



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 160 OF 2012

DAKIANGA DISTRIBUTORS LTD PLAINTIFF

VERSUS

SAMWEL KENANI OMWANDO 1ST DEFENDANT

LAND REGISTRATION – KISII 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on 9th May 2012 seeking; a declaration that the plaintiff is the rightful owner of all that parcel of land known as **LR No. Kisii Town/Block III/196** (hereinafter referred to as “**the suit property**”), a declaration that the entries in the register for the suit property to the effect that the 1st defendant is the proprietor thereof are null and void, an order for the rectification of the register for the suit property, a permanent injunction to restrain the defendants from interfering with, transferring, selling or in any manner dealing with the suit property and general damages. In its plaint dated 8th May 2012, the plaintiff averred that, at all material times, the plaintiff was the registered proprietor of the suit property having purchased the same from Golf Course Shoe General Ltd. in the year 2000. The plaintiff averred that after acquiring the suit property, it constructed a go-down on a portion thereof and set up a zero grazing unit on the remaining portion. The plaintiff averred that the go-down aforesaid was let by the plaintiff to Kenya Seed Company Ltd. The plaintiff averred further that sometimes in September, 2011, the 1st defendant started laying a claim over the suit property.
2. The plaintiff averred that in the said month, the 1st defendant entered the suit property with the intention of selling the same and interfered with the activities at the zero grazing unit on the property. The plaintiff averred that following this claim by the 1st defendant over the suit property, the plaintiff launched investigations which revealed that through fraudulent conspiracy, the 1st and 2nd defendants had caused the suit property to be registered in the name of the 1st defendant as the leasehold proprietor thereof. The plaintiff averred that it has occupied and developed the suit property extensively from the year 2000 without any complaint from the 1st defendant. It is on account of the foregoing that the plaintiff decided to institute this suit against the defendants when demand and notice of intention to sue sent to the defendants yielded no positive response.
3. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 8th May, 2012 seeking a temporary injunction to restrain the defendants from entering, mortgaging, charging, leasing, transferring, selling or in any other manner whatsoever interfering with the suit property pending the hearing and determination of this suit. The plaintiff’s application was supported by the affidavit of the plaintiff’s director one, Lydia Nkirote Manene sworn on 8th May

2012. In her affidavit, the plaintiff's said director stated that; the plaintiff purchased the suit property from Golf Course Shoe General Ltd. in the year 2000 and had the property transferred and registered in its name on 30th June 2000. The plaintiff thereafter constructed a go-down on the suit property which it rented to Kenya Seed Company Ltd. in the year 2002. The plaintiff's said director stated further that, when the plaintiff purchased the suit property, the same had well marked boundary beacons in place.
4. The plaintiff's said director stated further that, in the month of September 2011, the 1st defendant entered the suit property without the plaintiff's permission with the intention of fencing and selling off the same. The plaintiff made an inquiry at the Kisii Land Registry on the status of the suit property which inquiry revealed that the land register for the suit property that contained the name of the plaintiff as the proprietor of the suit property had been removed and replaced with a new register that indicated that the 1st defendant is the proprietor of the suit property. The plaintiff's said director stated that the said register with the name of the 1st defendant as the proprietor of the suit property does not contain the entries relating to the dealings with the suit property from the time the title was created in the year 1923 upto the date of the purported acquisition of the said property by the 1st defendant. Following this discovery, the plaintiff reported the matter to the police who after investigations preferred charges against the 1st defendant. The investigations carried out by the police revealed that the 1st defendant's purported title to the suit property was obtained fraudulently in questionable circumstances. The plaintiff's said director stated further that the 1st defendant has never occupied the suit property and has no idea how the same was developed. The plaintiff's said director stated that it would only be fair and just in the circumstances of this case that the temporary injunction sought is issued to preserve the suit property.
 5. The plaintiff's application was opposed by the 1st defendant through a replying affidavit sworn on 18th June 2012. The 1st defendant contended that contrary to the contentions by the plaintiff, he is the registered proprietor of the suit property having acquired the same on 30th June 2004 from one, Christopher Gwaro. The 1st defendant contended that he has occupied the suit property since he acquired the same without any interference from the plaintiff or anyone else until 7th September, 2011 when one, Charles Mageto a director of the plaintiff chased away his workers who had been sent to fence the suit property. The 1st defendant contended that he is the lawful proprietor of the suit property and that the plaintiff has no title or valid claim over the property. The 1st defendant contended that the charge that had been preferred against him by the police at the instance of the plaintiff was dismissed by the court. The 1st defendant contended that the plaintiff has not established a prima facie case against the 1st defendant that would entitle him to the orders sought herein. The 1st defendant contended that he has since filed a suit against Charles Mageto who is said to be a director of the plaintiff in relation to the suit property in which suit he has sought injunction. The 1st defendant contended that the orders sought herein if granted may conflict with the orders which may be issued in the 1st defendant's said suit against Charles Mageto. The 1st defendant termed the plaintiff's application herein as ill advised, misconceived and legally untenable.
 6. When the plaintiff's application came up before me for hearing on 3rd July 2013, I directed that the same be argued by way of written submissions. The advocates for the parties filed their respective submissions and the same are on record. I have considered the plaintiff's application together with the affidavit that was filed in support thereof. I have also considered the 1st defendant's affidavit in reply to the said application. Finally, I have considered the written submissions by the plaintiff's and the 1st defendant's advocates filed herein on 17th September 2013 and 15th August 2014 respectively and the authorities cited in support thereof. The principles upon which this court proceeds while considering an application for a temporary injunction like the one before me are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**, an applicant for a temporary injunction must establish a prima facie case against the respondent. He must also demonstrate that he will suffer irreparable injury that cannot be adequately compensated in damages if the order is not granted.

