



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
ENVIRONMENTAL AND LAND CASE NO. 31 OF 2012

ELIUD WEKESA SITUMA..... PLAINTIFF/APPLICANT

VERSUS

JOHN NYONGESA

SILAS NYONGESA

WYCLIFF W. NYONGESA..... DEFENDANTS/RESPONDENTS

RULING

By an application dated 27th July 2012, the applicant has moved the court seeking orders;

- **THAT** the applicant is the registered owner of the suit parcels of land.
- **THAT** as a registered proprietor he is entitled to enjoyment of full proprietary rights.
- **THAT** the respondents without any legal justification have continuously interfered with those rights.
- The respondents are selling part of the suit land to third parties.
- **THAT** it will best serve the interest of this suit if the orders prayed are granted.

Prayer 1 & 2 of the application is dispensed with as there were no interim orders granted. The application was argued inter partes by way of written submission. This ruling is therefore in respect to prayer 3,4 & 5 of the application.

The application is premised on grounds on the face of it and on the supporting affidavit of the applicant. In the application the applicant says he is the registered owner of the suit parcels. He has annexed copies of title deeds to support this averment. He also says that as the registered owner, he is entitled to enjoy the proprietary rights.

In paragraph 3 of the supporting affidavit, he says the defendants/respondents took advantage of his absence and invaded the land and are doing wanton destruction of the properties in the land and have embarked on a fraudulent selling process.

Mr. Wanyama for the applicant filed written submission, he states that the defendants' interferences of the suit land is a bar/hindrance for the plaintiff to develop it hence occasioning his substantial loss. He has quoted the case of *Michael G. Kimotho Vs. Nicholas M. Mugo Civ. Appeal No. 53 of 1995* in the court of appeal in Nairobi to fortify their submissions.

The application is opposed. The respondents have filed replying affidavit through John Nyongesa Nasokho, the 1st respondent sworn on 9th January 2013. He avers the application has been made without

making full disclosure. In paragraph 5, he states that he has on the land several houses and trees and granting the injunction amounts to constructive eviction. The respondent contends the titles were fraudulently detained. Finally they contend since the applicant is not in occupation, he will suffer no loss.

The respondent filed their written submissions through Bulimo & Co. adv. And their advocate on record Mr. Situma from the said firm has submitted on all the principles of granting injunctions. He submits the applicant has not proved a prima facie case since according to him, the titles were fraudulently obtained.

He also submitted the applicant will suffer no loss as he had not been in occupation of this land. In any event it is the respondents who will suffer as they have done extensive development on the land and therefore balance of convenience tilts in favour of the respondents. He relied in case law of *Farmers Partner Ltd & 2 others Vs. Barclays Bank of Kenya Ltd. [2009] e KLR and Giella Vs. Cassman Brown & Co. Ltd. [1973] E.A p. 358.*

The applicant is asking this court to grant an injunction to restrain the defendants from “selling, tilling, ploughing, utilizing or in any manner making use of” my interpretation of “in any manner making use of the suit parcels” which in my view would include the respondents not staying on this land. He has admitted that the respondents are in the land both in the supporting affidavit and the plaint. He has not disclosed when they invaded the land. Also in prayer (a) of the plaint he has sought eviction orders.

The respondents being in occupation means that this is not the nature or circumstances under which order 40 ought to apply. Order 40 rule (a) anticipates a situation where any property in dispute is in danger of being wasted, damaged or alienated or rule 1(b) the defendant threatens to dispose or remove the property hence obstruction or delayed in execution of a decree. The applicant has not explained to this court the nature of damage that the respondents are causing to the suit properties. Neither has he shown that the defendants are intent on disposing of the land. He has merely alleged this. In any event the title deeds are in his names so the sale will not be completed unless he surrenders his title deeds.

In the case of Michael G. Kimotho Vs. Nicholas M. Mugo cited by the applicant, it was a judgment given by the court after hearing a party. It was judgment not ruling on an application. Neither was it in regard to issues of injunction. It has no relevance in the present circumstances. Probably applicable at the conclusion of this case in support of their submissions.

The other case cited by the Respondents, Farmers Partner Ltd & 2 others Vs. Barclay's Bank of Kenya Ltd, is applicable to a certain extent in terms of quoting Giella Vs. Cassman Brown.

However in terms of establishing a prima facie case, an expert report (as in the farmers case) cannot be compared with value attached to holding a title deed.

In the instant case, although the applicant may have a prima facie case, the balance of convenience is much stronger in tilting in favour of the respondents as they await the outcome of the case. Since the applicant did not disclose when the respondents invaded his land, it would be safer for the court to maintain the status quo till the suit is heard and determined. In the circumstances, I decline the application for injunction with costs to the Respondents.

RULING DATED, SIGNED, READ AND DELIVERED in open court this 17th day of June 2013.

OMOLLO

JUDGE.