



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 75 OF 2012
THAYU KAMAU MUKUGIPLAINTIFF
VERSUS
FRANCIS KIBARU KARANJA DEFENDANT
RULING

1. The Plaintiff / Applicant hereinafter referred to as the applicant has filed a Notice of Motion dated 15th February 2012 under Order 40 Rules 1(a) and 3(3) of the Civil Procedure Rules and all other enabling provisions of the law, seeking the following orders that:-

i. A temporary injunction do issue restraining the defendant whether by himself, or his servants, agents, employees, workmen or otherwise howsoever, from trespassing on the Suit Property(Nairobi Land Reference Number 13330/164), erecting structures whether permanent or temporary or of any nature whatsoever pending the hearing and determination of this suit.

ii. A temporary injunction do issue restrain the defendant whether by himself or his servants, agents, employees, workmen or otherwise howsoever from interfering in any manner with the plaintiff's right of ownership, quiet enjoyment or legal interest in the suit property, that is to say Nairobi Land Reference Number 13330/164 pending the hearing and determination of this suit.

iii. Any further relief that the court deems fit in the interest of justice.

iv. The costs of this application be borne by the defendant on the grounds that the plaintiff is the registered proprietor of the suit property but the defendant has continually trespassed on the suit property depriving its use and enjoyment by the plaintiff and the suit property is in danger of being wasted and damaged before the issues raised in the plaint have been heard and finally determined.

2. The application is supported by the Affidavit of Thayu Kamau Mukugi dated 15th February 2011 and he states the following; that he is the registered proprietor of Nairobi L.R. Number 13330/164, hereinafter referred to as "the suit property, that he purchased the suit property free from any encumbrances for valuable consideration from Joreth Limited, a limited liability company incorporated in the republic of Kenya, vide a Transfer dated 11th March 2010 and registered in the Nairobi Lands registry on 6th April 2010, that upon registration the Nairobi Lands Registry issued him with a Certificate of title Number I.R. 129562 dated 6th April 2010 in his name.

3. That he was therefore surprised when he went to the suit property and found that the defendant and his agents/servants have been trespassing on his land and the said defendant has erected a fence and gate and posted guards thereon hence denying him access to it; that he is the rightful owner for the suit property and a recent search at the Nairobi Lands Registry confirms this; that he is informed by his advocates that Section 23(1) of the Registration of Titles Act, Cap 281 of the Laws of Kenya gives him an absolute and indefeasible title to the suit property and that the law guarantees his right of enjoyment and ownership of the suit property; that given the defendant's actions, he is afraid that the suit property is in real danger of being wasted or damaged by the defendant and his agents; that unless the Court restrains the defendant from trespassing on the suit property then he will suffer great loss and his rights under the law shall continue to be violated.

4. The respondent filed a Replying affidavit sworn by Francis Kibaru Karanja dated 13th March 2012 and he states the following; that he is the owner of that parcel of land known as L.R. No. 13330/164; that the said parcel of land was originally owned by a large group of individuals being the beneficially owners thereof and the parcel of land aforesaid was referred to as Thome Farmers No. V; that the beneficial owners decided to subdivide the said parcel of land and had it surveyed and the individual titles were issued to them; that to facilitate the process of subdivision, survey and the issuance of the title documents to the beneficial owners, it was agreed that Joreth Limited be incorporated and act as the legal owner.

5. That one Abrahm Kiarri Mburu was issued with share certificate No. 509 by the said Thome Farmers No. 5 Limited and his name duly entered into the Register of the Company as owning the unsurveyed plot no 21; that the said land parcel L.R. no. 13330 was subsequently subdivided and surveyed upon which the said plot No. 21 was designated L.R. No. 13330/164; that the said Abraham Kiarri Mburu entered into a Sale Agreement with one Isaac Enterprises Limited with respect to the suit land in November 2007; that in January 2008, the said Isaac Enterprises Limited entered into a Sale Agreement with him and one Martha Wairimu Waithaka with respect to the said land.

