



IN THE HIGH COURT OF KENYA

AT NAKURU

ENVIRONMENT AND LAND COURT

HCC NO 243 OF 2012

JOEL KOMU WAINAINA APPLICANT

VERSUS

DANIEL WAWERU NDUATI.....RESPONDENT

RULING

By a Notice of Motion dated 13th July, 2012 brought under order 40 rule 1, 2, 4, order 51 rule 1, 3(1) of the civil procedure rules, 2011 and section 3A, 1A and 1B of the civil procedure Act, the applicant, Joel KomuWainainaseeks the following orders among others:

1. That pending the hearing and determination of this suit this honorable court be pleased to issue an order of temporary injunction restraining the defendant by himself, his agents and servants from entering, trespassing, cutting down trees, erecting structures, selling, transferring, alienating, disposing, tilling, cultivating, leasing or in any way interfering with the subject parcel of land known as Subukia/ Subukia Block 13/1804(Kianwe) ("suit land") and a copy hereof be served upon the OCS SubukiaPolice station for effective compliance.
2. That costs of this application be provided.

The grounds upon which the application is premised are found in the body of the application, supporting and supplementary affidavits sworn by Joel Komu Wainaina on 13th July 2012 and 30th July 2012.

The applicant's case is that he is the registered owner of the suit land measuring 0.8094 hectares having been issued with a title deed on 9th May, 2012: That sometime thereafter upon visiting his land, he found that the respondent had entered the suit land and started cultivating without his consent: That when he conducted a search in the lands registry, it revealed that he was still the registered owner:That the applicant was therefore very shocked when the respondent reported to the Police that the applicant had falsified some documents and caused malicious damage leading to the applicant's arrest: That the respondent together with the Assistant Chief Kandie sublocation, intimidated and forced him to sign an agreement that he owed the defendant one acre before he could be released on bond: That it has now become difficult for him to access his land where he intends to erect a family home andcultivate causing him damage and loss.

Daniel NduatiWaweru the respondent herein, swore a replying and a further affidavit on 27th July,2012 and 2nd August,2012.He strenuously opposed the application and deponed that the applicant had concealed vital information therefore guilty of material non disclosure: That he is the lawful unregistered

owner of the suit land excised from Subukia block 13/411 having bought 11/2 acres of land from Simon BusyekaThumbi : That when he went to take possession he found that the vendor had sold to the plaintiff his 1/2 acre, so he took possession of the remaining 1 acre, started cultivating, put up a semi permanent house and a pit latrine: That on 30th April,2012 he received a letter from the applicant telling him that he had trespassed on his land and thereafter embarked on destroying his fence prompting the respondent to report the matter to the Police:That they were both summoned to the Police station where they held a meeting in the presence of the OCS, Chief Kianoe and three village members where it emerged that the applicant had processed one title capturing his portion of land and that of the respondent's and had charged the title to Equity bank to obtain a loan: That the applicant also confirmed that the respondent had been in occupation of the suit land since 2004: That after it emerged that the applicant had obtained the title fraudulently and he could face criminal charges the applicant pleaded with the respondent not to press charges and he would in exchange return the respondent's land and signed an agreement drafted by the chief without any coercion .

I have considered the application, affidavits sworn in support of each of the rival parties. Being an application for temporary injunction, the strictures enunciated in the famous **Giella V Cassman Brown & Company Limited (1975) EA 358** and later in the **Kenya Commercial Finance Company Limited V Afraha Education Society (2001) 1 EA 8** must be satisfied.

First, the applicant must show that he has a *prima facie* case with a probability of success, secondly, it must be demonstrated that the applicant might suffer irreparable injury if the injunction is not issued and thirdly, should the court be in doubt, it will decide the application on a balance of convenience. These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the applicant has a *prima facie* case.

In considering whether the applicant has established a *prima facie* case, I shall not dwell on the merits of the case but merely look to see whether the applicant's right has been violated by the respondent.

In support of his case, the applicant has exhibited a title deed in his name for the suit land, a certificate of official search, an agreement dated 6th July, 2012 between him and the respondent authored by the chief Kianoesub locationand a cash bail receipt. The applicantclaims that being the registered owner of the suit property, his interest in the suit property is indefeasible. His aforementioned contention is based on Section 27and 28 of the Registered land Act, Chapter 300 laws of Kenya (repealed). The **sections proves:-**

“(27) Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with allrights and privileges belonging or appurtenant thereto;

(b).....

