



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 501 OF 2013

AHMED IBRAHIM SULEIMAN AND ANOTHER.....PLAINTIFF

VERSUS

NOOR KHAMISI SURUR.....DEFENDANT

RULING

The Plaintiff by a notice of motion application dated 25th April 2013 filed in court on the same date inter alia seeks the following orders:-

1. That this Honourable court be pleased to issue an order of eviction against the defendant from all that parcel of land known as **Nairobi/Block 61/69**.
2. That this Honourable court be pleased to grant an order of injunction restraining the Defendant from interfering with the Plaintiffs quiet possession and from trespass on the suit property.
3. That this Honourable court be pleased to issue a mandatory injunction to compel the Defendant to give vacant possession to the Plaintiffs of all that parcel of land known as **Nairobi/Block 61/69**
4. That this Honourable court be pleased to issue a permanent injunction against the Defendant from interfering with or in any way dealing with the Plaintiffs property described as **Nairobi Block 61/69**.

The Plaintiffs premise the application on the grounds that:-

1. That the Plaintiffs are the registered owners/proprietors of the suit property having bought the same in the year 2012 from one **Jemia Ismael** and the title documents thereto transferred to the Plaintiffs as joint owners.
2. That at the time of the said transfer, the Defendant was in occupation of the suit property herein but had given an undertaking to vacate the said property and give vacant possession thereto but the Defendant failed to honor the undertaking to vacate and still occupies the Plaintiffs property to date.
3. That the Plaintiffs deserve to take over management and occupation of their property in a beneficial manner as the same is charged to a bank and the failure by the Defendant to give vacant possession of the said property is causing untold misery to the Plaintiffs as they are straining to pay up the loan installments monthly whereas they do not get any proceeds from their property.

The Plaintiff's application is further supported on the grounds contained in the supporting affidavit sworn by **Ahmed Ibrahim Suleiman** on 25th April 2013 and the further Affidavit sworn on 28th May 2013. The supporting affidavit and the further affidavit set out in detail how the Plaintiffs acquired and got to be registered as the proprietors of the suit property.

The Defendant has filed a replying affidavit sworn on 15th May 2013 in opposition to the Plaintiff's application for mandatory injunction. The Defendant avers that he and his family reside in the suit property and states that the suit property was registered in trust in the names of his mother **Jemia Ismael**. The Defendant avers that as the eldest son of his mother, he has unfettered interest in family matters and more specifically where the sale of family property such as the suit property where he actually resides is concerned. The Defendant further avers that he registered a caution over the suit property to protect his interest as beneficiary and that when the Land Registrar vide letter of

13th December 2011 marked "NKS 3" annexed to the replying affidavit gave notice of intention to remove the caution the Defendant promptly vide his letter dated 17th January 2012 annexed as "NKS4 (a)" to replying affidavit objected to the removal of the caution but nonetheless the Registrar of Lands proceeded to remove the caution and subsequently registered the transfer in favor of the Plaintiffs without giving the Defendant a hearing on his objections.

The Plaintiffs by the further affidavit clarified that one **Jemia Ismael** who was the Defendant's mother was the sole registered owner of the suit property before selling the same to the Plaintiffs and that she had bought the suit property through a loan from the **Ministry of Housing**. The Plaintiffs contended that the said **Jemia Ismael** was not holding the property in trust for the Defendant. It is the Plaintiff's assertion that the said **Jemia Ismael** rightly and properly transferred the suit property to the Plaintiffs who now the registered owners have absolute rights of ownership and their rights and interests are in terms of section 25(1) of the **Land Registration Act No. 3 of 2012** are indefeasible. That the said **Jamia Ismael** as the previous registered owner under the Registered Land Act, cap 30 Laws of Kenya (repealed) had unfettered rights as the absolute owner of the suit property to deal with the suit property howsoever she pleased.

On the claim that the Defendant's caution was improperly removed the Plaintiffs counter that the caution was procedurally removed after due notice to the Defendant after failure by the Defendant to comply with the terms of the notification. The response by the Defendant to the Registrar was filed out of time and hence the **Land Registrar** was not obliged to have any regard to the same.

The parties have filed written submissions in support of their respective positions. For the Plaintiff the main thrust of the Plaintiff's submissions is that the Plaintiffs lawfully purchased the suit property and are the registered owners and as such are entitled to enjoy all the rights conferred by ownership. The Plaintiffs submit the previous owner was the sole registered owner of the suit property having purchased the same from the **National Housing Corporation** and therefore had the power to transact with and/or transfer the suit property. The Defendant's allegation of trust is unsubstantiated and no evidence of any trust has been tendered. It is the Plaintiffs submission that the Defendant is illegally trespassing and in occupation of the suit property in disregard of the law and sanctity of ownership by the Plaintiffs.

The Plaintiff further submits that the registration of the transfer of the suit property in favour of the Plaintiffs conferred upon the Plaintiff's absolute ownership rights and privileges in terms of section 24 and 25 of the **Land Registration Act No. 3 of 2012** and that these rights are indefeasible unless it is proved that the registration of the title was obtained through fraud or misrepresentation to which the person is proved to be a party or if the title was acquired illegally, unprocedurally or through a corrupt scheme within the meaning of section 26(1) (a) and (b) of the **Land Registration Act No.3 of 2012**.