7. If the court is in doubt as to the above, the application would be considered on a balance of convenience. The plaintiff and the 1st defendant have both claimed ownership of the suit property. The plaintiff has contended that it acquired the suit property on 30th June 2000 through purchase from Golf Course Shoe Centre Ltd. Golf Course Shoe Centre Ltd. had on its part purchased the suit property from B.A.T Kenya Ltd. sometimes in the year 1996 and had the property registered in its name on 4th October 1996. B.A.T Kenya Ltd. had on the other hand acquired the suit property from Gethin & Dawson Properties Ltd. on 28th January 1976. Gethin & Dawson Properties Ltd. are said to have been the first registered proprietors of the suit property whose register is said to have been opened in the year 1923. The plaintiff has claimed that upon acquiring the suit property, it developed the same by putting up a go-down thereon which he let out to Kenya Seed Company Ltd in the year 2002. The plaintiff has claimed further that in the year 2003, he used the suit property to secure a loan in the sum of kshs. 5 Million from National Bank of Kenya Ltd. The plaintiff has contended further that it occupied and used the suit property and the developments thereon peacefully until sometimes in September 2011 when the 1st defendant entered the suit property with the intention of fencing the same claiming that he is the owner thereof.
8. The plaintiff has contended that it is after this incident that the plaintiff discovered that through conspiracy and fraud the 1st and 2nd defendants had removed the register for the suit property that contained the name of the plaintiff as the proprietor of the suit property and replaced it with one that indicated that the suit property is owned by the 1st defendant. The alleged fraud was reported to the police who after investigations arraigned the 1st defendant in court on charges relating to among others, making document without authority. The plaintiff has contended that the 1st defendant was acquitted of the said charges not because he was tried and found not guilty but due to the failure by the prosecution to proceed with the case when the application for adjournment was rejected by the trial court. The plaintiff produced as exhibits to the affidavit of Lydiah Nkirote Manene among others, a copy of a certificate of lease for the suit property dated 30th June 2000 in favour of the plaintiff, copies of architectural drawings for the go-down that the plaintiff is said to have put on the suit property, a copy of a valuation report over the suit property dated 15th July 2002, a copy of a letter from National Bank of Kenya Ltd dated 26th September 2011 confirming that the suit property was charged to the said bank by the plaintiff to secure a loan of kshs. 5 Million, a copy of charge sheet in Criminal Case No. 165 of 2012, a copy of a certificate of official search on the title of the suit property dated 9th May 2003, a copy of an instrument of transfer of lease dated 4th August 1975 by which the suit property was transferred by Gethin & Dawson Properties Ltd to B. A. T Kenya Ltd, a copy of consent to transfer dated 4th June 1975 by Gusii County Council to Gethin & Dawson Properties Ltd, a copy of a certificate of lease for the suit property dated 28th January 1976 in favour of B. A. T Kenya Ltd, several correspondence between Gusii County Council and B. A. T Kenya Ltd. over payment of rates and rent for the suit property, a copy of an instrument of transfer of lease dated 30th September 1996 through which B. A. T Kenya Ltd. transferred the suit property to Golf Course Shoe Centre Ltd. at a consideration of kshs. 750,000/=, copies of consent to transfer dated 16th April 1996 and 1st October 1996 by Kisii Municipal Council and District Land's Officer Kisii respectively, a copy of an instrument of transfer of lease dated 30th June 2000 through which the suit property was transferred by Golf Course Shoe Centre Ltd. to the plaintiff herein at a consideration of kshs. 1,000,000/=, a copy of a certificate of lease dated 7th October 1996 in favour of Golf Course Shoe Centre Ltd and statements recorded with the police in the course of investigations of the complaint that was lodged by the plaintiff regarding the 1st defendant's claim over the suit property.
9. On his part, the 1st defendant has also contended that he is the lawful owner of the suit property. The 1st defendant has contended that he purchased the suit property from one, Christopher Gwaro sometimes in the year 2004. The 1st defendant annexed to his affidavit in reply to the application herein; a copy of certificate of official search dated 4th October 2011 on the title of the suit property which shows that the property was registered in his name on 30th July 2004, a copy of a certificate of lease for the suit property dated 30th July 2004 in favour of the 1st defendant, a copy

- of the register for the suit property and copies of the charge sheet and proceedings in Criminal Case No. 165 of 2012. The 1st defendant also annexed copies of the pleadings in Kisii HCCC No. 186 of 2011 that the 1st defendant has instituted against Charles Mageto, a director of the plaintiff herein.
10. It is clear from the foregoing that each party has put forward substantial material in support of the rival claims over the suit property. The plaintiff has put forward documents detailing the ownership of the suit property from 1923 to date. The 1st defendant on the other hand has traced the origin of the suit property to the year 1976 and has put before the court documents showing the ownership of the suit property from that date to date. In the plaintiff's catalogue of persons who have owned the suit property from 1923 to date, the 1st defendant does not feature. The plaintiff does not also feature in the 1st defendant's list of owners of the suit property. The documents of title put forward by the plaintiff and the 1st defendant to stake their rival claims over the suit property have all originated from the District Land's Office, Kisii. The plaintiff has a certificate of lease for the suit property and a certificate of official search both issued by the District Land Registrar Kisii in testimony to the fact that the plaintiff is the registered owner of the suit property.
 11. The 1st defendant also has a certificate of lease and a certificate of official search again issued by the District Land Registrar, Kisii to the effect that the 1st defendant is the registered proprietor of the suit property. In this state of affairs, I am unable to determine at this stage as to which of the title documents before me are genuine and which ones are forgeries. The only material that I have before me in terms of evidence at this stage are the plaintiff's affidavit together with the annexures thereto and the 1st defendant's affidavit together with the annexures thereto. I have no reason on the material before me to believe the plaintiff's affidavit evidence as against that of the 1st defendant and vice versa. I am of the view that the validity or otherwise of the documents before me can only be determined at the trial where the parties and their witnesses would be subjected to cross-examination and the original copies of the documents before the court subjected to more detailed scrutiny.
 12. Due to the foregoing, the merit of the plaintiff's case herein is doubtful. The doubt has been created by the parallel title documents that have been put forward by the 1st defendant in his defence which I am unable to dismiss at this stage as forgeries for the reasons that I have given above. Having expressed my doubt on the chances success of the plaintiff's case, I am equally doubtful if the plaintiff would suffer irreparable injury in the event that the orders sought are not granted. In the circumstances, the plaintiff's application falls for consideration on a balance of convenience. There is no dispute that the plaintiff is in possession of the suit property and that it has developed the same by putting up a go-down which it has rented out to a tenant. On the other hand, the 1st defendant seems on the material before me to have neither occupied nor developed the suit property. It follows from the foregoing that the plaintiff would suffer more harm or injury than the 1st defendant if the orders of injunction sought are not granted. The balance of convenience therefore tilts in favour of granting the injunction sought by the plaintiff.
 13. In conclusion, I would allow the plaintiff's application dated 8th May 2012 in terms of prayer 3 thereof. I would in the interest of justice and for the purposes of ensuring that the status quo is maintained make a further order that pending the hearing and determination of this suit or further orders by the court, the plaintiff shall not sell, create a further charge or transfer the suit property. The cost of the application shall be in the cause.

Delivered, signed and dated at KISII this 21st day of November, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Michoma h/b for Bosire for the Plaintiff

Mr. Soire h/b for Oguttu for the 1stDefendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE