



No. 168

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIROMENT & LAND COURT CASE NO. 305 OF 2012

1. ISAAC ONWONG’A MARIERA

2. ISAAC ONWONG’A MARIERA suing as personal representative

of the estate of Pastor Sospeter Mariera Oongo.....PLAINTIFFS

VERSUS

1. ABEL MORANGA OGWACHO

2. THE LAND REGISTRAR, KISII COUNTY

3. THE HONOURABLE ATTORNEY GENERAL..... DEFENDANTS

RULING

1. I have before me two applications both brought by the Plaintiffs. The first application was brought by way of Notice of Motion dated 8th August, 2012. The principal prayer sought in that application was an order of injunction to restrain the 1st defendant from encroaching upon, disposing, selling, leasing, charging, pledging, transferring, alienating or in any manner dealing with the title of all that parcel of land known as LR. No. Kisii Municipality/ Block III/240(hereinafter referred to as “the suit property”) pending the hearing and determination of this suit. On 30th January, 2013, the parties agreed to argue the said application by way of written submission. On 9th October, 2013, I fixed the application for ruling on 24th January, 2014 after both parties had put in their written submission. I made a further order that pending my ruling on the matter; the parties should maintain the status quo. The Plaintiffs’ second application was brought on 22nd October, 2013 by way of a Notice of Motion application dated 19th October, 2013. This application sought an order that pending the delivery of my ruling on the first application dated 8th August, 2012, on 24th January, 2014, an order of injunction should issue restraining the 1st defendant from encroaching upon, undertaking development of any kind, leasing, charging, wasting, alienating or in any manner dealing with the title of the suit property. The Plaintiffs also sought an order for the citing of the 1st defendant for contempt of court for disobeying the status quo order that the court had made on 9th October, 2013. The Plaintiffs’ second application was brought on the ground that after the court had fixed the first application for ruling on 24th January, 2014 and ordered the parties to maintain the status quo, the 1st defendant entered the suit property and commenced construction works thereon which to the Plaintiffs amounted to contempt of court. This second application came up for hearing on 7th November,

2013 when the advocates for the parties made oral submissions. Since this application is related to the first one dated 8th August, 2013, I informed the parties that I would rule on the two applications together. In that regard, I would start with the application dated 8th August, 2012.

2. The Plaintiffs brought this suit against the defendants on 9th August, 2012 seeking among other reliefs, a declaration that the registration of the 1st defendant as the proprietor of the suit property and the issuance to him of a certificate of lease by the 2nd defendant is a nullity *ab initio*, an order compelling the 2nd defendant to cancel the registration of the 1st defendant as the leasehold proprietor of the suit property, a permanent injunction restraining the 1st defendant from encroaching upon, disposing, selling, leasing, charging, pledging, transferring, alienating or in any manner dealing with the suit property, a mandatory injunction compelling the 1st defendant to remove forthwith the fence that the 1st defendant has erected around the suit property and general damages for trespass to be assessed by the court. Together with the plaint, the Plaintiffs filed the application dated 8th August, 2012 in which they sought interlocutory injunction the terms of which I have set out herein above pending the hearing and determination of this suit. The application was brought on the grounds set out in the body thereof and on the affidavit of the 1st Plaintiff sworn on 8th August, 2012. The Plaintiffs' application was brought on the grounds that; at all material times, the Plaintiffs were the registered leasehold proprietors of the suit property. The Plaintiffs purchased the suit property from one, Fredrick Ayienda Makoyo (hereinafter referred to as "**Makoyo**") sometimes in the year 1984 and had the property transferred to their names on 5th March, 2003. Upon the suit property being transferred to the Plaintiffs by Makoyo, they were issued with a certificate of lease on the same date. The Plaintiffs have been receiving demand notices for rates and ground rent from the Municipal Council of Kisii since the suit property was registered in their names which they have been settling promptly. On 5th March, 2011, the 1st Plaintiff who was out of the country was notified that the 1st defendant was fencing off the suit property. Following this incident, the Plaintiffs carried out a search on the title of the suit property which revealed that the 1st defendant was purportedly the registered as the proprietor of the suit property having been registered as such on 10th November, 2008 and issued with a certificate of lease on the same date. The Plaintiffs thereafter lodged a complaint with the Commissioner of Lands and the Police concerning the registration of the 1st defendant as the proprietor of the suit property. Following these complaints, a restriction was entered on the title of the suit property and criminal charges preferred against the 1st defendant. The Plaintiffs contended that the registration of the 1st defendant as the proprietor of the suit property was an act of fraud perpetrated by the 1st and 2nd defendants. The Plaintiffs contended further that Makoyo did not sell the suit property to one, **Nikora Isaboke Kingara** from whom the 1st defendant had alleged to have purchased the suit property. The Plaintiffs contended further that when Makoyo sold to the Plaintiffs the suit property, he handed over to them all documents of title and as such there was no way in which the suit property could have been sold to the said Nikora Isaboke Kingara again. The Plaintiffs contended that in his statement to the Police, one, **Joshua James Owuor**, a land registrar who is alleged to have registered the transfer of the suit property in favour of the 1st defendant and endorsed the 1st defendant's proprietorship of the suit property in the register denied having done so as he had retired from the public service when he is alleged to have registered the said document of transfer and made the endorsement. The Plaintiffs contended that the registration of the said Nikora Isaboke Kingara as the proprietor of the suit property was part of a scheme and was a prelude to the fraudulent registration of the 1st defendant as the proprietor of the suit property. The Plaintiffs contended that the acts complained were intended to disentitle the Plaintiffs of their interest in the suit property and that the orders sought are necessary to preserve the suit property pending the hearing of this suit. The Plaintiffs annexed to their affidavit in support of the application among others, a copy of the agreement for sale dated 5th June, 1984 that was made between the Plaintiffs and Makoyo, a copy of Makoyo's Certificate of Lease dated 26th January, 1981, copies of demands for rates made upon Makoyo by the Municipal Council of Kisii as at 1990 and receipts for payments made by Makoyo in response thereto, a copy of the Plaintiffs' Certificate of Lease dated 5th March, 2003, copies of land rates demands made upon the

