



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 445 OF 2011

JOSEPH MURUNGU KIARIEPLAINTIFF

VERSUS

JEREMIAH GITAU ROTOI.....1ST DEFENDANT

MARY WANJIKU KIARIE.....2ND DEFENDANT

SUSAN MUTHONI MBURU.....3RD DEFENDANT

MARY MUTHONI NJUGUNA.....4TH DEFENDANT

THIKA DISTRICT LAND REGISTRAR.....5TH DEFENDANT

RULING

There are two applications before the Court for consideration; the first one is brought by the Plaintiff, and the second by the 2nd 3rd and 4th Defendants. The Plaintiff's application is a notice of motion dated 23rd August 2011, wherein he is seeking the following orders from this Court:

1. That a temporary injunction be issued against the 2nd, 3rd and 4th Defendant/Respondents jointly and severally by themselves and/or their agents/servants/employees to prevent them or any of them on behalf of M/S Ebenezer, Restoration Christian Centre from further fencing, erecting a perimeter boundary wall,

around, excavating, construction, leasing, charging, selling or alienating the suit property in Title Number RUIRU EAST/JUJA EAST BLOCK 2/1094 or otherwise howsoever continuing to encroach, trespass, damage, waste, deal with or in any manner interfere with the Plaintiff/Applicant's quiet possession, use and enjoyment of the property pending the hearing and final determination of the suit herein.

2. That a mandatory injunction do issue to compel the 2nd, 3rd and 4th Defendants/Respondents jointly and severally on behalf of M/S Ebenezer Restoration (Christian) Centre to cede and/or restore vacant possession of the suit property to the Plaintiff/Applicant.

3. That an order do issue to compel the 5th Defendant/Respondent to forthwith issue an official search certificate to the Plaintiff/Applicant in respect of the suit property being Title No. RUIRU EAST/JUJA EAST BLOCK 2/1094 (hereinafter referred to as the suit property) within 21 days of the Order, and per the Applicant's paid up request/s to the 5th Respondent.

The grounds for the Plaintiff's application, which are also deponed to in the Plaintiff's Supporting Affidavit sworn on 23rd August 2011 are that the Plaintiff is the sole lawful and registered owner of the suit property which he acquired by purchase in 1984, and further that he has since been in occupation and use by farming thereon. The Plaintiff claims he was issued a title on 07/06/1989 from the Kiambu District Land Registry under whose jurisdiction the suit property then fell, yet the 4th Defendant has now purported to issue a parallel title to the suit property in favour of the 2nd, 3rd and 4th Defendants, and has refused to issue a certified search copy of the Plaintiff's title document.

Further, that the 2nd, 3rd and 4th Defendants/Respondents having purported to have purchased the property from the 1st Defendant on behalf of themselves and of M/S Ebenezer Restoration (Christian) Centre, invaded the suit property on 18/08/2011, and started uprooting the Plaintiff's fence thereon, digging up a trench/foundation on the boundaries thereof and are erecting a perimeter wall thereon without the knowledge and authority of the Plaintiff. The Plaintiff's caretaker was also alleged to have been forcibly ejected from the suit property.

The Plaintiff states that unless otherwise restrained as sought, the Defendants will have succeeded in unlawful evicting him from the suit property, and will committ acts of wastage, vandalism, destruction and/or possible unwanted developments that will permanently change the character of the land to the unquantifiable and irreparable detriment of the Plaintiff. The Plaintiff has attached a copy of his title deed and application for official search as evidence.

The 2nd Defendant who is the Chairperson of the Trustees of Ebenezer Christian Centre swore a Replying Affidavit on 10th October 2011 on her behalf and on behalf of the 3rd and 4th Defendants. The 2nd, 3rd and 4th Defendants in the said affidavit claim to have bought the suit property from the 1st Defendant after they confirmed he was the owner of the same, and they have annexed as evidence a copy of a Certificate of Official Search dated 17/10/2008 showing the same, and an agreement for sale entered into between the Ebenezer Restoration Christian Centre with the 1st Defendant dated 18th October 2008. The property was thereafter registered in the names of the Trustees of the said Ebenezer Christian Centre after payment of the purchase price, and a copy of a title deed issued on 11/11/2008 was attached as evidence.

The 2nd, 3rd and 4th Defendants denied that they colluded or conspire with the 1st Defendant or the 5th Defendant or both of them or any other person to defraud the Plaintiff or any person or at all in the transaction on the suit property, and stated that they are innocent purchasers for value without notice. Further, that at the time the Trustee of the Centre visited the suit property, the same was vacant and undeveloped and photographs of the suit property were annexed as evidence. The 2nd, 3rd and 4th Defendants further stated that the Plaintiff came to the suit property in 2009 when they had fenced the property with poles and were constructing a perimeter stone wall around the property, and alleged that he was the owner of the property. The Plaintiff at the time also showed the 2nd, 3rd and 4th Defendants a copy of his title deed to the suit property.