6. That the said Joreth Limited through its Advocates agreed to transfer to him and his co-owner the suit land upon the payment of the sum of Kshs.306,576/- being the costs to facilitate the issuance of the title documents to his co-owner and him; that they paid the said charges and forwarded the executed transfer documents to Messrs Kimani Kahiro the Advocate for Joreth Limited; that the said lawyers subsequently wrote to his lawyers and indicated that they were not in a position to effect the transfer as the said title and deed plan were with another lawyer of Joreth Limited, to wit M/s Njeri Kairuki & Co. Advocates; that despite having purchased the interest owned by the shareholder of Thome Farmers No. V, Joreth Limited through M/S Njeri Kariuki & Company Advocates wrote to his lawyer demanding that he pay a sum of kshs,7,000,000/- for the transfer to be effected to him; that he was surprised, as he had purchased the parcel of land known as L.R. No. 13330/163 which adjoins L.R No. 13330/164 and at no time was asked for any further consideration.

7. That being aggrieved by the action of the registered owner M/S Joreth Limited, he filed a suit ELC No. 49 of 2010 against Isaac Enterprises Limited and Joreth Limited in February 2010; that only in August 2011 he received a telephone call from the plaintiff's mother one Wambui alleging that the suit land herein was registered in the name of the plaintiff; that he was also summoned to the Kasarani Police station where he was shown copies of a title issued in favour of the plaintiff and a transfer both of which were dated in August 2011; that he is now surprised and shocked to see the title and transfer dated 6th April 2010 as it is at variance with the one shown to him.

8. That he has noted that the alleged transfer which the plaintiff holds was lodged on 6th April 2010 and a title issued on the same date which is nearly impossible to effect at the lands office, taking into account the Red-take and bureaucracy at the lands office; that he further noted that the lodging registration and issuance of the title were all effected at 11.00 am and 6th April 2010, which act is impossible; that to confirm that the titles is a forgery is further buttressed by the fact that the deed plan is verified after the issuance of the title, which is irregular; that he has further made inquiries and established that the day book number appearing on the transfer, to wit no. 211 of April 2010, does not exist at the Lands Registry in the April 2010 Register and is a forgery; that he has now filed an application in the suit filed by himself and his co-defendants to enjoin the said Joreth Limited and the Plaintiff herein in the suit and intend to

seek therein an order for a cancellation of the title herein; that he seek to have the plaintiffs application dated 15th February 2012 to be dismissed.

9. Counsels made oral submissions in Court. I have considered the said submissions together with the contents of the affidavits filed by the parties. It is apparent that the parties are referring to the same suit premises. The respondent has given a detailed history at paragraphs 4 to 12 of his replying affidavit on how he purchased the property after its subdivision from L.R. 13330. It is evident that after his purchase the vendors lawyer demanded a sum of 7,000,000/- for the transfer to be effected (FKK5). This letter is dated 17th April 2009. The respondent thereafter filed suit ELC 49 of 2010 as shown in his replying affidavit. So far the respondent has no title to the property.

10. The plaintiff claims to have bought the property from Joreth Limited as shown in the transfer dated 11th March 2010. He has also exhibited a certificate of title dated 6th April 2010. The respondent at paragraphs 21 to 24 questions the legality of the plaintiff's title for reasons that the transfer which the plaintiff holds was lodged on 6th April 2010, and a title issued on the same date which is nearly impossible to effect at the at the lands office, taking into account the red tape and bureaucracy at the lands office and further that noted that the lodging registration and issuance of the title were all effected at 11.00 am on 6th April 2010, which acts is impossible to effect. What the respondent depones has not been established yet and can only be established through *viva voce* evidence.

11. The plaintiff seeks an injunction. The plaintiff is required to show that he is within the principles that were stated in the case of *Geilla Vs. Cassman Brown & Co. Ltd EA 1973*

- i. That he has a prima facie case with a probability of success;
- ii. That he will suffer irreparable injury if the injunction is not granted
- iii. If the Court is in doubt, it will decide the application on the balance of convenience.

The plaintiff has a title of the suit property which title is proof of his ownership of the suit property as provided under the provisions of section 23(1) of the Registration of Titles Act. The respondent has recourse under section 24 of the Registration and Titles Act in the event that the title was irregularly obtained. Prima facie the plaintiff has proved that he has a prima facie case with probability of success. He has stated that the suit property is in danger of being wasted or damaged by the defendant, if the injunction is not granted. I find that the applicant has shown that the balance of convenience tilts in his favour. I therefore grant prayers 4, 5 and 7 of the Notice of Motion dated 15th February 2012. Orders accordingly.

Ruling dated and read this 20th day of April 2012

**R. OUGO
JUDGE**

In the Presence of:-

For the Applicant

For the 1st Respondent

Court Clerk