



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ENVIRONMENT AND LAND COURT
ELC CASE NO. 614 OF 2013

JULIUS NGIGI MUNJUGAPLAINTIFF

VERSUS

THE CHAIRMAN BOARD OF GOVERNORS

MURANG'A COLLEGE OF TECHNOLOGY

PRIMARY SCHOOL

Through the CHAIRMAN, SECRETARY AND TREASURER.....
DEFENDANT

RULING

By his plaint filed herein on 17th June 2013, the plaintiff who described himself as the rightful and registered owner of the parcel of land known as MURANG'A MUNICIPALITY BLOCK 11/257 sought orders directing the defendant to remove all fencing around the said property hereinafter referred to as the suit property as well as a permanent injunction to restrain the defendant by itself, its servants, agents or anyone acting through it from trespassing, encroaching, entering or taking possession of the said suit property. The plaintiff also sought damages for trespass as well as the usual other remedies. Simultaneously with the filing of that plaint, the plaintiff sought injunctive relief to restrain the defendant from interfering with his enjoyment of the suit property. The said application was supported by the plaintiff's affidavit in which he deponed, inter alia, that he is the registered owner of the suit property and annexed a copy of the certificate of lease (annexture *JNM 1*) adding that the defendant who are his neighbour have without justification fenced off the suit property and are now in the process of developing it.

The application is opposed and by his replying affidavit HARRISON MWANGI MWITHIGA who is the Chairman of the defendant denies that there are plans to develop the suit property and that in any event, the plaintiff has never been in possession of the suit property which is part of the open field used by children of Technology Primary School and to deny the defendant that field would be a denial of the defendant's rights under the Constitution. It is further deponed that the defendant has used the property for over 28 years and has therefore acquired it by adverse possession and in any case, the plaintiff has ceded the suit property to the defendant.

However, in a further affidavit, the plaintiff denies having ceded the suit property to the defendant saying he still has the original certificate of lease in respect to the property.

Counsels for both parties have filed written submissions which I have considered together with the rival affidavits and annextures.

This being an application seeking injunctive relief, it will be considered within the principles set out in the case of GIELLA VS CASSMAN & CO. LTD 1973 E.A 358 which are that:-

- a. ***The applicant must show a prima facie case with a probability of success***
- b. ***The applicant must show that unless the injunction is granted, he will suffer irreparable injury and,***
- c. ***Where the Court is in doubt, it will decide the application on the balance of convenience.***

It is not in dispute that the suit property is registered in the names of the plaintiff/applicant. The certificate of lease issued to him (annexture *JNM 1*) is under the now repealed **Registered Land Act** and under **Section 28 of the said Act**, the plaintiff/applicant's rights cannot be defeated except as provided for under that Section and **Section 30** – Nowhere in the defence or the replying affidavit has it been suggested that the plaintiff/applicant holds the suit property in trust for the defendant/respondent or that the defendant/respondent enjoys any of the rights enumerated in **Section 28 and 30 of the Registered Land Act** with respect to the suit property. The registration of the suit property in the plaintiff/applicant's names therefore vests in him the absolute ownership of the land together with all the rights and privileges belonging or appurtenant thereto as provided for under **Section 27 of the repealed Registered Land Act**. Similar provisions are found in **Section 24, 25 and 28 of the new Land Registration Act 2012**. On that evidence, it is clear to me that the plaintiff/applicant has established a prima facie case to warrant the granting of the orders sought.

The defendant/respondent while not exhibiting any document of ownership of the suit property has nonetheless annexed to the affidavit of its Chairman Mr. Harrison Mwithiga, various documents including a letter from the District Commissioner Murang'a to the effect that there was a need to acquire additional land for the defendant and part of the land identified is the suit property which belongs to the plaintiff/applicant who will then be ***“given equivalent plots on the opposite side of the road or any other site which they will prefer”*** - see letter dated 12th March 1990. This was followed by a letter dated 15th March 1990 from the Town Clerk Murang'a Municipal Council addressed to the plaintiff/applicant expressing the council's intention to acquire his property and compensate him with another property. However, there is no evidence that the plaintiff/applicant was ever compensated with another plot and indeed on 4th February 2009, he wrote to the council asking it to show him the alternative plot. From the defendant/respondent's own annextures which show that Development plans for the defendant/respondent are ready and affect the suit property, it is clear that if the defendant develops the property, the plaintiff/applicant will suffer irreparable loss as it is not clear what the defendant proposes to put on the suit property. There is no evidence that the plaintiff/applicant's property has been legally acquired as provided for under the **Land Acquisition Act Cap 295 Laws of Kenya** and neither is there any evidence demonstrating that the plaintiff/applicant has ceded his right to the suit property. There may have been an intention to acquire the suit property for the expansion and development of the school which is no doubt a noble intention. Indeed the plaintiff/applicant appears to be ready and willing to give up the suit property if he is compensated with the alternative plot that was promised to him. However, before that is done, the defendant/respondent are clearly violating the plaintiff/applicant's rights over the suit property and ought to be enjoined.

The replying affidavit of the defendant's Chairman suggests that the defendant has been in occupation of the suit property for 28 years since 1985 and has therefore acquired the same by way of adverse possession. Only a Court can declare a party to have acquired ownership of property by adverse possession. A party cannot make a unilateral decision declaring himself to have acquired ownership of another's property by adverse possession no matter how long he has occupied the property in question. Only a Court of law is vested with the powers to make such a declaration and therefore the assertion in paragraph 14 of the replying affidavit of Mr. Harrison Mwithiga that the defendant ***“has a right to the land by way of adverse possession”*** is clearly misplaced and cannot be a serious averment.

Ultimately therefore, upon considering all the material placed before me, I am satisfied that the plaintiff/applicant is entitled to the orders sought in his Notice of Motion dated 17th June 2013 and I accordingly grant him the prayers sought therein together with costs of the application.

B.N. OLAO

JUDGE

19TH SEPTEMBER, 2013

19/9/2013

Coram

B.N. Olao – Judge

CC – Muriithi

No appearance for Applicant

Mr. Gitonga for Mbuthia for Respondent present

COURT: Ruling delivered this 19th day of September 2013 in open Court.

B.N. OLAO

JUDGE

19TH SEPTEMBER, 2013