The 2nd, 3rd and 4th Defendants thereupon referred the matter to the Criminal Investigations Department (CID), and the 1st Defendant was arrested and arraigned in court and charged with the offence of obtaining money by false pretence and procuring execution of documents by false pretences in Thika Criminal Case No. 237 of 2009. The 1st Defendant was subsequently acquitted after trial in a judgment delivered on 24/03/2010, and the 2nd, 3rd and 4th Defendants state that they then went back to the suit property and continued with their possession of the same.

The Plaintiff disputed the 2nd, 3rd and 4th Defendants averments in a Supplementary Affidavit sworn on 3rd November 2011, and the 2nd, 3rd and 4th Defendants then filed the second application which is a Notice of Motion dated 20th December 2011, wherein they sought the following orders:

1. That the Plaintiff either by himself, servants, employees, agents and/or any other person be restrained by way of injunction, from harassing, intimidating, evicting and/or the 2nd, 3rd and 4th Defendants or agents from the suit property or in any way interfering, intermeddling, taking over, selling, wasting, using the suit property and/or in any way interfering with the developments therein until the Application is determined inter-parties.
2. That this Honourable Court be pleased to discharge, vary or set aside the ex parte orders of interim injunction issued by Hon. Lady Justice M. G. Mugo on 26/08/2011.

The grounds for the second application were deponed to in a Supporting Affidavit sworn by the 2nd Defendant on 20th December 2011. The main grounds are that the Plaintiff purported to enter into the suit property and illegally execute a court order issued on 2/12/2011 which has not been served upon the 2nd, 3rd and 4th Defendants and/or their Advocates on record, and that on 6th December, 2011 the Plaintiff invaded the suit property in the company of police officer, hooligans and many armed youths seeking to evict the 2nd, 3rd and 4th Defendants from the suit property, and forcefully take over the suit property without the express authority of the court. Additional evidence annexed to the supporting affidavit included copies of the court orders issued on 26/8/2011 and 2/12/2011 respectively, and copies of the photographs showing the developments erected by the 2nd, 3rd and 4th Defendants on the suit property.

Further, that the Plaintiff illegally obtained the interim orders through nondisclosure of material facts as he has never been in possession and/or developed the suit property at any material time, and has been interfering with, wasting, depleting and/or destroying the said property from its original state thereby defeating the rights, interests of the 2nd, 3rd and 4th Defendants who are the registered owners and actual occupants of the property.

The Plaintiff denied the above grounds and averments in a replying affidavit he swore on 11th January 2012 wherein he denied that neither police officers, hooligans or armed youth were on the suit property on 06/12/2011 nor any harassment, threats, evictions, demolitions and take-overs took place as alleged, and that the photographs exhibited by the 2nd, 3rd and 4th Defendants were a reflection of the peaceful cultivation and planting which went on smoothly by his caretaker and a group of labourers on the suit property on the said date.

The Plaintiff further denied that the Defendants are in possession/occupation of the suit property, and that there are any buildings erected on the same apart from his caretaker's unoccupied one-roomed temporary/timber shelter. The Plaintiff in his response also stated that he never visited the suit property on 06/12/2011, and never met or talked to the 1st Defendant on the said date. Furthermore that on the said date he was in Komothai Village, Githunguri for the burial of one James Gichuru Wambui, and he annexed a copy of the funeral programme together with a photograph of himself at the said function.

The Plaintiff's advocate filed written submissions dated 11th January 2012, and made oral submissions at the hearing of the application on 16th February 2012 in which he submitted that he had abandoned prayer 5 of his application on vacant possession. The Defendants' Advocate also made oral submissions at the

said hearing, relying on written submissions dated 15th February 2012.

The Advocates reiterated the above-stated facts at the said hearing, and the Plaintiff's Advocate in addition submitted that any title to the suit property issued subsequent to the Plaintiff's title was fraudulently issued, and that the Plaintiff had pleaded the particulars of fraud in the Plaint, including the facts that the transfer in favour of the 1st Defendant was in 2002, yet he was issued with a PIN certificate in 2006. Other particulars pleaded were that there are no transfer documents shown in evidence by the 2nd, 3rd and 4th Defendants, and that the documents they produced in evidence are contradictory as to the purchase price, with the sale agreement showing a figure of Kshs 500,000/= and subsequent documents showing a purchase price of 250,000/=, both prices which were below the market price.

The said Advocate relied on the authority of **Locabail International Finance vs AgroExport & Others (1986)1 All E.R. 901** for his submission that a mandatory injunction could be issued as the Plaintiff's was a straightforward case, and the Registrar by his refusal to issue an official certificate of search had contravened section 36(2) of the Registered Land Act. The Plaintiff's Advocate also submitted that the Plaintiff had established a *prima facie* case as he has a title and therefore a proprietary interest in the suit property, and had shown the involvement of the Defendants in fraud. The Advocate also relied on the decision in **Ochieng vs Ochieng (1995-1998) 2 E.A. 260** for the submission that a sale which is void does not entitle the purchaser to obtain proprietorship or title to the land sold.