The Plaintiffs have referred me to the cases of **JOEL KIPCHIRCHIR KITUR –VS- DAVID KIMUTAI LANGAT AND ANR [2006]** and **GLADYS WANJIRU KIRUBI –VS- JOHN KANGETHE KIBE [2005]** eKLR where both **Judges L.Kimaru** and **J.M. Khamoni** respectively issued orders for the eviction of defendants from parcels of land registered in favour of the Plaintiffs having found that the Defendants were in unlawful occupation of the parcels of land and therefore were

trespassers. The Judge however made the findings after fully hearing the cases and not at the stage of an interlocutory application.

The Defendant for his part submits that the Plaintiffs have not satisfied the threshold for the grant of injunction as enunciated in the principles set out in **GIELLA-VS- CASS BROWN & CO LTD [1973] EA 358**. The Defendant reiterates his averments in the replying affidavit and further contends that the Plaintiff's application seeks interim orders which in reality if granted would amount to granting final orders without hearing the parties on the merits of the suit. The Defendant submits the grant of the interim orders of injunction sought which are in the nature of mandatory injunctions would prejudice and occasion injustice on the Defendant as the court would be rendering a final decision on an interlocutory application without hearing the parties at the trial.

I have in brief set out the parties respective rival positions in this matter and what stands to be determined is whether in the circumstances of this case the Plaintiffs would be entitled to the injunctive relief sought which indeed are in the nature of mandatory orders and which if granted would virtually dispose this suit at the interlocutory application stage.

The Plaintiffs have demonstrated that they are the registered owners of the suit property following the successful purchase of the property from the previous registered owner **Jemia Ismael**. The Plaintiffs have furnished a copy of the Agreement for sale, land rent clearance certificate, consent to transfer, duly executed transfer and the registered title documents to the suit property together marked as "**AIS-6**" and annexed to the further affidavit of **Ahmed Ibrahim Suleiman** dated

20th May 2013. I am satisfied that the Plaintiffs regularly and procedurally purchased the suit property and that upon registration of the transfer in their favour, the Plaintiffs under the provisions of section 24 of the Land Registration Act became vested with the absolute ownership of the suit property and further under section 25 of the Act the rights of ownership acquired by the Plaintiffs are indefeasible except as provided under the Act.

Section 25(1) of the Land Registration Act provides as follows:-

25. (1) *The rights of a proprietor whether acquired on first registration or 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-*

- 1. *To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***
- 2. *To such liabilities, rights and interests as affect the same and are declared by section 28 not to noting on the register unless the controversy is expressed in the register.***

The Plaintiffs having been registered as proprietors and having been issued with a certificate of lease over title **No. Nairobi/Block 61/69** are in terms of section 26 (1) of the **Registration of Lands Act entitled to the protection of the law.**

26 (1) *The certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except-*

- 1. *On the grounds of fraud or misrepresentation to which the person is proved to be a party, or***
- 2. *Where the certificate of title has been seen acquired illegally, unprocedurally or through a corrupt scheme.***

The Defendant's claim that his mother who was the previous owner of the suit property was holding the

property in trust is not substantiated. Indeed the contrary appears to be the case as there is evidence to the effect that **Jemia Ismael** purchased the property in her name through a loan from **National Housing**. The fact of occupation of the suit property by the Defendant alone cannot create a trust. Evidence has been tendered that the previous owner had requested the Defendant to vacate the suit premises which the Defendant had agreed to do in March 2010 but declined to vacate. I do not consider that on the material placed before the court there is any basis for the claim by the Defendant that there was a trust. At any rate the existence of a trust was not noted against the register of the title.

On the issue of the caution that the Defendant claims to have been irregularly removed by the Land Registrar I would like to observe that the registration of a caution alone cannot create a registrable interest where there was none. The essence of registering a caution or a caveat is to act as a stop gap measure to enable the cautioner or caveatee to initiate action to establish his or her interest. The removal of the caution in the instant matter appears to have been regular since the Defendant did not file the objection within the time allowed in the letter by the Land Registrar dated 13th December 2011 which provided for 30 days. The Defendant lodged his objection on 17th January 2012 which fell outside the 30 days allowed. As per the Land Registrar's notice the period for lodging the objection lapsed on 12th January 2012.

The Plaintiffs became registered as proprietors of the suit property for valuable consideration on 18th May 2012 when simultaneously with the registration of the transfer in their favour, a charge in favor of **K-REP BANK LIMITED** for **Kshs. 2,200,000** was also registered against the property such that the Bank now also has a registered interest against the property. The Plaintiffs are servicing the Bank loan notwithstanding that they are not utilizing the property. It is my view that following the transfer and registration of the Plaintiffs as the owners of the suit property, the defendant continued in occupation of the suit property at the will of the Plaintiffs and upon being requested to vacate the property he was obligated to do so. Such a notice to vacate the suit property was given to the Defendant on 8th October 2012 through the Plaintiffs Advocates whereby the Defendant was instructed to vacate the premises and handover vacant possession to **M/S Muigai Commercial Agencies** within 7 days from the date of the notice. The Defendant did not yield possession as demanded and hence his continued occupation after the expiry of the notice was unlawful and could only have been in occupation as a trespasser.

