



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 441 OF 2013

EUNICE WAMBUI NDERITU.....PLAINTIFF

-VERSUS-

KENNETH KIMARI GATERE.....DEFENDANT

RULING

The application before me for determination is a Notice of Motion dated 8th April 2013, brought by the Plaintiff under Section 3A and 63(e) of the Civil Procedure Act, Order 40 Rule 1, 2 and 3 and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff seeks an order that the Defendant, his agents and/or servants be restrained from trespassing, encroaching, developing, alienating, disposing, selling and/or in any manner whatsoever dealing No. 13330/246 pending the hearing and determination of this suit.

The application is supported by the Plaintiff's affidavit sworn on 8th April 2013. The main ground for the application is that whereas the Plaintiff is the registered owner of the suit property, the Defendant has illegally deposited construction materials on the suit property with a view of commencing construction without the Plaintiff's authority and/or consent. The Plaintiff is the registered proprietor of L.R. No. 1330/246 (the suit property) as per the copy of certificate of title annexed to her supporting affidavit and marked EWN1. The plaintiff purchased the suit property vide an agreement for sale dated 24th July, 2011 marked EWN2.

It is the Plaintiff's case that when she bought the property, there was no caveat or encumbrance indicating the Defendant's claims and therefore that the Defendant's allegations that he owns the land are without any legal basis since the Defendant has no documents to lay claim on the suit property.

In a further affidavit sworn on 29th April 2013, the Plaintiff has stated that the Defendant has never been the registered owner of the suit premises since in the replying affidavit, the Defendant alleges that he was in the process of purchasing the property and had not even cleared the entire purchase price. The Plaintiff contends that the Defendant's claim lies against third parties and is for a refund of the amount paid but not the land since he had not completed the process.

It is the Plaintiff's case that although the Defendant acknowledges that Joreth Limited are the owners of the suit premises, the Defendant has no evidence to show that he had dealings with Joreth Limited. The Plaintiff alleges that instead, the Defendant and his father had dealings with Thome V who are not the owners of the land and whom the Defendant should pursue for deceiving them. The Plaintiff claims that

she has been in possession of the land since she bought it, and that the materials shown in the Defendant's photographs were deposited in the suit property with a view of constructing a fence which was stopped by the area chief. The Plaintiff maintains that the Defendant cannot allege that he developed the suit premises since no development plan could be approved to allow him develop the land since he has no title to the suit property.

The application is opposed and the Defendant has filed a replying affidavit as well as a further affidavit sworn on 10th May 2013. The Defendant has stated that his father, Gitere Kahuria purchased two (2) shares from Thome Farmers No. 5 Ltd where he was allocated share certificate number 1072 which has been attached as evidence. The Defendant contends that his father was allocated two (2) plots within Land Reference number 13330 for each share purchased. Further, the Defendant has stated that at the time of allocation, there was a proposed subdivision plan wherein the plots allocated to his father were identified as plot numbers 357 and 358.

It is the Defendant's case that his father paid survey fees of Kshs 1,150/- per plot and has attached the payment receipts as evidence. The Defendant has averred that he settled on one of the plots in 1989 where he built his matrimonial home where he resides until today. Further, the Defendant has stated that on 5th September 1993, his father sold to him the two (2) shares and the plots for a consideration and the sale agreement has been annexed. The Defendant contends that after subdivision and surveying of Land Reference 1330, his plots were allocated LR 13330/241 and 13330/246.

The Defendant has alleged that following a newspaper advertisement on 2nd February 2005 stating that Joreth Limited was the registered proprietor of the parcel of land Known as LR 13330 off Thika Road erroneously called Thome V, the Defendant went to the offices of the 2nd Defendant where he was directed to deal with **Njoroge Nga'ng'a and Co. Advocates** who requested him to pay Kshs 295,567/- per plot, being title processing fees. The Defendant further alleges that he made further payments of Kshs 1,100,000/- to Dan & Anderson Associates who were the certified public accountants appointed Defendant to process titles in place of Njoroge Nga'ng'a and Co. advocates.

The Defendant has averred that in or around November 2012, the 2nd Defendant through Dan & Anderson Associates availed transfer documents for his execution in respect of L No. 13330/241 which have been lodged for registration in the Lands Offices. It is the Defendant's case that save for a balance of Kshs 67,000/- , he has paid the purchase price for LR No. 13330/246 but that transfer documents for the said parcel are yet to be availed to him for execution despite several inquiries on the same being made to a director of the 2nd Defendant. The Defendant has alleged that on 21st March 2013, a large number of rowdy youths stormed into LR 13330/246 and started demolishing his livestock sheds and employee's living quarters and has annexed as evidence photographs of the demolished structures. The Defendant has also annexed a copy of a letter dated 27th March 2013 from Chege Wainaina & Co. Advocates stating that the Plaintiff was the owner of LR 13330/246.

In the further affidavit, the Defendant stated that the dealing with the suit property began in 1980s which resulted in the issuance of share certificates to his father in 1989 when the owners were referred as Thome V. Further, that the lease in respect of the suit property commenced on 1st January 1999 and a certificate of title was issued to Joreth Limited on 6th April 2011.

