



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
HCCC. NO.14 OF 2011

ANNE WAIRIMU NDUNGU.....PLAINTIFF

VERSUS

DAVID RUTHIA KABOGO.....DEFENDANT

RULING

(1) On the 25th January, 2011, Anne Wairimu Ndungu filed suit against David Ruthia Kabogo seeking declaration that Plot No. L.R.7340/79 Mavoko Municipality (the suit property) lawfully belongs to her and an injunction against the Defendant restraining him from interfering, trespassing, remaining or entering the suit property or any sub-divisions thereof. The Plaintiff avers that she purchased the suit property from M/s Githunguri Njiru Farm (1966) Ltd on the 10th April, 2008 and is the beneficial owner thereof. She says that she took possession of the suit property upon payment of the purchase price and has sub-divided the same and sold some portions to third parties. She contends that upon visiting the suit property in January, 2011 she found that the first Defendant had trespassed into her land alleging ownership thereof and has fraudulently sold some plots to third parties who have commenced developments thereon. In paragraph 9 of the Plaintiff's statement of claim, the Plaintiff states that after carrying out her investigations it has turned out that the first Defendant is using an I.R. No.90812 of a parcel situate in Nairobi L.R. No.209/14269 and with a fraudulent intent obtained a certificate of title to her land (the suit property) whose location is Machakos and to the Plaintiff's prejudice. The Plaintiff goes on to set out the particulars of the fraud alleged in paragraph 10 of the Plaintiff's statement of claim contending that she has suffered inconveniences and stands to suffer irreparable loss and damage should the first Defendant alienate the suit property, the Plaintiff has sought the intervention of the court for redress.

(2) Simultaneously with the filing of the Plaintiff's statement of claim, the Plaintiff also took out of Notice of Motion under Order 40 rules 1, 2, 3 and 9 of the Civil Procedure Rules, 2010, seeks temporary injunction in terms of the prayer in the Plaintiff's statement of claim pending the hearing of the application and this suit respectively. The application is based on the grounds that the Plaintiff is the lawful bona fide purchaser for value of the suit property; that the first Defendant has invaded the suit property alleging ownership and purporting to have title deeds and has already unlawfully started selling some of the parcels the plaintiff had sub-divided without any colour of right; that upon investigations it has emerged that the purported title the first Defendant is holding is a fraud; and that the Plaintiff stands to lose should the first Defendant continue selling the already sub-divided plots.

(3) The application is supported by the Plaintiff's own affidavit made on the 25th January, 2011 in which she repeats the grounds upon which the application is brought as well as the averments made in the Plaintiff's statement of claim. In paragraphs 3, 4 and 7 of the affidavit, the Plaintiff deposes as follows:

“3. That upon completion of purchase price payment the vendors executed a transfer in my favour (copy of the transfer attaché and marked ‘AWN 2’.

4. That I subsequently took possession and occupation of the suit premises and have already subdivided the same at a great cost and sold some of the parcels to 3rd parties (Attached is copy of the subdivision map and marked ‘AWN 3’

7. That the defendant's actions are not only unlawful but are malicious and untenable and are aimed at alienating my lawful property without any colour of right and should be stopped by the honourable court in good time to save the emergence of conflict between the opposing purchasers before further damage or alienation.

(4) When the application came up for mention before Waweru J., on the 28th January, 2011 the learned judge and on the basis of the evidence in paragraph 7 of the supporting affidavit ordered that:

“interim injunction be and is hereby granted in the terms that both parties are hereby restrained from selling, leasing, transferring or otherwise disposing of the suit land pending disposal of the Notice of Motion dated 25.1.2011.

(5) The first Defendant filed his replying affidavit dated the 15th February, 2011 on the 18th February, 2011. He opposes the application on the basis of the following grounds and reasons set out in paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of his affidavit:-

“2. That I was lawfully allotted a parcel of Land Reference No.7340/79 from the Government of Kenya and was issued with a letter of allotment Ref. No.39711/XXVI dated 12th October, 1998. (Attached herein and marked 'DRK 1' is a copy of certificate of title dated the 12th October, 1998 and the Letter of Allotment).

3. That I paid the full stand premium and other related charges to the Government of Kenya all totaling to Kenya Shillings One Hundred and Thirty Thousand (KShs.130,000). (Attached herein and marked DRK2 are copies of the rent clearance, rates payment receipt and rent payment receipts).

4. That the said parcel of land had been surrendered to the Government of Kenya and I was legally allotted the same and it has never been in the Plaintiff's possession as claimed in paragraph 4 of her affidavit.

5. That as the lawful owner of the said parcel of land I have since been in rightful possession of the same and it has never been in the Plaintiff's possession as claimed in paragraph 4 of her affidavit.

6. That I made an application for the sub-division of the parcel of land which consent was granted and on sub-division of the said parcel of land, I proceeded to sell the same to genuine purchasers. (Attached herein and marked 'DRK3' are copies of the application for consent and letters of consent dated 2nd September, 2010 respectively”.

7. That the said sale was within the law and not illegal as stated by the Plaintiff in the 6th paragraph of her affidavit.

8. That the Plaintiff has purported to sell the land to third parties, among them a number of Administration Police Officers, despite the fact that she is not the true owner of the said parcel of land.

9. That due to the persistent interference of the plaintiff and the police officers, the bona fide purchasers of my land have been unable to develop their individual parcels of land.

(6) In light of the interim order set out in paragraph (4) hereinabove with which the Plaintiff was dissatisfied, she brought another Notice of Motion on the 10th March, 2011 sending that the said interim order be amended to conform with the prayer sought in the Notice of Motion dated the 25th January, 2011 and further that the Officer-in-charge Utawala Police Post and Ruai Police Station be directed to effect observance of the orders of this court that application is supported by the Plaintiff's affidavit dated the 10th March, 2011 which she depones as follows in paragraphs 2, 3, 4, 5 and 7 thereof:-

“2. That on 19th day of February, 2011 as I was going about my usual business on the suit property, a rowdy crowd descended upon me and my entourage and they started heckling and shouting at me to immediately exit the suit premises as they claimed the same belonged to the defendant/respondent who had subsequently sub-divided and sold plots to them.

3. That I immediately made a report at Utawala Police Post (OB No.8/19/2/2011) and Ruai Police Station (OB No.24/19/2/2011).

4. That further to my investigation I have come to realize that the defendant/respondent has been using hirelings namely Julius Onyango, Geoffrey Ogwaga, Charles Okunde and Benjamin Wanga to frustrate the orders of this court by trespassing, alienating, constructing and further sub-dividing the suit premises.

5. That I am reliably informed by my Advocates on record, advise which I verily believe to be true and correct that the defendant/respondent is bent on defeating the spirit of the court order on account of its wording which is not wholly comprehensive and all inclusive hence our instant application for further orders. (attached is a copy of the served order dated 28th January, 2011 and marked 'AWN 6'

7. That one Calleb Onguti on the instructions and/or authority of the defendant/respondent is currently proceeding with construction work even after being supplied with copies of the court order. (attached are photos of the ongoing construction works on the suit premises and the same are marked as a bunch 'AWN 9".

(7) On the 16th March, 2011, Calleb Jomo Ong'uti (the second Defendant) referred to in the Plaintiff's said affidavit dated the 10th March, 2011 sought in a Chamber Summons application dated and filed on the said date to be enjoined in this suit as co-Defendant and leave was granted accordingly on the 16th March, 2011. In his supporting affidavit also dated the 16th March, 2011, the second Defendant states the following in paragraphs 2, 3, 4, 5, 6, 7 and 8:

"2. That I lawfully purchased plots of land known as Plot Nos.35, 36,37, 46, 38,43,44 and 45 that were a subdivision of L.R.No.7340/79 ATHI RIVER from the Defendant herein (Attached herein and marked 'CJO1' are copies of the sale agreements entered into between myself and the Defendant herein, dated 21st June 2010 and 12th July, 2010 respectively and a copy of the map showing the proposed subdivision of the said property).

3. That I confirmed with the vendor, the Defendant herein, that he sought consent to the relevant authorities to subdivide the said parcel of land which consent was granted on or around 2nd September, 2010. (Attached herein and marked 'CJO2' is a copy of letter of consent dated 2nd September, 2010)

4. That I bought each of the eight plots at Kenya Shillings Two Hundred Thousand (KShs.200,000.00) (Attached herein and marked 'CJO3' are copies of receipts showing payment of the purchase price).

5. That upon payment of the Purchase Price, I was issued with Certificates of ownership (Attached herein and marked 'CJO4' are copies of the Certificates of ownership to the said plots).

