



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 617 of 2011

DAVID MBURU WAKAIMBA.....PLAINTIFF/APPLICANT

VERSUS

CHIEF LAND REGISTRAR.....1ST DEFENDANT/RESPONDENT

PERCY ARTHUR OYUGI OPIO.....2ND DEFENDANT/RESPONDENT

DAVID MATHENGE.....3RD DEFENDANT/RESPONDENT

EQUITY BANK LIMITED.....4TH DEFENDANT/RESPONDENT

RULING

The Plaintiff filed a Notice of Motion application dated 8th November 2011 under Order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rules and Sections 1A, 1B, 3A, and 63(e) of the Civil Procedure Act. The Plaintiff is seeking the following orders:

- a) An order of injunction restraining the Defendants from transferring, charging, dealing, interfering with the Plaintiff's enjoyment and occupation of the suit property Title No. Ruiru East Block 1/104 (hereinafter referred to as the suit property) pending the hearing and determination of the main suit.
- b) An order of mandatory injunction directing 1st Defendant to produce for the inspection of the Court and the parties herein the Original Land Register for the suit property together with the Transfer Forms, copies of Identification Cards, copies of PIN Certificates and Land Control Board Letters of Consent to Transfer used by the 1st Defendant to transfer the suit property to the 3rd Defendant and 2nd Defendant respectively.

The application is premised on the grounds that the Plaintiff purchased the suit property sometimes in 1994 and was registered as the absolute proprietor thereof and issued with a Title Deed. The Plaintiff avers that he took possession of the suit property and is in the process of completing construction of residential premises on the suit property. The Plaintiff further alleges that the 1st Defendant without legal basis issued Title Deeds to the 2nd & 3rd Defendants who have charged the property to the 4th Defendant. The Plaintiff also claims that the 1st Defendant has declined to produce the Original Land Register for the suit property, Transfer Forms, copies of Identification Cards, copies of PIN Certificates and Land Control Board Letters of Consent to Transfer used by the 1st Defendant to transfer the suit property to the 3rd Defendant and 2nd Defendant respectively.

The application is supported by an affidavit sworn by the Plaintiff dated 8/11/2011 wherein, the grounds

outlined in the application are detailed. The Plaintiff in addition has stated that he purchased the suit property from one Bernard Kuria Waweru who was a member of Githunguri Constituency Ranching Company Limited, which was the initial owner of the suit property. He also avers that he has never sold the suit property to anyone and still has the original title in his possession, and that he has lodged a complaint with the Criminal Investigations Division (C.I.D).

The Plaintiff has attached as evidence copies of two title deeds with respect to the suit property, one issued to him on 16th May 1994 and the other issued to the 2nd Defendant on 12th March 2010. He has also attached copies of photographs showing the developments on the suit property, and of correspondence regarding his complaint and his request for documents from the 1st Defendant.

This application was opposed. The 1st Defendant filed grounds of opposition dated 18/4/2012. The 1st Defendant averred that the application is misconceived, incompetent and bad in law as the prayer sought cannot be granted at this stage, and that the application is fatally defective and an abuse of the court process. Further, that the Plaintiff is guilty of material non-disclosure, has deliberately misled the Court and has come to this court with unclean hands and is hence not entitled to an order of injunction. The 1st Defendant maintained that granting the orders sought by the Plaintiff will be a great injustice upon the 1st Defendant.

The application was also opposed by the 2nd Defendant who filed a Replying Affidavit sworn on 20/1/2012. The 2nd Respondent averred to be the registered proprietor of the suit property having purchased the same from the 3rd Respondent on 9/2/2010. Further, that he conducted a search at the Land Registry to confirm whether the title was transferable, and the suit property was subsequently valued and he paid the stamp duty. The 2nd Defendant explained in detail the events leading to the transfer of the suit property to him, resulting in the issuance of a title deed in his name.

