



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 495 OF 2011

KASARANI MALL LIMITED.....PLAINTIFF

VERSUS

DANIEL OTIENO MIGANGA1ST DEFENDANT

DAVID J KOLLAL.....2ND DEFENDANT

GILBERT THUO MACHARIA3RD DEFENDANT

ROYSA COMMUNITY SELF HELP GROUP4TH DEFENDANT

RULING

The Plaintiff/Applicant, hereinafter referred to as applicant, filed a Notice of Motion dated 20th September 2011. The Applicant seeks the following prayers:

- i. Pending the hearing and determination of this suit, an order of injunction do issue against the defendants whether by themselves, their employees, servants or agents or any of them or whomsoever purporting to be a member of the 4th defendant or anyone else not authorised by the plaintiff restraining the defendants and any of them from trespassing on the plaintiff's land known as L.R. No. 5875/2, Thika Road, entering thereon and committing any acts of waste or damage or in any other way purporting to alienate the property of the plaintiff in any manner whatsoever
- ii. The OCS, Kasarani Police Station does supervise and ensure that this order is implemented for purpose of maintaining law and order to protect the plaintiff's property.
- iii. Costs of this application be provided for.

The application is based on the following grounds:-

- (a). The defendants by themselves, their agents, servants or employees or purported members have threatened to invade the plaintiff's land known as L.R. No. 5875/2, Thika Road
- (b). The intention of the invasion is to commit acts of waste, damage or alienation so as to defeat the plaintiff's lawful title.
- (c). Unless restrained by an order of this court, the plaintiff's property is in danger of being wasted, damaged or alienated.

The application is supported by the Affidavit of M/S Pauline Kimotho dated 18th February 2011. The defendants/respondents hereinafter referred to as the respondents opposed the affidavit. David J. Kolal the Secretary to the 4th Respondent filed a replying affidavit on behalf of the Respondents.

The plaintiff/Applicant in its affidavit sworn by Pauline Kimotho states the following in brief:-

That the plaintiff is the lawful and registered owner of the property known as L.R No. 5875/2 located along Kasarani area, Thika Road measuring about 6.944ha. This property was initially granted by the Government to Solio Construction Company Limited on 18th May 1992 and was subsequently transferred to the plaintiff company on that day and the plaintiff is registered as a legal owner; that during the months of September and October 2010, the defendants made threats to invade the plaintiff's land with a view to occupying the same and possibly sub-dividing it between themselves. The 1st and 2nd and 3rd defendants described themselves variously as officials of the unincorporated entity known as Roysa Community self Help Group, the 4th defendant. The defendants also incited members of the public purporting them to be members the 4th defendant to carry out the threats of invasion and subdivision. Paragraphs 8 to 13 gives details of the plaintiff's investigation on the group and correspondence between the lawyers over the suit premises. The applicant further states that before this suit they had ELC Civil case No. 515 of 2010 Uchumi Supermarkets Limited and Kasarani Mall Limited versus Daniel Otieno Miganga, David J. Kolal, Gilbert Thuo Macharia and Roysa Community Self Help Group; that on 28th October 2010 an injunction application was heard and the court gave a ruling. The court declined grant the injunction on the grounds that; the suit property is owned by Kasarani Mall Limited and not by Uchumi supermarkets Limited, the prime mover of the case was Uchumi Supermarkets Limited while it ought to have been Kasarani Mall Limited, that although the Respondents had no colour of right to claim the property, the Applicants in that case could not ride on the weakness of the Respondents case to obtain the injunction. After the ruling the applicants filed a notice of discontinuance and once the injunction was dismissed the Respondents from the 1st of September 2011 renewed their threats to invade the Applicants' land. The applicant avers further that the Respondents may actually carry out their threats, that unless restrained by an order of this Court, the defendants will continue to issue those threats to invade the Applicant's land with impunity and that the current status of the land is that the Applicant is in possession and has fenced it all round with a stone wall.

