



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 127 OF 2011

SAMUEL NJOROGE APOLLO.....PLAINTIFF
VERSUS
JARED HAMISI MOKAYA.....DEFENDANT
RULING

The plaintiff/applicant Samuel Njoroge Apollo filed this suit against Jared Hamisi Mokaya on 7/1/2011. The applicant claims to be the registered owner of all that piece of land known as Dundori/Lanet Block 5/604 (Kiamunyeki "A") having purchased it from one Patrick Mbugu Njuki but that the defendant/respondent has illegally and without lawful cause entered and remained on the suit land, erected structures thereon. The plaintiff now seeks order that the respondent do give vacant possession of the suit land or that the respondent be evicted therefrom and his structures which he has erected thereon be demolished and a permanent injunction to issue restraining him and his agents or servants from trespassing or interfering with possession of the suit land in any manner.

The respondent filed a defence dated 20/6/2011, in which he claims to have purchased the suit property and paid the full price, took possession in 2002 and put up a permanent home thereon and he has resided thereon peacefully. He denied all the allegations that the suit land belongs to the plaintiff.

Thereafter, the applicant filed these application. The first application is the Notice of Motion dated 14/7/2011 in which the applicant asks the court to strike out the defendant's defence and enter judgment against the respondent as prayed. It is supported by the affidavit of the applicant dated 14/7/2011. To support his claim that he is the owner of the suit land, he exhibited a title deed in his name which was issued on 4/3/2011. The second application is the Notice of Motion dated 24/8/2011 in which the applicant seeks an order of injunction to restrain the respondent either by himself, his agents or servants from erecting structures, developing, wasting, alienating or in any way dealing with the suit land adversely to the plaintiff's detriment. Again that Notice of Motion is supported by the applicant's affidavit sworn on 24/8/2011 in which he depones that since he filed this suit, the respondent has gone ahead and is developing the said land. He exhibited photographs as evidence that the respondent is developing the land without the applicant's authority and the respondent's actions are meant to woodwilk the court that the buildings built before this suit was filed. The respondent filed two affidavits dated in October opposing both applications. He claims to be the owner of the suit land having bought it in 2002 from Patrick Mbugu Njuki as per the exhibited agreement dated 25/2/02 (JAM1). He contends that he took possession of the suit land immediately and was developed it immediately.

Mr. Njuguna, counsel for the applicant urged that since the applicant is the holder of a title issued under the **Registered Land Act**, he is an absolute owner and that title cannot be overridden by a sale agreement. He further argued that the sale agreement is between the former owner of the land and the respondent and if the respondent has any claim, it should be against the former owner of the land. Counsel also submitted that the sale agreement does not have the Land control Board consent and is therefore null and void and the respondent should seek a refund of the purchase price. Counsel relied on

the decision of **Simiyu V. Watambala (1985) KLR 852**, where the Court of Appeal held that the agreement for sale of the land was a controlled transaction requiring consent under **Section 6(1)** of the **Land Control Act 1967** and the transaction was void for want of the consent and that the purchaser was only entitled to the purchase price. For the prayer of an injunction, counsel relied on the case of **Bhupendra Patel V. D.M. Kontos CA 147/00** where the plaint was dismissed for being an abuse of the court process and without merit.

I have now considered the proceedings and affidavits sworn in support and in opposing to the applications, it is not in dispute that the applicant holds a title in respect of the land which the respondent purchased from Patrick Mbugu Njuki vide the sale agreement of 25/2/2002. His title was only issued on 24/3/2011. The applicant did not tell the court exactly when he purchased the suit land and he did not exhibit any sale agreement or Land Control Board consent as required. This case is still at an interlocutory stage. Given that title deeds are sometimes obtained through improper procedures, I would have expected the applicant to demonstrate how he came to obtain the title deed.

I have seen the contents of paragraph 4 of the plaint, in which the applicant was trying to explain how he came to purchase the land. Those facts have been denied by the respondent and he put the applicant to strict proof. There was no reply to the defence. In my view, these are facts which need to go to trial to enable each party explain to the court what transpired. Even if the applicant is the registered owner of the land, I find that this is not a case that this court can determine at this interlocutory stage. Could it be that the respondent was the first buyer of the land and he has been short changed by the applicant and the seller as alleged by the respondent? That is for the full hearing.

For the above reasons, I find that this is not a case which the defence can be struck out at this stage. The defence raises triable issues and the defendant should be given his day in court. The Notice of Motion dated 14/7/2011 is therefore dismissed with costs to the respondent.

The applicant exhibited some photographs of the suit land to demonstrate that the respondent was erecting some structures on the land since this case was filed. The respondent claims to have taken possession in 2002. I noticed in the photographs that there seems to be both old and new constructions plus bananas and trees. Since a dispute has arisen with both the applicant and respondent claiming the suit land, it is only proper that the respondent ceases to continue with any further construction of structures on the disputed land. After considering all the submissions, I find that the balance of convenience tilts in favour of the respondent since he is in possession, however, I will grant prayer 3 of the Notice of Motion dated 24/8/2011 to the extent that the respondent should not carry out any further developments or construction on the suit land or do any act or interfere with the land in a manner detrimental to the applicant's interests. However the respondent should remain on the land till the matter is heard on merit.

DATED and DELIVERED this 28th day of March, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the plaintiff/applicant.

Mr. Njuguna for the defendant/respondent.

Kennedy – Court Clerk.