28. The right of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a)to the lease, charges and other encumbrances and to the conditions andrestrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require Noting on the register ,Provided that nothing in this section shall be taken to relieve a proprietor from any duty obligation to which he is subject as a trustee.

Similarly, the respondent has exhibited a sale agreement dated 25th September, 2004 between him and Simon Busyeka Thumbi for the purchase of 11/2 acres to be excised from plot no. Subukia/ Subukia Block 13/411, some photographs, a demand letter from the plaintiff's counsel dated 30th April, 2012, a letter in response to the demand letter dated 2nd July, 2012 and a letter from equity bank showing the suit land was being held as security by them.

The contention by the applicant is contested by the respondent who has averred that the applicant's title was fraudulently obtained and that its ownership is subject of his unregistered interest thereto (as a person in possession or occupation of the suit land).

It is common ground that the applicant is the registered owner of the suit land. As such, he is *prima facie* the indefeasible owner of the suit land, together with all privileges and appurtenances thereto. However, I hasten to point out that unless there is evidence to the contrary the applicant's rights in the suit land are by dint of the provisions of section 30 of the Registered Land Act (which governed the suit property when registration was effected) subject to overriding interest that may affect the property even though not noted in the register.

Such overriding interests are expressed under Section 30 (supra) to include the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed. See section 30 (g) of the Registered Land Act.

Whereas the applicant is *prima facie* the owner of the suit land, there is evidence that the respondent did purchase land from Simon Busyeka Thumbi, the same person who sold the land to the applicant and that the respondent is in occupation of the suit property. The applicant, through paragraphs 3, 8, 9 and 12 of the affidavit he swore on 13th July, 2012 has admitted that the respondent is in occupation of the suit land.

As the court when considering whether or not to grant a temporary injunction is not supposed to make any definitive finding on issues of law and fact, from the affidavit evidence, I find as a fact that the applicant's ownership of the suit property is subject to the respondent's rights as a person in occupation. Whereas the applicant is seeking an injunction to restrain the respondent from entering, trespassing, cutting down trees, erecting structures, selling, transferring, alienating, disposing, tilling, cultivating, leasing or in any way interfering with the subject parcel of land it is clear from the affidavit evidence that by the time he came to court the respondent was already in possession of the suit property. See Yego V Tuiya & another 91986) KLR 726 where the Court of Appeal held:-

“the order of the judge requiring the appellant to deliver up vacant possession of the land exceeded the terms of the respondents' application, and under the civil procedure Rules order XXXIX Rule 1, this was not a proper thing to do.”

Also see Esso (K) Ltd V. Mark Makwata Okiya civil appeal No. 69 of 1991 where the court of Appeal held:-

“ the purpose of Injunction is to maintain status quo. Injunctions are not to be granted if the event meant to be restrained has taken place; and courts should not grant orders not prayed for.”

Although this court initially granted an interim order in favor of the applicant, it is not bound to follow its decision where facts emerge in a different light. See Uhuru Highway Development Ltd V. Central Bank of Kenya Civil Appeal No. 140 of 1995 the Court of Appeal held;

“ views expressed by a court at an interlocutory stage are not binding on the trial court as facts may emerge in a different light, or views may change or the court may not follow its own decision when found to be wrong. Concluded views can only be expressed on facts not in

dispute, facts which stand out as clear as day light.”

From the affidavits presented in this application it is clear that by the time the applicant went to court the suit land had been the subject of a protracted dispute between the applicant and the respondent. Having found that the respondent was in occupation when the applicant went to court and there being no evidence to prove that he was not in occupation when the property was registered in the name of the applicant, I decline to grant the order sought.

The upshot of the foregoing is that the plaintiff's application dated 13/7/2012 is dismissed with costs.

Dated, Signed and delivered in open Court this 14th day of August 2013.

L N WAITHAKA

JUDGE

Present

Ms Said holding for Njeri Njagua Defendant

N/A for plaintiff

Stephen Mwangi: Court Clerk

L N WAITHAKA

JUDGE