivated his land thereby causing him mental anguish. The Applicant argued that the Respondent's actions were well calculated with an intent of depriving him of his property.

RESPONDENT'S CASE

5. Opposing the application, the Respondent vide his replying affidavit sworn on 19th of January 2022 averred that he is the registered owner of the suit property and a stranger to the sale agreements alluded to by the Applicant.

6. He further argued that he had always been in possession of the entire suit land and that the photographs annexed by the Applicant do not reflect the developments done on the suit land. He argued that the balance of convenience does not tilt in favour of the Applicant as he was the one who was in occupation of the suit property and that he was the one who had planted the crop. He contends that if the orders are granted it would amount to evicting him from the suit land.

THE SUBMISSIONS

7. The application was canvassed by way of written submissions. The Applicant's written submissions were filed on 11th of March 2022.

8. Counsel for the Plaintiff/Applicant identified the issues for the court's determination as follows: -

i) Whether a certificate of title of land held by a proprietor is absolute proof of ownership and therefore cannot be impeached.

ii) Whether the Applicant has a legal and/or equitable interest in four acres from the suit property.

iii) Whether the threshold for granting interlocutory injunction have been met.

9. On the issue as to whether a certificate of title held by a proprietor is absolute proof of ownership, Counsel submitted that a certificate of title can be challenged under Section 26 of the Land Registration Act which provides for instances when the title can be impeached.

10. Counsel further submitted that the Applicant was challenging the Respondent's title to the entire parcel of land as there was a fraudulent undertaking and misrepresentation on the part of the Respondent geared towards depriving him of his property. Counsel submitted that the Respondent in his fraudulent and misrepresentational intent had failed to acknowledge that he had sold 4 acres of the suit property vide the sale agreements and as such, the title did not represent the actual state of the suit property. He called upon the court to determine root of the title in order to determine ownership. Counsel place reliance on the case of **Propwa Company Limited Vs Justus Nyamo Gatondo & Another (2020) eKLR** to support his submissions.

11. On the issue as to whether the Applicant has a legal or equitable right in the four acres within the suit property, Counsel submitted that the Applicant executed the sale agreements with the Respondent for the sale of the 4 acres of land and That upon the purchase, the Respondent had allowed the Applicant to take possession of the said portion of land. Counsel further submitted that having furnished the court with evidence of the sale agreements, it follows that the Respondent holds the land in trust for the Applicant.

12. To buttress his submissions, Counsel relied on the following cases:-

a) **Ndirangu Kariuki Vs Wellington Wanjau (2021) eKLR,**

b) **Abubakar Salim Machiri Vs Machiri Y.S.M Mohammed (2021) eKLR,**

c) **Twalib Hatayan & Another Vs Said Saggah Ahmed Al Heidy (2015) eKLR.**

13. On the issue as to whether the Applicant has met the threshold for the grant of an injunction, Counsel submitted that the Applicant had established a *prima facie* case as he had tendered sale agreements to demonstrate that he had purchased 4 acres and that he was in possession of the same. Counsel placed reliance I the case of **Mrao Limited Vs First American Bank of Kenya & 2 Others (2003) eKLR.**

14. In addition, Counsel submitted that the Applicant had been in possession of the suit property since 1996, would suffer irreparable harm if an order of injunction is not granted as the Respondent would attempt to sell the suit property and thus infringe his right to property.

15. Counsel further submitted that the inconvenience caused to the Applicant if the injunction is not granted would be greater than the one caused to the Respondent. He placed reliance on the case of **Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR.**

16. The Respondent's written submissions were filed on 11th of March 2022. Counsel for the Respondent identified the following issues for the court's determination;

i) Whether the Plaintiff/Applicant should be granted an interim injunction as prayed.

ii) Who should bear the costs of this suit.

17. Counsel submitted that the Applicant had not met the requirements for the grant of an injunction as set out in the case of **County Government of Tana River Vs Mohammed Gare Bulale & 3 Others (2021) eKLR.** In addition, Counsel submitted that the suit land was registered in the Respondent 's name who denied ever selling a 4-acre portion of the suit land to the Applicant. Counsel argued that the Applicant had not established a prima facie case. Reliance was placed on the case of **Ochola Kamili Holdings Limited Vs Guardian Bank Limited (2018) eKLR.**

18. Counsel further submitted that the Applicant had not demonstrated that he would suffer irreparable loss that cannot be compensated by way of damages. Reliance was placed on the case of **Elizabeth Muthoni Hussein Vs Vikesh Jinit Shah (2018) eKLR.**

19. Counsel further submitted the balance of convenience was in favour of the Respondent as he was the registered owner of the suit land and was in possession of the same as evidenced by the crops planted thereon.

