



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 367 OF 2011

CHARLES OGONGO ANDEREPLAINTIFF

VERSUS

DAVID KENDOGO.....DEFENDANT

RULING

The Application that is before this Court for consideration is one dated 21st July 2011 filed by the Plaintiffs. The orders sought are that the Defendant, his servants, agents and/or employees be restrained by way of temporary injunction from dealing, selling, wasting, damaging, intruding on, developing and/or interfering with Plot No. L. R. 209/9607 Sub-plot No. 31 situated in Eastland Nairobi (hereinafter referred to as the suit property), pending the hearing and determination of the instant application. The Plaintiff is also seeking an order that the Defendant, his agents and/or any other person working for him or under his instruction be evicted from the suit property forthwith, and that the OCS Buru Buru Police Station does ensure compliance of this Order. The Plaintiff's Advocate at the hearing of the application on 26th January 2012 asked for a ruling on the basis of the pleadings and submissions filed.

The grounds for the application are elaborated upon in a supporting affidavit sworn by the Plaintiff on 21st July 2011. The grounds are that the Plaintiff is the owner of the suit property, having bought the same from one Daniel Owino Mbuya on the 20th November 2010 for a purchase price of Kshs.305,000.00/= . The Plaintiff has annexed as evidence the said sale agreement dated 20th November 2011, and a bundle of documents of ownership handed over to him by the vendor, which include the vendor's certificate of ownership with respect to the suit property, the sale agreement between the vendor and original owner of the suit property, one Evans Mwamunga Mazola T/A Mbale Farm, and the letter of allotment by the Department of Lands dated 10th February 1998 to Mbale Farm with respect to L.R No. 209/9607.

The Plaintiff, who works in Juba, Southern Sudan, further states that sometime in June, 2011 his brother was passing by the suit property and found construction workers developing the said plot. Further, that upon enquiry, they said workers told him that they had been contracted to build on the said property by the Defendant who claims to have bought the said Plot from one Tobias. The Plaintiff claims that the Defendant has refused and/or ignored his plea to stop construction on the suit property, and has snubbed summons by the area Chief after the Plaintiff reported the matter to the said Chief. The Plaintiff has also annexed as evidence the said letter from the Area Chief dated 22 June 2011, and photographs taken of the suit property.

The Defendant responded to the application by way of Grounds of Opposition dated 27th July 2011, wherein he states that the application is bad in law, frivolous, vexatious and an abuse of the process of this Court, as it does not in any way establish that the property in the instant suit is the one the Defendant is developing. Further, that the application is premised on material non disclosure of the fact that there has been a site visit by the both the local area Chief and officers from the CID, who confirmed that the suit property is not the one the Defendant is constructing on.

The Defendant also filed a Replying Affidavit sworn on 27th July 2011, wherein he stated that he purchased a parcel of land excised from Nairobi LR Number 209/9607 and named as Sub-plot Number 79 on 6th June, 2011 from Mr. Tobias Luchera Mkolwe. Further, that he was subsequently issued with a Certificate number 09 by Mbale Farms Development Project. The Defendant produced as exhibits the copies of my vendor's ownership Documents including a certificate of ownership with respect to Sub-plot no.79, a copy of the sale Agreement dated 6th June 2011 between the Defendant and the vendor, a copy of a Bankers Cheque in favour of the Vendor for Kshs 300,000, and a copy of certificate of ownership in the Defendant's name for Sub-plot no. 79.

The Defendant further states upon the said purchase, he commenced development of the same property until the 22nd day of June, 2011 when he received a summons from the Assistant Chief, Kariobangi South sub-location, at the instance of the Plaintiff, directing that he ceases construction until the ownership issue is resolved. The Defendant averred that he obeyed the said order from the Provincial Administrator and ceased construction for the duration that investigations were conducted, which said investigations included site visits and a perusal of the site maps. Further, that the said Assistant Chief compiled a report dated the 12th day of July, 2011 detailing the investigations he had conducted and outlining his findings and reasons for concluding that the premises on which the Defendant was constructing was Sub-plot Number 79 and not Sub-plot Number 31. The Defendant produced as evidence the said summons dated the 22nd Day of June, 2011 and the said report dated the 12th day of July, 2011.

The Defendant also states that during the subsistence of the said provincial Administrator's investigations, he was summoned to the CID headquarters on the 4th day of July, 2011 at the Plaintiff's instance, and claims that the matter was dismissed by the CID as the Plaintiff was unable to substantiate his claim on the suit property whereupon the Plaintiff then lodged the instant suit.

The Plaintiff's Advocate filed written submissions dated 9th December 2011, wherein he reiterated the above-stated facts, and disputed the authenticity of the certificates of ownership produced as evidence by the Defendant, claiming that two of them bear the same serial number and the signatures in all of them are different. He also stated that the purported issuer of the certificate Evans Mwamunga Mazola died in 2010, and could not have issued the Defendant with a certificate in June 2011 when he purports to have bought Sub-Plot 79. No evidence of the said death was however produced by the Plaintiff. The Plaintiff's Advocate also disputes the authenticity of the sketch map produced by the Defendant as evidence, as well as the report by the area Chief, on the grounds that issues of land do not fall within the Chief's jurisdiction, and that he used the disputed sketch map in preparing the report and was thereby compromised.

I have read and carefully considered the pleadings, evidence and written submissions by the parties to this application. I will proceed with the determination of the application on the basis of the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358**. The Plaintiff has produced as evidence of ownership the sale agreement dated 20th November 2010, which he has not signed, and which therefore cannot be relied upon by this court. There is also no evidence produced of payment of the purchase price to the vendor. Further the Defendant has produced evidence which indicates that the suit property is not Sub-plot No. 31 but Sub-plot 79. The Plaintiff has not produced any evidence or report to show otherwise. This Court cannot therefore make any orders regarding the suit property without reliable evidence and confirmation from the relevant authorities as to the correct locations of Sub-Plot 31 and Sub-Plot 79 of L. R. 209/9607. I therefore find that the Plaintiff has failed to establish a *prima facie* case and the Plaintiffs' application dated 21st July 2011 is therefore denied.

The Plaintiff shall bear the costs of the application.

Dated, signed and delivered in open court at Nairobi this ____20th ____ day of ____March____, 2012.

P. NYAMWEYA

JUDGE