Mr. Kolal stated the following in his replying affidavit in brief:-

That the Respondents are the owners of plot No. 5875/2 located along Kasarani area, Thika Road measuring about 6.944 ha. That the property was not granted by the Government to Solio Construction Company Limited; that the contents of what the applicant attached on the grant is different from what they attached in ELC No. 515 of 2010; that in the amended plaint in ELC No. 515 of 2010 at paragraph 4 the Applicant pleaded that it transferred the suit to Uchumi Supermarkets Limited; that the Applicant does not have a genuine title to the property and that is why they state at paragraph 4 a of the amended plaint in ELC No. 515 of 2010 that "*there does exist a problem with regard to the 1st Plaintiff's registration which problem the Plaintiffs and the commissioner of lands are resolving*"; that the Respondents can not threaten and invade what belongs to them; that the correspondence referred to by the Applicant show that the advocate was acting for Uchumi Supermarkets and not the applicant and the applicant was not a party to the application in ELC 515 of 2010 the annexure referred to was not introduced to court and therefore an after thought; that the court in its ruling in ELC 515/2010 ruled that the date of the registration by the Applicant is inconsistent with the pleadings of the Applicant and even now in this Application the annexed grant (applicant annexure "PK1" pages 1-4) is different from the one which was annexed in ELC 515 of 2010. (DKJ3 and "DKJ5"); that the Applicant is not in possession of the suit premises and if it is then the said possession is illegal; that on 29th September 2011 an advert (DKJ6") was placed in the Daily Nation news paper indicating that a caveat emptor has been placed on the suit property with lots of contradiction as to who owns the suit property; that the orders issued on 20th September 2011 ought to be discharged as the same were obtained by failure to disclose the material facts hence a lot of contradictions in the Applicant's Application.

Counsels made oral submissions in court which I have carefully considered together with the affidavits

filed and annexures. The Applicant is seeking an injunctive order against the defendants, for the Applicant to succeed it must meet the principles that are set out in the case of Geilla vs. Cassman Brown & Co. Ltd E.A 1973 at page 53 that:-

- i. The applicant has a prima facie case with a probability of success
- ii. That if an injunction is not granted the Applicant might otherwise suffer irreparable injury
- iii. When the court is in doubt, it will decide the application on the balance of convenience

The Applicant claims to have a title of the property and the Respondents too claim they have a title. The Applicant has annexed a title at pages 1-4 of P. Kimotho's affidavit. The Respondents counsel in his submission took the court through what they state a differences in the titles annexed by the applicant at pages 4, 40 and 64. In the further affidavit of P. Kimotho which is page 59, the applicant explains that the document attached at page 40 was a wrong document. I find that the Applicant did not hide this fact from the court but disclosed it and I can presume the Applicant acted in good faith. What remains are the titles annexed at pages 4 and 64. I find that at pages 5 to 8 of P. Kimotho's affidavit she explains the caveat that appears on the title at page 64. The said explanation is reasonable one. What have the defendants attached to show they have a title? The defendant attached a conveyance drawn by M/S Olima Akhuku & Company Advocates. In the bundle attached by the applicant at page 70, an issue arose on whether the said counsel did the conveyance. Was there an agreement that was drawn before this conveyance? I find that none has been attached. At pages 168 -170a it is apparent that there is *Suit No. ELC 47 of 2011 (OS)* where a different set of Plaintiffs were claiming the suit premises by way of adverse possession. From the facts before me I find that prima facie on the documents attached by the Applicant, the Applicant has shown that they have a title to the property. The Applicant has therefore shown that it has prima facie case with a probability of success. I find no contradiction in the advert that appeared in the daily nation as it states who they are as concerns the suit premises. On the issue of possession the Applicant states it is in possession. It is apparent that the Respondents are not. I also take note that from the two statements annexed at pages 173 to 177 of the Applicants affidavits, the defendants have made threats to invade the suit premises.

On the issue of irreparable damages I find that although the Applicant has not attached anything to show the value of land it is evident on the title that the consideration that was paid was 85,000,000/= which is a colossal sum. Lastly I find that a balance of convenience tilts on favour of the Applicant. I therefore find that there is merit in the application and I grant the Applicant prayer 2 and 3 of the application dated 20th September 2011. The Applicant is awarded cost of the application.

Dated and delivered this 24th Day of February 2012

R. OUGO
JUDGE

In the Presence of:-

Mr Murugara For the Applicant

Mr. Oduor For the Respondent

Mr. Kabiru Court Clerk