The Defendant maintained that LR No. 13330/246 had already been sold to him by the time the plaintiff claims to have purchased the same and was only awaiting preparation of transfer documents from Joreth Limited for his execution and therefore, that any purported sale and issuance of a certificate of title pursuant to that transaction was fraudulent. The Defendant reiterated that he has been in continuous occupation since 1989 to date and as evidence annexed letter authored by his neighbours to this effect to his replying affidavit.

The parties filed written submissions in which they reiterated the above facts and the Plaintiff's counsel in submissions dated 21st May 2013 argued that the Defendant having admitted that Joreth Limited are the owners of the suit premises and that he had offered to purchase the suit premises from the said company

and was in the process of completing payment, he cannot be said to be an adverse possessor. Counsel for the Plaintiff submitted that there is no survey report to show that the plots bought by the Defendant from his father are the same as the suit premises. Further, it was stated that the Defendant lacks *locus standi* and is not entitled to the suit premises since his father neither executed a transfer in his favour nor a power of attorney to transfer his interest in the property in the Defendant.

Counsel for the Plaintiff referred the court to the case of **Giella -vs- Cassman Brown & Co. Ltd (1973)EA 358** and submitted that the Plaintiff had proved that she was the registered owner of the suit premises having purchased the same and paid a sum of Kshs 8,000,000/- where upon a title deed was issued to her. The Plaintiff through her advocate stated that if she loses the land, she will suffer irreparable loss and damage which cannot be compensated in damages. It was further submitted that the balance of convenience lies in favour of the Plaintiff who is the registered owner of the suit premises since the Defendant has threatened to interfere with the land when he is not the owner. Counsel contended that the Defendant would not suffer any prejudice if the order for injunction is granted because the purported agreement for sale makes provision for refund of the purchase price in the event of breach.

The Plaintiff has contended that she was an innocent purchaser for value without notice since at the time of purchase, there was no encumbrance on the suit property. Counsel contended that the authority cited by the Defendant where a party was held to be in adverse possession was not applicable in the present case since the Defendant has been pursuing a purchase of the property with the previous owners and further, that there is no pending claim for adverse possession filed by the Defendant. The Plaintiff relied on the case of **Kim Pavey & others -vs- Loise Wambui Njoroge & anor(2011)eKLR** where the court stated that time which has begun to run under the Limitation of Actions Act is stopped either when the owner asserts his rights or when his right is admitted by the adverse possessor.

The Defendant's counsel submitted in his written submissions dated 27th May 2013 that the Defendant had adequately demonstrated that he had been in possession since 1989 and is still in possession. It is the Defendants contention that the possession was adverse so as to entitle him rights of ownership by virtue of the doctrine of adverse possession.

Counsel for the Defendant further submitted that since the Plaintiff has never utilized nor possessed the suit property which has been in the hands of the Defendant since 1989, the property does not have any special value to the Plaintiff except the purchase price of Kshs 8,000,000/- which can be refunded by Joreth Limited who have been enjoined in these proceedings. The Defendant argued that damages will be a sufficient remedy in the circumstance of this case. Lastly, it was submitted that the current status quo which has subsisted since 1989 is that the Defendant has been in occupation and therefore, that the balance of convenience favours the maintenance of status quo as the parties litigate on substantive issues through a full trial.

The issue that falls to be determined is whether on the facts, evidence and circumstances as outlined and discussed above the plaintiff is entitled to the order of injunction sought. The plaintiff for her part has established that she is the registered owner of the suit property having purchased the same from Joreth Limited. The plaintiff's rights as a registered proprietor under Section 25 of the Land Registration Act, Act No. 3 of 2012 are subject to leases, charges and other encumbrances as well as overriding interests. The defendant contends that he has acquired rights of ownership by virtue of being in adverse possession and hence an issue does arise whether or not he has acquired an overriding interest over the title. The fact that the defendant admits that he was in the process of purchasing the suit land puts to question his claim of adverse possession as this would negate the claim of being an adverse possession.

However, on the evidence and material presented before the court there is credible evidence that the defendant is in possession of the suit land or part of it as can be discerned from copies of the photographs showing what is stated to be damaged livestock sheds which must have belonged to the defendant. As the matter stands now both the plaintiff and the defendant are staking claim of ownership to the suit property. While the plaintiff has established a prima facie case that has a probability of success based on the evidence of ownership being the registered owner as per the certificate of title, the court also notes that there is credible evidence that the Defendant may be in occupation and/or possession of the suit land

and/or portion of it and granting an injunction in the terms sought by the plaintiff may amount to conferring the right to the plaintiff to evict the defendant without the suit being heard and determined.

An order for eviction can only be granted where a mandatory injunction is sought which is not the case in the present application and/or after the suit is heard and determined and a party is decreed as the owner as opposed to the other claimant or party. In the present matter I acknowledge there is a need to preserve the suit property until the matter is heard and determined and given the circumstances of the case the order that commends itself to the court and in order to do justice to all parties is that parties should observe and maintain the present status quo obtaining on the ground and specifically the court directs and orders that:-

- i. Both parties do maintain the present status quo where no party shall carry out any further developments on the suit property of whatever nature.
- ii. In case the Defendant is in possession such possession to be permitted to continue until the suit is finally heard or determined.
- iii. The parties should fast-track the preparation of the suit for hearing by ensuring compliance with order 11 of the Civil Procedure Rules for the suit to be heard on a priority basis.
- iv. The costs of the application to be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant