



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 350 of 2010

PETER GAHAHU MWICHIGI.....PLAINTIFF/APPLICANT

VERSUS

JANE NJOKI.....1ST DEFENDANT/RESPONDENT

STEPHEN K.A SOI.....2ND DEFENDANT/RESPONDENT

KALENJIN ENTERPRISES LTD.....3RD DEFENDANT/RESPONDENT

RULING

By a plaint dated 9th March, 2010 the applicant, Peter G. Mwachigi, instituted this suit against the respondents, Jane Njoki, Stephen K.A Soi and Kalenjini Enterprises Limited seeking, among other orders, a permanent injunction to restrain the respondents from entering, remaining upon, (restore) transferring, alienating or in any other way dealing with LR NAKURU/MUNICIPALITY BLOCK 29/708 (the suit property).

Subsequently, the applicant filed the notice of motion dated 9th December, 2011 seeking an order of temporary injunction to restrain the respondents as explained above pending the hearing and determination of the suit.

The application is premised on the ground that the applicant was allocated the suit property by the 3rd respondent in 1970's; that the respondents fraudulently got the suit property registered in favour of the 1st respondent who is now developing it; and that the development being carried out by the 1st respondent is prejudicial to his (applicant's) proprietary interest in the property.

In opposition to the application, both the 1st and the 2nd respondents have filed grounds of opposition in which they contend that the application is misconceived, incompetent, lacking in merit and an abuse of the process of the court. The 1st respondent has also sworn an affidavit in which she contends that the application is *res judicata* Nakuru CMCC NO. 842 of 1999; that the applicant after losing the case in the lower court did not prefer an appeal to challenge the decision of the lower court; that the application is belated as she has already subdivided the suit property and developed it.

I have considered the argument by the applicant and the response by the respondents. I have also considered the submissions filed by both the applicant and the respondents together with the cited authorities.

The issues for determination are:-

- (i) Whether the current suit is *res judicata* Nakuru CMCC No.842 of 1999? and if not,
- (ii) Whether the applicant has made up a case for the granting of an order of temporary injunction.

Beginning with the first issue, the respondents contend that the issue of ownership of the suit property was heard and determined by a court of competent jurisdiction in Nakuru CMCC NO. 842 of 1999. The applicant, on his part, argues that the lower court had no jurisdiction to determine the issue of cancellation as it is only the High Court that could cancel the title issued to the 1st respondent.

Under **Section 159** of the **Registered Land Act**, Chapter 300 of the Laws of Kenya (now repealed);

“Civil suits relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty-five thousand pounds, by the Resident Magistrate's Court...”

From the quoted section of the law above, the jurisdiction of the Resident Magistrate's Court is limited to subject matters with value not exceeding twenty five- thousand pounds. Neither the applicant nor the respondent has given an indication of the value of the suit property, the subject matter of the suit in the lower court. Whether or not the lower court had jurisdiction to determine the issue of cancellation of the title issued to the 1st respondent depends on the undisclosed value of the suit property. The lower court, depending on the value of the suit property might not have had jurisdiction to determine the issue of cancellation of the title issued to the 1st respondent depends on the undisclosed value of the suit property. Owing to lack of evidence of the correct value of the suit property, I decline to declare the application or the suit *res judicata*.

The party claiming the court had no jurisdiction ought to have provided the proof. Without value of property, presumption should be that the court had jurisdiction.

On the second issue, for an order of temporary injunction to issue in favour of the applicant, he has to satisfy the conditions set in ***Giella v Cassman Brown & Co. Ltd. (1973) EA 358***, namely that he has a *prima facie* case with a probability of success, that he might otherwise suffer irreparable injury, which cannot adequately be compensated by an award of damages unless the injunction is granted; and that the balance of convenience tilts in his favour.

In the instant application, the applicant claims a proprietary interest in the suit property. His interest is premised on a sale agreement allegedly signed between himself and one, Kiprotich A. Soget. The applicant contends that the 1st Defendant bought the suit property from the 2nd respondent with full knowledge of his interest in the property and that the purchase and subsequent registration was tainted with fraud. However, he has neither provided any evidence of the sale agreement nor demonstrated the link between the said seller and the respondents. The respondents have, on their part denied the applicant's contention. They have also averred that the transaction between them was lawful (paragraph 3 of the statement of defence).

Under **Section 109** of the **Evidence Act**, Chapter 80, Laws of Kenya he who alleges has a duty to prove and whoever desires any court to give judgment to any legal right or liability dependent on the existent of facts which he asserts must prove that those facts exist. (section 108 of the Evidence Act).

Although the applicants claims proprietary interest in the suit property he has not provided any evidence that he bought the suit property; or that the person who allegedly sold the property to him had sufficient interest in it or that he is even in possession of the same.

On the contrary, through the applicant's own affidavit, and that of the 1st respondent, it is apparent that the dispute lodged by the applicant against the 1st respondent over the ownership of the suit property was

decided in favour of the latter by a court of competent jurisdiction; that the applicant did not challenge that decision by way of appeal or review. It is also clear that the 1st respondent is in occupation of the suit property and that she is registered as the owner.

On the basis of this, I find that *prima facie* the 1st respondent is the owner of the suit property.

For want of evidence as to the nature of the applicant's interest in the suit property, I also find and hold that the applicant is not likely to suffer any irreparable injury. The balance of convenience also tilts in favour of the 1st respondent who, *prima facie*, is the owner of the suit property and who may incur great loss and prejudice if she is restrained from accessing the suit property and supervising the developments she has initiated thereon.

For the foregoing reasons the application has no merit and is dismissed with costs.

Dated and Signed at Nakuru this 11th day of February 2013.

**W. OUKO
JUDGE**

Dated, Signed and Delivered at Nakuru this 22nd day February, 2013. Hon. Justice M. J. Anyara Emukule.