



No. 159

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L CASE NO. 38 OF 2012

PHILIP OUMA NYANDIGA.....PLAINTIFF

VERSUS

ALLY SAM NYANDIGA.....DEFENDANT

RULING

1. The Plaintiff brought this suit seeking an order for the eviction of the defendant from all that parcel of land known as **LR No. Kabuoch/Kobita/Kawuor/2378** (hereinafter referred to as “**the suit property**”) and a permanent injunction to restrain the defendant from interfering with the plaintiff’s occupation and ownership of the said parcel of land. The Plaintiff claimed that the Plaintiff is the registered proprietor of the suit property and that the defendant without any lawful excuse trespassed on the suit property by among others, carrying out farming activities thereon, building structures thereon, purporting to let the same to third parties, cutting down trees and uprooting crops grown thereon. As a result of these acts of trespass the Plaintiff has been deprived of the suit property and he has been unable to develop the same or to put the same to any meaningful use. The Plaintiff claimed that he demanded that the defendant stops the said acts of trespass on the suit property but the demand was ignored rendering the filing of this suit necessary. Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 19th December, 2012 seeking a temporary injunction to restrain the defendant from trespassing on, wasting, alienating, disposing off or in any way interfering with the suit property pending the hearing and determination of this suit. The application was brought on the grounds that the Plaintiff is the registered proprietor of the suit property and that the defendant has trespassed on the suit property thereby depriving the Plaintiff of the same. The Plaintiff contended that he has a prima facie case against the defendant and that unless the injunction sought is granted, he stands to suffer irreparable harm.
2. The Plaintiff’s application was opposed by the defendant. Through a replying affidavit sworn on 11th March, 2013, the defendant contended that the suit property is family land and that it is owned by the Plaintiff’s and the defendant’s father, one, Patroba Nyandiga. The defendant contended that the Plaintiff fraudulently caused the suit property to be registered in his name knowing well that the same was to be shared by among others the defendant. The defendant termed the Plaintiff’s application as frivolous and an abuse of the process of the court and urged the court to dismiss the same as the orders sought if granted would cause the defendant and his mother irreparable loss.
3. When the application came up for hearing on 20th June, 2013, Mr. Okenye appeared for the Plaintiff while the defendant did not appear although the date was given in court in his presence. In his submission, Mr. Okenye reiterated the contents of the Plaintiff’s affidavit in support of the

- application and urged the court to allow the application. Mr. Okenye submitted that the defendant's replying affidavit did not in any way answer the Plaintiff's claim. Counsel argued that there is no way the Plaintiff can be accused of fraud in acquiring the suit property while the same was transferred to the Plaintiff by their father, the said Patroba Nyandiga who is still alive. Counsel argued that the defendant has no right to challenge the decision of their said father to transfer the suit property to the Plaintiff.
4. I have considered the Plaintiff's application and the submission made by the Plaintiff's advocate. I have also considered the affidavit filed by the defendant in opposition to the application. The principles to be applied while considering applications for interlocutory injunction are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for interlocutory injunction must show that it has a prima facie case with a probability of success against the defendant and that unless the orders sought are 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.
 5. The Plaintiff has annexed to his affidavit in support of the application a copy of the title deed for the suit property which shows that the suit property was registered in the name of the Plaintiff on 27th December, 2011. The defendant has not denied the Plaintiffs ownership of the suit property. His contention is that the Plaintiff acquired the suit property fraudulently. The defendant has not set out either in his statement of defence dated 11th March, 2013 that was filed on 4th April, 2013 or in his replying affidavit the particulars of fraud that the Plaintiff is being accused of.
 6. According to the said title deed that has been produced by the Plaintiff, the Plaintiff acquired the suit property in consideration of the sum of Ksh. 250,000.00 that was paid to the previous owner thereof. The suit property is registered under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed). Section 27 (a) of the Registered Land Act, Cap. 300 Laws of Kenya (hereinafter referred to as "**the Act**") provides that, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land with all rights and privileges belonging or appurtenant thereto. On the other hand, section 28 of the Act, provides that the rights of a proprietor acquired on first registration or subsequently for valuable consideration shall not be liable to be defeated save as provided in the Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims subject only to the limitations set out under that section.
 7. The Plaintiff has demonstrated that he is the registered proprietor of the suit property. The defendant has not placed any material before me which points to the Plaintiff's alleged fraud in the acquisition of the suit property. In the absence of such material, I am convinced at this stage that the Plaintiff is the prima facie owner of the suit property. I am therefore satisfied that the Plaintiff has established a prima facie case against the defendant with a probability of success. The defendant has not placed any material before the court to justify his occupation of the suit property. In the absence of such justification, the only conclusion that this court can reach is that the defendant is occupying the suit property unlawfully.
 8. I am also satisfied that unless the orders sought are granted, the Plaintiff will suffer irreparable harm. The Plaintiff has shown that he is the owner of the suit property. As such owner, he has a right to peacefully occupy and use the same. Any act that interferes with that occupation would cause irreparable loss to the Plaintiff. The upshot of the foregoing is that the Plaintiff has established a case for granting of the orders sought.
 9. The Plaintiff's Notice of Motion application dated 19th December, 2012 is granted in terms of prayer 3 thereof. The plaintiff shall have the costs of the application.

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

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

N/A for the Defendant

Mobisa Court Clerk.

S. OKONG'O

JUDGE