I have in my analysis of this matter come to the conclusion that the Plaintiff are registered as the rightful owners of the suit property and that the Defendant has no valid claim against them. The Plaintiffs title in my view is regular and the same is in terms of sections 25 and 26 of the Land Registration Act indefeasible. The Plaintiffs title can only be challenged on the limited grounds set out under section **26 (1) (a) & (b)** that is fraud or misrepresentation and/or if it is shown the title has been acquired through a corrupt scheme. The Defendant has not established any fraud and/or illegality to which the Plaintiffs were a party. The documentation tendered by the Plaintiffs shows that they procedurally carried out the transaction until they were registered as the owners.

The Plaintiffs have sought both a prohibitive and mandatory injunctive relief. On the question of the prohibitive injunction the threshold for its grant is as enunciated in the **GIELLA-VS- CASSMAN BROWN** case (supra) principles and I am satisfied without doubt that the Plaintiffs have established a prima facie case with a probability of success. The Plaintiffs have acquired the suit premises which they have charged to **K-Rep Bank Ltd** and are servicing a mortgage and I do not think damages would be an adequate remedy in the event the injunction is not granted and the Plaintiffs are successful at the trial.

The test for granting a mandatory injunction is on a higher threshold than in the case of prohibitive injunctions and the Court of Appeal in the case **KENYA BREWERIES LTD –VS- WASHINGTON OKEYO (2002) IEA 109** had occasion to discuss and consider the principles that govern, the granting of mandatory injunctions. The court of Appeal held that the test for grant of a mandatory injunction was correctly stated in **Vol. 24 Halsbuty Laws of England, 4th Edition para 948** that provides:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear

and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the Plaintiff, a mandatory injunction will be granted on an interlocutory application”

In the English case of **LOCABAIL INTERNATIONAL FINANCE LTD –VS- AGRO- EXPORT & ANR [1986] I ALL ER 901** which our court of Appeal has followed in its decisions the court held:-

“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than was required for a prohibitory injunction.”

The court of Appeal quoted the above passage in the **Locabail** case (*supra*) with approval in the case of **SHARIFF ABDI HASSAN –VS- NADHIF JAMA ADAN (Civil appeal No. 121 of 2005) 2006 eKLR** where the court further observed:-

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to the property.”

The court of Appeal further in the case of **JAJ SUPER POWER CASH AND CARRY LTD –VS- NAIROBI CITY COUNCIL & 20 OTHERS**

(CIVIL APPEAL NO. 111 of 2002) stated thus:-

“This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

It is my considered view that the Plaintiffs case herein passes the tests outlined in the above authorities referred to for the grant of a mandatory injunction. On the facts of this case the Plaintiffs case is plain and clear. They are the registered owners and their title is indefeasible. The Defendant in my view cannot have an answer to the Plaintiffs claim as he had no role to play in the sale and purchase of the suit property and his claim of a trust against his mother who was the vendor at best would be farfetched and it is unsubstantiated. There are special circumstances in the Plaintiff’s case in that the Plaintiffs following the acquisition of the property have charged the property to Krep Bank Ltd and are servicing the Bank loan. The Defendant cannot occupy the suit property rent free when the Plaintiffs paid for it and are servicing a loan on the property yet they are not receiving any benefit out of it. The suit property constitutes security for the loan and the Defendant is in occupation of the suit premises as a trespasser and the Plaintiffs are entitled to have him evicted if he does not vacate voluntarily.

The Plaintiffs case is plain and clear and in my view no purpose will be served by not determining the issue whether or not the Defendant is a trespasser in the suit premises at this stage rather than delaying the Defendant’s day of reckoning. The delay in determining the question will only serve to delay meting justice to the Plaintiffs who have in my view demonstrated they are the rightful owners of the suit premises. I will not allow the Defendant the luxury of delaying justice to the Plaintiffs when it has become clear to me that the Defendant is in trespass in the Plaintiffs property. The court is enjoined under the constitution, the civil procedure act and even under the Environment and Land court act to administer justice in a just expeditious, proportionate and cost effective manner t all litigants. The justice of this matter demands that I make a determination of this matter at this stage.

In the premises, I allow the notice of motion by the Plaintiff dated

25th April 2013 and order that the Defendant do vacate from the suit premises within 30 days from the date of being served with this order failing which an order of eviction against the Defendant is to issue upon application by the Plaintiffs.

The costs of this application are awarded to the Plaintiffs.

Orders accordingly

Ruling Dated, Signed and Delivered at Nairobi

This 31st day of October 2013

J. M. MUTUNGI

JUDGE

In presence of

.....Plaintiff

.....Defendant