Plaintiffs by the Municipal Council of Kisii and the receipts for the payments made by the Plaintiffs in response thereto, a copy of the White Card(not Green Card) for the suit property, a copy of the Certificate of Lease dated 10th November, 2008 in the name of the 1st defendant, copies of statements recorded with the police by, the Plaintiff, Makoyo, one, James Joshua Owuor, and one, Esau Aloo Odero, and a copy of a charge sheet through which the 1st defendant was charged in relation to his acquisition of the suit property.

3. The Plaintiffs' application was opposed by the 1st defendant. The 1st defendant swore an affidavit on 17th September, 2012 in reply to the Plaintiff's application. In his response to the application, the 1st defendant contended that the Plaintiffs' alleged title to the suit property is based on false documents and as such the same is misconceived. The 1st defendant contended that he is the lawful owner of the suit property having purchased the same from Nikora Isaboke Kingara to whom the suit property had been sold by the original leasehold proprietor, Makoyo. The 1st defendant contended that the said Nikora Isaboke Kingara executed an instrument of transfer of the suit property in his favour which was duly registered at the Lands Office, Kisii and a certificate of lease issued to him. The 1st defendant contended that upon being registered as the proprietor of the suit property, he took possession thereof and remained in such possession without any interference and/or adverse claims from any third party until March, 2011 when his workers who had gone to put up a fence around the suit property were chased away by the 1st Plaintiff. The 1st defendant contended that he is the lawful and bona fide registered owner of the suit property and that the parallel ownership documents held by the Plaintiffs are fraudulent and as such not legally tenable. The 1st defendant urged the court to dismiss the Plaintiffs' application as the injunction sought cannot issue against the 1st defendant to restrain him from dealing with his own property. The 1st defendant annexed to his replying affidavit, a copy of a transfer that is alleged to have been executed by Makoyo in favour of Nikora Isaboke Kingara dated 6th August, 1984, a copy of an instrument of transfer of lease dated 9th August, 1984 allegedly executed by Makoyo in favour of Nikora Isaboke Kingara, a copy of a transfer of the suit property dated 5th November, 2008 said to have been executed by Nikora Isaboke Kingara in favour of the 1st defendant, a copy of an instrument of transfer of lease dated 10th November, 2008 said to have been executed by Nikora Isaboke Kingara in favour of the 1st defendant, a copy of the certificate of lease dated 10th November, 2008 in the name of the 1st defendant, a copy of a certificate of official Search dated 3rd February, 2011 relating to the title of the suit property, a copy of the register of the suit property, a copy of the Rates Clearance Certificate dated 23rd February, 2011 and a copy of a letter dated 31st October, 2011 from the Commissioner of Lands.
4. As I had stated at the beginning of this ruling, the parties agreed to argue the application herein by way of written submissions. The Plaintiffs filed their submissions on 25th February, 2013 while the 1st defendant filed his submissions in reply on 6th May, 2013. I have considered the Plaintiffs' application together with the submissions filed herein by the advocates for the Plaintiff. Equally, I have considered the affidavit filed by the 1st defendant in opposition to the application and the submissions filed by the 1st defendant's advocates. This is the view that I take of the matter. The principles to be applied while considering an application for interlocutory injunction are well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for a temporary injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that unless the order sought is granted, he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. Applying the foregoing principles to this case, the question that I need to answer is whether the Plaintiffs have met the conditions necessary for granting the injunction sought. It is not in dispute that the suit property was registered in the name of Makoyo as the first leasehold proprietor thereof. What is disputed is ownership of the suit property subsequent to the registration of Makoyo as the proprietor of the same. Whereas the Plaintiffs and Makoyo claim that Makoyo had sold and transferred the suit property to the Plaintiffs on 5th March, 2003 at a consideration of Ksh.45,000.00, the 1st defendant on his part has claimed that the suit property was sold and transferred by Makoyo to one, Nikora Isaboke

Kingara on 9th August, 1984 at a consideration of Ksh. 250,000.00 and that the said Nikora Isaboke Kingara (hereinafter referred to only as “**Nikora**”) subsequently sold and transferred the suit property to the 1st defendant on 10th November, 2008 at a consideration of Ksh. 600,000.00. Both the Plaintiffs and the 1st defendant have certificates of Leases issued by the District Land Registrar, Kisii with respect to the suit property. The Plaintiffs’ Certificate of Lease was issued on 5th March, 2003 while the 1st defendant’s Certificate of Lease was issued on 19th November, 2008. The Plaintiffs claim that the 1st defendant caused himself through acts of fraud to be registered as the proprietor of the suit property. The Plaintiffs lodged a complaint against the 1st defendant with the police. The 1st defendant has been charged in court with several counts of making documents without authority and uttering the same with intent to deceive. The documents concerned are the Transfer of Lease, Certificate of Lease and the White Card which the 1st defendant has produced herein in proof of his ownership of the suit property. Several witnesses have recorded statements with the police. They include the land registrar who is alleged to have registered the transfer that was executed by Nikora in favor of the 1st defendant and issued the 1st defendant with a certificate of lease. The said land registrar has stated in his statement that he had retired from public service as at 10th November, 2008 when he is alleged to have registered the 1st defendant as the proprietor of the suit property and issued him with a certificate of lease. There is also the statement of Makoyo who has denied selling the suit property to anyone else a part from the Plaintiffs. The criminal case that was preferred against the 1st defendant is still pending hearing and determination. Whereas the validity of the title held by the 1st defendant over the suit property has been brought into serious question by the statements made to the police that I have referred to hereinabove, as of the date hereof, the register of the suit property held at the land’s office shows that the 1st defendant is the leasehold proprietor of the suit property. This fact is clear from copies of the White Card annexed to the Plaintiffs’ affidavit in support of the application herein and the 1st defendant’s affidavit in reply. It follows that until this court makes a determination that the 1st defendant acquired his title to the suit property fraudulently, the 1st defendant remains the registered proprietor of the suit property. On the other hand, the Plaintiffs also have a title to the suit property. They have claimed that the land register for the suit property has been fraudulent tampered with as a result of which the 1st defendant has been registered as the proprietor of the suit property several years after the same property was registered in their names. I am unable at this stage to make a determination as to which of the two titles, one held by the Plaintiffs and the other by the 1st defendant is genuine. The Plaintiffs have accused the 1st defendant of obtaining a parallel title to the suit property fraudulently. The same accusation has been leveled against the Plaintiffs by the 1st defendant. The issue as to whose title is the valid one will have to be determined at the trial upon taking evidence. Due to the foregoing, I am doubtful whether the Plaintiffs have established a prima facie case against the 1st defendant to warrant the granting of the orders of injunction sought. Having expressed my doubt as to the Plaintiffs’ case against the 1st defendant, the Plaintiffs’ application falls for consideration of a balance of convenience. From the evidence on record, it is clear that until the 1st defendant attempted in March, 2011 to fence off the suit property, the suit property had remained undeveloped. There is no evidence before me that either party had developed the suit property. In the circumstances, the balance of convenience would not tilt in favour of either party. In the circumstances, the order that commends itself to me to make in this matter is one that will preserve the suit property so that neither party transfers or alienates the same while this case is pending. It is necessary that the status quo that was prevailing as at March, 2011 before the 1st defendant made attempts to fence off the suit property is maintained pending the determination of this case. In the **Court of Appeal Case of Ougo & Another -vs- Otieno(1987)KLR 364**, it was held that,

“The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”

5. Due to the foregoing, I am unable to grant the prayers sought in the Plaintiffs’ application dated 8th August, 2012. In place thereof it is hereby ordered that, pending the hearing and determination

of this suit or until further orders by the court, neither party shall develop, sell, transfer, lease, charge or in any other manner alienate the suit property namely, LR. No. Kisii Municipality/ Block III/ 240. Either party shall be at liberty to apply on the issue of the preservation and protection of the suit property. In view of this order, the Plaintiffs' application dated 19th October, 2013 has been overtaken by events. Each party shall bear its own costs of both applications.

Delivered, dated and signed at KISII this 22nd day of November 2013.

S. OKONG'O

JUDGE

In the presence of:-

..... for plaintiffs

..... for 1stdefendant

.....Court Clerk.

S. OKONG'O

JUDGE