



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL & LAND CASE 159 OF 2012

JAMES MAINA NJENGA.....PLAINTIFF

- VERSUS -

JOSEPH WAITHAKA WAMBUI.....1ST DEFENDANT

NGEI II KUGERIA LTD.....2ND DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 26th March 2012. It is expressed to be brought under orders 40 and 37 of the Civil Procedure Rules 2010 and sections 30 and 143 of the Registered Land Act (now repealed). The plaintiff prays for injunction to restrain the defendants from interfering with his quiet possession and title of plot 222 Kahawa West III. The plaintiff relies on two depositions sworn on 26th March 2012 and 24th May 2012.
2. In a nutshell, the plaintiff's case is that he bought the land from the 2nd defendant. He was issued with a share certificate. He got vacant possession. He has never sold it. He was thus surprised when the 1st defendant entered and trespassed on the property alleging that he bought the land from one James Maina Njenga. The alleged vendor has similar or identical names to the plaintiff. The plaintiff's take of the situation is that the alleged vendor was bogus and defrauded the 1st defendant. He contends that the 1st defendant is a complete stranger.
3. The motion is contested. The 1st defendant has filed two affidavits in reply: a replying affidavit sworn on 11th April 2012; and, a further affidavit sworn on 11th May 2012. There is also another replying affidavit sworn by Wairimu Kinyanjui on behalf of the 2nd defendant on 17th April 2012. In a synopsis, the 1st defendant claims to be the *bona fide* purchaser of the land for value without notice. He is in possession. He has put up structures on the disputed land. He questions the validity of the documents produced by the plaintiff marked "J1" and J2". The 1st defendant has exhibited a sale agreement dated 1st April 2011 between him and a person known as James Maina Njenga for the consideration of Kshs 470,000. In the replying affidavit at paragraphs 5 and 6, he avers that he bought the land from the 2nd defendant Ngei Two Kugereria Limited and was issued with a share certificate number 332 annexed. He has been paying local rates. He thus submitted that the balance of convenience tilts in his favour. He prays for dismissal of the motion.
4. I have heard the rival arguments. At the heart of the suit is a dispute over ownership of the suit land. The disputants have laid claim to it. The determination of the legal owner is the true province of the trial court on tested evidence. However, I must at this stage, on a preponderance of the evidence available,

determine whether the plaintiff has a *prima facie* case. When a litigant approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80. See also the Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

5. I have to delve into the respective documents of title by the disputants to determine priority of ownership or superiority of the claims. I do so with trepidation because, at this stage I am not fully seized of all the evidence. The plaintiff has exhibited a share certificate number 026 issued by the 2nd defendant company dated 22nd October 1991 for plot 222. The suit land has not been registered or a title issued. The plaintiff's reliance on sections 30 and 143 of the Registered Land Act (now repealed) are misplaced. The defendant only bought the land on 1st April 2011. It was April fools day. He bought the land from a person with identical names to those of the plaintiff. He does not know the plaintiff. They are strangers, they both concede. He was issued with a share certificate by the 2nd defendant company on 15th April 2011. He has attached 3 payment receipts to the company for transfer and related fees of plot 222. Annextures "JWW 4" are receipts for payment of rates to the City Council of Nairobi. He is in possession, has erected temporary structures and is in the course of putting up a permanent structure. So, how did this happen and who is telling the truth?

6. The answer is partly found in the replying affidavit of Wairimu Kinyanjui sworn on 17th April 2012 on behalf of the company. She depones as follows at paragraphs VII, VIII, IX and X;

"VII. THAT I aver that I'm aware as informed by my office staff that on or around 11th December 2011 (sic) one person by the name James Maina Njenga turned up and reported that his land share certificate plot number 222 had been lost and or destroyed in fire together with original payment receipt of issuance of original certificate and he was advised by office staff to follow the due process as required by the law and he later availed a police abstract and his National identity card for purposes of replacement of the share certificate which is a routine activity and he paid chargeable costs (annexed and marked as exhibit "WK1" arecopies of police abstract, National identity card and affidavit).

VIII. THAT I aver upon availing of the requisite police abstract, affidavit in support and positive identification the said person James Maina Njenga, the Plaintiff herein was issued with a certificate Number 214 dated 1/4/2011 (annexed and marked as exhibit "WK2" is a copy of share certificate No.214).

IX. THAT thereafter the said James Maina Njenga – the plaintiff and the 1st Defendant one Joseph Waithaka Wambui on their own free will and in presence of their witness one Mary Wangu Kiruthu who both professed to know fairly well approached our office and stated their wish to transact the subject plot No.214 whereby the 1st Defendant Joseph Waithaka Wambui was to purchase and the Plaintiff one James Maina Njenga was to sell and upon the sale transaction a certificate No.332 dated 15/4/2011 was issued to the 1st Defendant herein (annexed and marked as exhibit "WK3" isa copy of National identity Card of one Mary Wangu Kiruthu).

X. THAT I aver that the 2nd Defendant did not sell the subject land No.222 to 1st Defendant, receive any sale consideration thereto and indeed it does not know how and in which mode the sale price was paid at all and the transactees (sic) should reveal the same to Court for purposes of setting the record straight and indeed to confirm a sale was done as the 2nd Defendant suspects a foul play and a fraud plot".

7. I am thus left in no doubt that the 1st defendant was duped on 1st April 2011. A serious fraud may have been perpetrated. The police have been called in. The 2nd defendant company states at paragraphs XII and XIII of the replying affidavit that they initiated a criminal complaint. I also find, from the evidence at this stage, that the plaintiff's claim of ownership ranks in priority. I say so because he bought the property way back in 1991. On 22nd October 1991, he was issued with a share certificate number 026 for the suit land. He has not sold the plot number 222 to any person. He certainly is not the one who sold it to the 1st defendant. The 1st defendant's duplicate share certificate was obtained only on 15th April 2011 in circumstances that are irregular and which point strongly to fraud.

8. I am alive to the predicament the 1st defendant finds himself in. He has taken up possession of the land in questionable circumstances. He has started construction. From a legal standpoint that possession or construction cannot override the plaintiff's claim on title. And it would be foolhardy and a failure to mitigate further loss for the 1st defendant to insist on possession or to continue construction. He is also not without a remedy of pursuing the fraudster known as James Maina Njenga (not the plaintiff) to whom he paid the alleged purchase price. That fraudster, perhaps and the 2nd defendant, seem appropriate defendants. But all those matters and the truth will be disentangled by the trial court.

9. At this stage, I am satisfied that the plaintiff has established a strong *prima facie* case with a probability of success. It would not be right, as proposed by the 1st defendant, to say he can be compensated in damages. True, the value of the properties can be ascertained. And there is a valid argument that damages would be available. But I hold the view that damages are not always a suitable remedy where the plaintiff has established a clear legal right or breach. See *JM Gichanga Vs Co-operative Bank of Kenya Ltd* [2005] e KLR, *Aikman Vs Muchoki* [1984] KLR 353. Granted those circumstances, even the balance of convenience does not tilt in favour of the 1st defendant.

10. For all of the above reasons, I find the plaintiff has reached the threshold for grant of an interlocutory prohibitive injunction. I order that an injunction shall issue against the defendants jointly and severally, their servants, agents or assigns or howsoever from remaining or continuing in occupation or possession or entering, alienating or dealing with the plaintiff's plot number 222 Kahawa West Phase III until the hearing and determination of this suit.

11. I also order that the main suit be determined within 1 year in default of which the order of injunction shall lapse.

12. I grant the plaintiff costs of the application in any event.

It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of July 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Njogu for the Plaintiff.

Mr. Laichena for Gitau for the 1st Defendant.

Mr. Muriuki for Kimani the 2nd Defendant.