



REPUBLIC OF KENYA

High Court at Machakos

Civil Suit 228 of 2011

DANIEL KIMANI MOSEKA.....PLAINTIFF

VERSUS

JAPHETH ARTHUR MWANGI KIURIRE.....DEFENDANT

RULING

The Plaintiff avers that he is the registered proprietor of all that piece or parcel of land comprised in **Land Reference Number Ngong/ Ngong/ 28986** measuring approximately 0.41 hectares hereinafter referred to as “*suit premises.*” The Defendant has however commenced construction of a perimeter wall around the suit premises where he intends to commence further developments thereof. The plaintiff's right to absolute ownership of the suit premises has hereby been infringed by the defendant resulting to loss and damage on his part.

On that basis the Plaintiff took out a Notice of Motion under a certificate of urgency dated 30th August 2011 seeking orders to injunct the defendant, his servants or agents from interfering with the plaintiff's ownership and possession of the suit premises and from constructing a perimeter wall around it or carrying out any developments thereof pending the hearing and determination of the suit.

The Application was premised on the grounds that; the plaintiff is the registered proprietor of the suit premises, that the defendant had since 1st August 2011, without authority started construction of a perimeter wall around the suit premises with an intention of carrying out further developments thereon, that he is being denied his right to absolute ownership, that he is apprehensive that the suit premises is in danger of being wasted and/ or alienated, the actions of the defendant are illegal and amount to trespass and that it is in the interests of justice that temporary orders of injunction be issued.

The plaintiff in support of his application swore that he is the registered and absolute proprietor of the suit premises. He annexed a copy of the Title Deed and the Sale Agreement to that effect. The suit premises were acquired by the Government in the year 1965 through a gazette notice number 4262 from one **Mokope Ole Tapasian** where the Original Title was surrendered for the purposes of subdivision. **Mokope** was compensated. The land was utilized to facilitate the works of Voice of Kenya (V.O.K) and the remainder reverted back to **Mokope**. **Mokope** was to be issued with a fresh title upon effecting some changes to the Registry Index Map. The plaintiff further swore that in the year 2002, the defendant claimed ownership of the suit premises and the dispute was adjudicated upon by the Kajiado Land Disputes Tribunal which decided that the suit premises belonged to **Mokope**. The defendant applied for judicial review orders of certiorari but **J. B Ojwang, J.** (as he was then) ruled that the dispute was not a litigious one, but that a cadastral and surveying process be undertaken to solve the dispute. There have been several disputes over the remainder of the suit premises between Mokope and the defendant. A Title Deed was issued to Mokope being the mother title, where after the plaintiff was issued with a title in respect to the suit premises. The defendant had through Suraya Sales Limited commenced construction of

a perimeter wall around the suit premises with intention of carrying out further developments thereof without the plaintiff's authority.

In response, the defendant raised a preliminary objection dated 4th October 2011 on the grounds that the plaintiff had no locus standi as he had relied on ownership of a parcel of land that had officially been declared to be non-existent and which registration was obtained by fraud. That the suit contravened the principles of res judicata under sec 7 of the Civil Procedure Act as the same had been previously heard and determined being HCC Suit No. 934 of 2003. That there is not an iota of merit in the application and it should be dismissed with costs.

The defendant further in his replying affidavit averred that, he is the registered owner of the parcel of land known as Land parcel number 1161/4 (original 1161/2), Karen Nairobi since 2nd December 1970. He purchased the property for a consideration from one **John Lionel Bretherton Llewelin, Lucy Gabb and Marian Johnstone** the personal representatives of the estate or **Isabel Mary Llewelin**. The said land was vacant until 1999 when six herdsmen, their relatives and agents invaded it and put up structures when he had left the country for medical treatment. They later on following a Court Order to vacate the land did so on 16th August 2011 only for another group of herdsmen to invade the land on 26th September 2011. That despite the different registration numbers, the property in dispute is indeed the same the suit premises. The defendant further avers that, the plaintiff's land is a few meters from his land and that it is well within the plaintiff's knowledge that the suit premises belongs to him and that the same was within Nairobi Province. The Titles of the suit premises were to be restricted, then recalled and cancelled. The suit HCC No. 934 of 2003 was dismissed and no appeal was filed, neither was the judgment set aside or stayed. The defendant has following the dismissal of the suit, contacted a building contractor to erect a perimeter wall and thereafter develop the whole property.

The defendant further filed a Notice of Motion dated 11th October 2011 under a Certificate of Urgency seeking prayers, for this suit to be transferred to Nairobi High Court from Machakos Law Court since the suit premises were situated in Nairobi and therefore this court lacked jurisdiction to entertain thereof. The application was accompanied by a supporting affidavit sworn by the defendant. The application came before **Dulu, J** on 12th October 2012, who certified it urgent. It was thereafter set down for *interpartes* hearing on 12th October 2012.

The application eventually came up for hearing, before **Dulu, J** who ordered parties to file and serve written submissions with regard to the application within 15 days and the status quo to be maintained. The plaintiff filed grounds of opposition and submissions dated 2nd November 2011 while the defendant filed his submissions dated 5th November 2011. By a ruling delivered 15th February 2012 **J.M Ngugi J.** dismissed the application and Ordered that the suit be heard at the Machakos High Court.

The application dated 30th August 2012 later came up before me for *interpartes* hearing on 6th June 2012. The plaintiff counsel **Mr. Ocharo** and the defendant agreed to canvass the application by way of written submissions. The submissions were subsequently filed and exchanged I have carefully read and considered alongside cited authorities.

Does the application satisfy the principles as set out in the classic case of **Giella vs Cassman Brown & Co. Ltd (1973) E.A 358** for the grant or refusal of an interlocutory injunction. Those conditions are:-

- The applicant must show a prima facie case with probability of success.
- That the plaintiff will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted, and finally,
- If the court is in doubt, it should decide the application on balance of convenience

It is also essential to note that an Injunction is basically a discretionary as well as an equitable remedy so that the conduct of the parties prior and subsequent to the mounting of the application may come into focus.

The issue for determination here is whether the suit premises belong to the Plaintiff or the Defendant herein. Both parties claim to have acquired the suit premises from different rightful owners as *bonafide* purchasers for value. Whether there was double allocation of the suit premises to different persons in the past who turned out to be the Vendors are issues that can be best addressed at the substantive hearing of the main suit. In the interim, the ownership of the suit premises should remain in limbo. In other words, neither the plaintiff nor the defendant can claim ownership of the suit premises based on their respective Titles. The validity of those Titles will be determined at the substantive hearing of the main suit. Therefore the defendant cannot for now proceed with the developments on the suit premises based on his alleged ownership of the suit premises at the expense of or to the prejudice of the plaintiff who also claims similar ownership.

Everything considered, I am satisfied that the plaintiff has at this interlocutory stage made out a prima facie case with a probability of success at trial. In the result, since Prayers (a) and (b) of the application have been overtaken by events, I would hereby allow prayers (c) (d) and (e) of the application with no order as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 15th OCTOBER 2012.

ASIKE- MAKHANDIA

JUDGE