



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 446 OF 2011

WILLIAM

TUMATE SIALALA SANO)

SUAKEI OKE PARKIRE)

LATOO ENE RIKANGA NCHEPAI) PLAINTIFFS

VERSUS

JULIUS OLE LAPOSO.....1ST DEFENDANT

KANAI OKE NASARINKE.....2ND DEFENDANT

VINCENT MBITHI.....3RD DEFENDANT

RULING

The Plaintiffs filed an application dated 24th August 2011 wherein they are seeking the following orders:

1. That there be a temporary injunction restraining the 1st, 2nd and 3rd Defendants, their agents, employees, servants and/or whosoever from entering, trespassing, remaining on, tampering with, encroaching, and/or erecting unlawful structures on all that parcel of land known as LR. Number 13873/Karen within Karen Estate pending the hearing and determination of this suit.
2. That the Plaintiffs herein be permitted to evict the Defendants from all that parcel of land known as L.R. Number 13873/Karen within Karen Estate.
3. That the Plaintiffs be permitted to demolish at the Defendants' expense the illegal structures from all that piece of land known as L.R. Number 13873 Karen situate at Karen Estate Nairobi (hereinafter referred to as the suit property).

4. That the orders of this court be enforced by the officer in charge Karen Police Station.

The main grounds for the application are that the Plaintiffs are the *bona fide* owners of the suit property and are in lawful and actual possession and occupation of the same. Further, that the 1st and 2nd Defendants is collusion with the 3rd Defendants have encroached and tampered with the said parcel of land by trespassing into the property, and erecting temporary dwellings and thereafter residing therein. The Plaintiffs claim that the failure, refusal and or neglect by the Defendants to vacate the said property amounts to unlawful invasion and/or illegal occupation of the Plaintiffs' parcel of land, and is detrimental to the Plaintiffs as they continue to suffer loss of their property rights and quiet possession and enjoyment of their piece of land.

These grounds are deponed to in the Supporting Affidavit sworn by the one of the Plaintiffs, William Tumate Sialala Sano on 24th August 2011, and in his Supplementary Affidavit sworn on 28th October 2011. The Plaintiffs state that they are the registered proprietors, owners and occupants of the suit property, where they reside with their families, and that their interests are registered vide a Title Deed dated the 19th October 1989. In addition the Plaintiffs state that in the year 2008 one Auriel Marie Joy Kimemia claimed ownership of the suit property, and that she also claimed to have been allotted the subject property and to have been issued a title in 1998 in her name and that of her husband (now deceased). The Plaintiff also state that in the same year another title deed was issued to one Mary Wanjiru Chege, and that they also got to know that a company known as Necter (K) Limited was also in possession of a title allegedly issued on the 2nd July, 1998 in respect of the suit property. The Plaintiffs have annexed as evidence copies of all the aforementioned title deeds.

The Plaintiffs further state that on realizing that various titles had been given as against the suit property, they instructed their advocates, Mose, Mose & Mullimo Advocates to protect their interests and preserve the suit property. Further, that the said advocates applied to this Court for the Plaintiffs herein to enjoined as Defendants/Counterclaimants in Nairobi ELC Civil suit No. 351 of 2008, and a court order allowing their joinder dated 11th September 2008 as well as their Memorandum of Appearance, Defence and Counterclaim dated 10th November, 2008 are annexed by the Plaintiffs as evidence. The Plaintiffs also aver that this court in the aforementioned case issued an order on 10th December 2008 for the maintenance of the *status quo* prevailing of the material time to the effect that the Plaintiffs herein were to continue living on the suit property to the exclusion of all other parties pending the hearing and determination thereof. The Plaintiffs aver that the said matter is yet to be heard and determined to date.

The 1st 2nd and 3rd Defendants responded in a Replying Affidavit sworn on on 19th October 2011 and a Further Replying Affidavit sworn on 30th January 2012 both by the 1st Defendant, and in a 2nd Replying Affidavit sworn by the 3rd Defendant on 19th October 2011. The Defendants deny that the Plaintiffs are registered proprietors and occupants of the suit property, and state that the documents held by the Plaintiffs are not genuine. The Defendants further state that the suit property is registered in the names of the 1st Defendant and one David Muntet, and they have attached as evidence a copy of a title to the suit property in the said names issued on 29th September 2000. Further, that the 2nd and 3rd Defendants do not reside on the land at all, and that the 3rd Defendant is the Chief of the location wherein the suit premises is situated. The Defendants also state that they are not aware of any legal proceedings relating to suit property.

The Plaintiffs' Advocates filed Written Submissions and Supplementary Submissions dated 13th December 2011, and 8th February 2012 respectively, while the Defendants' Advocates filed their Written Submissions on 7th February 2012. Both Advocates relied on the clients' titles to argue for or against the orders sought, and cited various decisions in this respect. I have read and carefully considered the pleadings and submissions by the parties. At this stage what I need to decide is whether the orders sought can be granted. Prayers 4 and 5 of the application dated 24th August 2011 are seeking eviction and demolition orders which are final orders which cannot be granted at this interlocutory stage. The only substantive prayer that can be granted at this stage is the one for a temporary injunction, and for the same

to issue the requirements stated in **Giella v Cassman Brown & Co Ltd, (1973) EA 358**, must be met. The main issue therefore is whether the Plaintiff has shown a *prima face* case to entitle him to the injunction sought.

The Plaintiffs have produced evidence of ownership the suit property by annexing a copy of the title to the suit property. The authenticity of this title has been contested by Defendants who have also produced copy of a title in the 1st Defendant's name with regard to the suit property. Other titles issued with respect to the suit property have also been produced in evidence and which are the subject of Nairobi ELC Civil suit No. 351 of 2008. The authenticity of all these titles, and which title is the valid one are issues to determined at full trial, and for this reason I am unable at this stage to find a *prima facie* case in favour of the Plaintiffs. 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. I will therefore decide prayer 3 of the Plaintiffs' application dated 24th August 2011 on the basis of balance of convenience.

The Plaintiff has also produced in evidence the pleadings and orders granted in Nairobi ELC Civil suit No. 351 of 2008, which are attached as annexures "WTSS 5", "WTSS 6", and "WTSS 7" to the Supplementary Affidavit sworn by the 1st Plaintiff on 28th October 2011. In particular there is the order granted by Honourable Justice Osiemo on 10th December 2008 and issued on 19th December 2008 that the *status quo* with regard to the suit property be maintained. This Court cannot therefore give conflicting orders with regard to the same property, and also finds that for there is need for the issue of the ownership of the suit property to be more efficiently heard and disposed of by all the parties involved. Pursuant to the sections 1A and 1B of the Civil Procedure Act and the overriding objectives stated therein and section 3A of the Civil Procedure Act, I therefore hereby order as follows:

1. H.C.ELC No. 446 of 2011 and H.C. ELC No. 351 of 2008 be and are hereby consolidated for hearing and disposal together.
2. That the *status quo* maintaining as at on 19th December 2008 when orders of Honourable Justice Osiemo were issued in Nairobi ELC Civil suit No. 351 of 2008 to continues to be maintained with regard to the land parcel known as L.R. Number 13873/Karen pending the hearing and determination of the suit filed herein, or until further orders.

Dated, signed and delivered in open court at Nairobi this ____3rd____ day of ____May____, 2012.

P. NYAMWEYA

JUDGE