The 2nd Defendant avers that he was provided with a certified copy of the green card in respect of the suit property by the District Land Registrar Thika, which indicated that the record was opened on 24/12/2009 and registered in the name of Githunguri Constituency Company Limited, and on the same day transferred to the 3rd Defendant. The 2nd Defendant maintained that he did all the due diligence to confirm that the suit property was transferable and that he did not perpetrate the alleged fraud. He further averred that he was not opposed to prayer for production of documents by the 1st Defendant, which would shed light with respect to the suit property. The 2nd Defendant produced as evidence a copy of the title deed issued to him on 12th March 2010 and various documents evidencing the transactions deposed to.

The Plaintiff was granted leave to serve the 3rd Defendant by substituted service through advertisement in a daily newspaper. There is an Affidavit of Service filed on 7/2/2012 showing that the 3rd Defendant was served as directed by the court, by way of advertisement in the *Daily Nation* newspaper on 12/1/2012. However despite such substituted service, the 3rd Defendant has not filed any pleading in response to the application herein.

The 4th Defendant also opposed the application, and filed a Replying Affidavit sworn on 20/1/2012 by Mary Mwangata its Senior Legal Officer. The Deponent stated that the 2nd Defendant is an employee of the 4th Defendant and hence entitled to all the privileges accorded to members of staff, which includes taking of mortgages. The Deponent confirmed that the 2nd Defendant took out a mortgage on 1/2/2010 to purchase the suit property, which was partially financed by the 4th Defendant under the staff mortgage scheme. The 4th Defendant averred that it did not perpetrate the alleged fraud and that it should be indemnified from any loss by the 1st and 3rd Defendants jointly and severally. The 4th Defendant further averred it was not opposed to prayer for production of documents by the 1st Defendant, as the records would identify the people who allegedly interfered with the records at the Lands Registry.

The parties relied on the submissions filed during the hearing of the application on 20th September 2012.

The Plaintiff's Advocate filed submissions dated 22/5/2012 and referred the Court to Sections 27(a) and 28 of the Registered Land Act Cap 300 (now repealed), and Article 40(1) of the Constitution. The Plaintiff contended that the suit property being registered in his name, he became the absolute owner of the same, and that the subsequent transactions were carried out without his knowledge, approval and or consent. Further, that any subsequent transfer is void *ab initio*, and a purchaser for value without notice of defective title cannot claim an interest in the suit property. The Plaintiff relied on the decision in the case of **Simon Towett Maritim - vs – Jonathan Muiruri Kibaru (2006) eKLR** in this respect.

The Plaintiff maintained that his application meets the requirements established in the case of **Giella –vs – Cassman Brown & Co. Ltd (1973) E.A 358**. The Plaintiff relied in the case of **Muigai – vs – Housing Finance Co. Kenya Ltd & Another Civil Case No. 1678 of 2001**, on the issue as to whether he can be adequately compensated by damages, wherein the court (Ringera J. - as he then was) quoted the decision in the case of **Lucy Njoki Waithaka –vs – ICDC , HCCC No. 321 of 2001** that an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary is not enjoined. Further, that some of the considerations to be borne in mind include the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties.

The 1st Defendant Advocate filed submissions dated 13/6/2012 wherein it was averred that they were not opposed to grant of the prayers as sought in the application dated 8/11/2011, other than prayer for production of documents. The 1st Defendant argued that the production of the green card would assist the court in making its final determination of the suit, and thus seeking production in the interim is misguided and should not be allowed. Further, that the grant of orders in interlocutory applications are normally made for preservation of property and/or maintenance of *status quo* or equity, pending the final determination of the suit.

The 2nd and 4th Defendants' Advocate also filed written submissions dated 30/8/2012. The 2nd Defendant referred the court to section 26 of the Land Registration Act of 2012, stating that he acquired the suit property lawfully, and was subsequently registered as proprietor for valuable consideration without notice of a defect in title. Further, that there was no evidence to show that the 2nd and 4th Defendant committed fraud as alleged by the Plaintiff, and that the subsequent registration of the 2nd Defendant as the proprietor of the suit property makes him the absolute and indefeasible owner thereof.