Further, that the Plaintiff had also shown he is in possession, and the balance of convenience was therefore in his favour. The Plaintiff's Advocate also submitted that damages would not be an adequate remedy, as the 2nd, 3rd and 4th Defendants run a non-profit charitable foundation, and it is not clear if they will be able to reconstitute the Plaintiff in the event that he succeeds in his claim.

The 2nd, 3rd and 4th Defendant's Advocate submitted that the suit filed was incompetent as no demand letters had been sent to the Defendants, and no notice of intention to sue the 5th Defendant who is a Government officer had been given. He also submitted that the Plaintiff had failed to establish any proprietary interest in the suit property as he had not provided any evidence of the processes leading to the issuance of his title, and no evidence has been provided from the Kiambu Land Registry where the land was first registered.

The said Defendants' Advocate further submitted that the 2nd, 3rd and 4th have established that they were innocent purchasers for value without notice, and are therefore protected by the law under section 27 and 143 of the Registered Lands Act, and the Advocate relied on the authority of **Job Muriithi Waweru vs Patrick Mbatia (2008) eKLR** in this regard. Furthermore the Defendants were not involved in any fraudulent dealing as they reported the matter to the police and testified in the Criminal case no. 237 of 2009, and in any case the 1st Defendant was acquitted of any fraud. Finally, the Advocate argued that the Plaintiff was not in possession of the said property, and that the 2nd, 3rd and 4th Defendants had brought evidence to show the developments they have made on the suit property. The Plaintiff had therefore failed to establish a *prima facie* case as required in **Mrao Ltd vs First American Bank of Kenya & 2 others (2003) KLR 125**, and that he could be adequately compensated in damages.

I have read and carefully considered the pleadings, evidence and written submissions by the respective parties to this application. The main issue before this Court is whether the two applications before me meet the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and in addition, if the Plaintiff has shown any special circumstance to entitle him to the mandatory injunction sought.

The first question I must answer is whether the Plaintiffs and 2nd, 3rd and 4th Defendants have established a *prima facie* case. The Plaintiff has produced evidence of ownership the suit property by annexing a copy of a title to the suit property issued on 07/06/1989. The 2nd, 3rd and 4th Defendants have also produced in evidence a copy of title with regard to the suit property issued on 11/11/2008. The validity of both titles is an issue to be determined at the full trial after production and examination of further evidence, and for this reason I am unable at this stage to find a *prima facie* case in favour of either the

Plaintiffs and 2nd, 3rd and 4th Defendants on the basis of their proprietary interests in the suit property. Likewise, the issue of whether there was any fraudulent dealing with the suit property is a matter that can only be decided after a full hearing of the suit filed herein.

Since both parties have provided evidence of their proprietary interests in the suit property, I will decide of the applications before me on the basis of balance of convenience. Both the Plaintiff and the 2nd, 3rd and 4th Defendants have disputed that the other party has possession of the suit property. In my opinion the balance of convenience in this respect tilts in favour of the Plaintiff for the reasons that a title over the suit property was issued to the Plaintiff before the one issued to the 2nd, 3rd and 4th Defendants, and there is a higher probability of the Plaintiff having been in possession of the suit property before the 2nd, 3rd and 4th Defendants.

The only outstanding issue for determination is whether a mandatory injunction can be issued for the Thika Land Registrar to issue an official search certificate with respect to the suit property. It was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. In my opinion this is one of such clear cases as section 36 of the Registered Land (Cap 300) provides as follows:

- (1) Any person, on application in the prescribed form, may inspect during official hours of business any register and any sheet of the registry map or any filed instrument or plan.
- (2) Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto, and certified copies of any document or of the registry map or of any plan filed in the registry.

The orders of this Court are therefore as follows:

1. The 2nd, 3rd and 4th Defendant/Respondents jointly and severally by themselves and/or their agents/servants/employees or any of them on behalf of M/S Ebenezer, Restoration Christian Centre are restrained from further fencing, erecting a perimeter boundary wall, around, excavating, constructing on, leasing, charging, selling or alienating the suit property in Title Number RUIRU EAST/JUJA EAST BLOCK 2/1094 or otherwise howsoever continuing to encroach, trespassing, damaging, wasting, dealing with or in any manner interfering with the Plaintiff's quiet possession, use and enjoyment of the said property pending the hearing and final determination of the suit herein.
2. The 5th Defendant to forthwith issue an official search certificate to the Plaintiff in respect of the suit property being Title No. RUIRU EAST/JUJA EAST BLOCK 2/1094 within 21 days of service of this Order, and subject to the Plaintiff's paid up application.
3. The 2nd, 3rd and 4th Defendants' application dated 20th December 2011 is hereby dismissed.
4. The costs of the two applications dated 23rd August 2011 and 20th December 2011 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 28th day of May, 2012.

P. NYAMWEYA

JUDGE