ANALYSIS AND DETRMINATION

20. Having considered the application and the written submissions, I find that the issue for determination is whether the Applicant has met the threshold for the grant of an order of injunction.

21. The principles applicable in an application for an injunction were laid down in the celebrated case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358** where the court held that in order to qualify for an injunction:-

ü *First the Applicant must show a prima facie case with a probability of success.*

ü *Secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.*

ü *Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.*

22. The first issue for determination is whether the Applicant has established that he has a *prima facie* case with a probability of success.

23. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) eKLR** 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.”

24. It is not in dispute that the Respondent is the registered owner of the suit property. This was confirmed by a copy of the certificate of the official search (IMK-1) annexed to the Applicant’s supporting affidavit. The Applicant gave an elaborate background on how he purchased from the Respondent four acres out of the suit property vide the sale agreements marked as annexures IMK-2a&b, IMK 3a &b and IMK4a & b. That after he purchased the suit properties, he took possession and fenced of the properties using sisal and planted trees thereon. The Applicant’s proprietary claim is based on the sale agreements executed between himself and the Respondent herein. The Applicant relied on the sale agreements to prove ownership of the same. The Respondent on the other hand averred that he is the registered owner of the land and denied executing the sale agreements.

25. The issues for determination is whether the Applicant purchased from the Respondent 4 acres of land comprised in the suit property and whether he is the legitimate owner of four acres within the suit land. These are issues that need to be canvassed in a full trial by calling evidence and interrogating it through cross examination. At this stage the court is not required to determine the issues which will be canvassed at the trial.

26. The court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy. Looking at the documents annexed to the respective affidavits, it is evident that the Plaintiff’s claim is not baseless. .

27. In the case of **Mbuthia Vs Jimba Credit Finance Corporation Ltd (1988) eKLR** the court held that;

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases.”

28. Similarly, in the case of **Edwin Kamau Muniu Vs Barclays Bank of Kenya Ltd NBI HCCC NO 1118 of 2002**, the court held that;

“In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria.”

29. At the interlocutory stage, the court is not required to make final findings on the contested matters. The issues of ownership and sale can only be determined in a full trial where the parties will have the opportunity call evidence and have the same challenged by way of cross examination.

30. In the case of **Virginia Edith Wambui Vs Joash Ochieng Ougo Civil Appeal No. 3 of 1987 eKLR**, the Court of Appeal held that;

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

31. In the present case, it is not in dispute that the Respondent is the registered owner of the entire suit land. It is evident that the Applicant’s proprietary claim over the suit property is anchored on the sale agreements. I have carefully looked at the sale agreements and I find that they relate to the sale of land No. 738. What is in dispute is whether the Applicant purchased from the Respondent 4 acres out of the suit land. Although the Applicant is not the registered owner of the suit land, it is clear from the pleadings and annexures that he has a legitimate claim of the 4 acres within the suit land. On the basis of the material that is on record, I find that the Plaintiff/Applicant has established a *prima facie* case with a probability of success.

32. As regards the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.

33. The Court of Appeal in **Nguruman Limited Vs Bonde Nielsen & 2 Others (2014) eKLR** held that: -

“On the second factor, the Applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to

prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”

34. The Applicant alleged that since the Respondent is registered owner of the suit property, he may attempt to alienate or even sell the suit land which would cause him to suffer irreparable loss which would not be adequately be compensated by way of damages. Although the Applicant is not the registered owner of the suit property, there is a real likelihood that the same may be transferred to third parties and therefore making the process of recovery difficult. The court is therefore convinced that the Applicant stands to suffer irreparable harm that cannot be compensated by way of damages if the suit property is transferred to third parties.

35. On the issue of balance of convenience, the court has to weigh the hardship to be borne by the Applicant by refusing to grant the injunction, against the hardship to be borne by the Respondent’s by granting the injunction.

36. Looking at the evidence presented by the parties herein, I find that if the suit properties are not preserved, they may be wasted away. On the issue of balance of convenience, I find that it tilts in favour of maintaining the status quo on the suit property,

37. In light of the foregoing, I find that the Applicant has met the threshold for the grant of a temporary injunction. Consequently, the application dated 20th December 2021 is allowed as prayed pending the hearing and determination of this suit.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF APRIL 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Mohammed.

Munyasya for Applicant.

Mwinzi for Respondent.