It was the 2nd and 4th Defendants' contention that a certificate of official search is conclusive as it reflects the true copy of the Register. They relied on the provisions of section 35(2) of the Land Registration Act, wherein it is stated that every extract from a document certified by a registrar to be a true copy or extract shall, in all proceedings, be received as *prima facie* evidence of the contents of the document. The 2nd Defendant stated that the Plaintiff's name does not feature in the certified copy of the green card that was provided to the 2nd Defendant. It was the submission of the 2nd and 4th Defendants that the Plaintiff had failed to establish a *prima facie* case with probability of success, and that as there was valid sale it would be unjust to injunct a *bona fide* purchaser for valuable consideration without notice to a defect title.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. At this stage what I am required to do is determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** as to the grant of a mandatory injunction.

In the case of a temporary injunction, the requirements are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience. For a mandatory injunction to issue that there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff in his Complaint dated 8/11/2011 is praying for judgment to be entered against the Defendants for a declaration that he is the absolute proprietor of the suit property, and for other consequent prayers. The Plaintiff has produced evidence of ownership of the suit property by annexing a copy of a title to the suit property issued to him on 16th May 1994.

The 2nd Defendant has also produced in evidence a copy of title with regard to the suit property issued to him on 12th March 2010. The validity of both titles is an issue to be determined at the full trial after production and examination of further evidence. 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. For these reasons I am unable at this stage to find a *prima facie* case in favour of the Plaintiff.

I will decide the prayer for an injunction on the basis of balance of convenience as there has been evidence of proprietorship brought by the Plaintiff. In my opinion the balance of convenience tilts in favour of the Plaintiff firstly for the reason that a title over the suit property was issued to him before the one issued to the 2nd Defendant. Secondly, none of the Defendants have disputed that the Plaintiff is the one in possession of the suit property.

The only outstanding issue for determination is whether a mandatory injunction can be issued for the Chief Land Registrar to produce the documents requested by the Plaintiff. In my opinion this is a clear case for a mandatory injunction to issue for two reasons. Firstly, the Registered Land Act (since repealed), which was the regime under which the suit property was registered at the time of filing the application provided in section 36 of 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.”

Similar provisions are now provided for in the Land Registration Act of 2012, which states that:

“A person who requires an official search in respect of any parcel, shall be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.”

The 1st Defendant is therefore obligated to provide the documents requested by the Plaintiff under the provisions of the applicable law cited in the foregoing,

Secondly, the Constitution in Article 35 gives every citizen the right of access to information held by the state, and information held by another person and required for the exercise or protection of any right or fundamental freedom. The 1st Defendant is an officer in a state office and bound by the provisions of Article 35 of the Constitution both in his or her official as well as personal capacity to provide the said documents to enable the other parties in this suit to exercise their rights. It is also instructive in this regard that the 2nd and 4th Defendant have not opposed the prayer for a mandatory injunction against the 1st Defendant.

In light of the foregoing reasons, the orders of this Court are therefore as follows:

1. The Defendants are restrained from transferring, further charging, dealing with, and or interfering with the Plaintiff's enjoyment and occupation of the suit property Title No. Ruiru East Block 1/104 pending the hearing and determination of the main suit or until further orders.
2. The 1st Defendant to forthwith produce for the inspection of the Court and the parties herein and to

file in Court the Original Land Register for the suit property together with the Transfer Forms, copies of Identification Cards, copies of PIN Certificates and Land Control Board Letters of Consent to Transfer used by the 1st Defendant to transfer the suit property to the 3rd Defendant and 2nd Defendant respectively within 30 days of service of this ruling and orders herein, upon payment by the Plaintiff of the prescribed fee.

3. The Plaintiff shall serve a copy of these orders on the 1st Defendant, and follow-up on the production and filing of the said documents.

4. The costs of the application dated 8th November 2011 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____24th____ day of ____October____, 2012.

P. NYAMWEYA

JUDGE