6. That I then embarked on developing the said plots.

7. That now the Plaintiff and/or her agents have trespassed onto my property and caused destruction claiming to be the rightful owners of the same.

8. That I was shocked by these actions because I had purchased the said plots lawfully and had the opportunity to peruse the certificate of title for L.R.No.7340/79 and the receipts for payment of land rent and rates which are in the name of the vendor, the defendant herein. (Attached herein and marked 'CJO5' are copies of the certificate of Title for LRN.7340/79 and the receipts for payment of land rent and rates.)

(8) The second Defendant also filed his defence on the 16th March, 2011 in which he denies each and every allegation of fact contained in the Plaintiff's said affidavit dated the 10th March, 2011 and reiterates the averments made in paragraph 2, 3, and 7 of his said supporting affidavit.

(9) The first and second Defendants in an replying affidavit dated the 4th April, 2011 responded to and denied the averments made in the Plaintiff's said affidavit dated the 10th March, 2011 in addition to repeating the substance of his earlier affidavit dated 15th February, 2011.

(10) The second Defendant in opposition to the plaintiff's second application dated the 10th March, 2011 filed his affidavit made on the 4th April, 2011 in which he repeats the averments made in his earlier affidavit dated the 16th March, 2011. He admits knowledge of the order of court made on the 28th January, 2011 but says it did not bar him from proceedings with constitution on the suit property.

(11) Finally, the Plaintiff in her further affidavit's sworn on the 13th April, 2011 reiterated the contents of her earlier affidavit's of her earlier affidavits of the 25th January, 2011 and the 10th March, 2011. She denies as having been fabricated the contents of the first and second Defendant's affidavits dated the 4th April, 2011. She also states as follows in paragraph 5 and 6 of her affidavit:

“5. That I am reliably informed by my Advocates on record, advice which I verily believed to be true and correct that without a title document, no building plans can be approved for the erection of a permanent structure such as the ones being constructed by the 1st and 2nd Defendant/Respondents and their cronies and/or alleged purchasers.

6. That I am also reliably informed that the authorities cannot disregard legally acquired title such as the one in my possession in determining ownership of land and it is therefore my conviction and contention that the acts of the 1st and 2nd Defendants are actuated by malice and fraudulent intent.

(12) I have considered both applications (which were heard together) and all the affidavits as well as the respective submissions filed on behalf of the Plaintiff and the first and second Defendants on the 15th April, 2011 and the 13th May, 2011 respectively.

(13) The Plaintiff has demonstrated that an agreement for sale dated the 10th April, 2008 with Githunguri Njiru Farm (1966) Ltd. to purchase a property described in Agreement as L.R. 7340/79 at the price or sum of KShs.1.5 million. She has produced a copy of the Bankers Cheque [“AWM 10”] as well as an instrument of transfer dated the 10th April, 2006 duly executed. The said transfer document states that the said company being registered as the proprietor from the government of Kenya ALL THAT vacant piece or parcel of land containing measurements two decimal zero two five (2.025) hectares and known as L.R.No.7340/79 transfers its right title and interest therein to the Plaintiff. On the face of it, the transfer appears to have been assessed for stamp duty but there is no evidence that it was duly stamped. There is also no evidence that the transfer was duly registered. The documents do not disclose whether the interest in the property deciphered therein and being transferred to the Plaintiff is freehold or leasehold. The document refers to a grant registered as Number I.R. 115941/1 (to which Deed Plan Number 115941/1 is said to be annexed) yet the Plaintiff has not produced this grant as evidence of the vendor’s (Githunguri Njiru Farm (1966) Ltd.) proprietorship under and by virtue of which she claimed a beneficial interest in the suit property. Looking at the said transfer document and in addition to the serious anomalies which I have pointed out =, it does not contain the memorandum of encumbrances referred to therein and does not therefore conform with statutory form prescribed under the Registration of Titles Act (Cap.281). The Plaintiff has also not explained why the transfer would have remained unregistered unrectified since the 10th April, 2006 when it was executed.

(14) The Plaintiff has channeled the first Defendant’s title as fraudulent and has given particulars thereof in paragraph 10 of the Plaintiff as I have already said. However, she has not produced any evidence at all to support the averments made in paragraph 4 and 7 of her supporting affidavit to the application dated the 25th January, 2011. The sub-division map [‘ANW 3’] is not signed and the client is stated to be “Urutagwo Mwiruti Women Group” which has not been explained. The Plaintiff has also failed to disclose the nature and extent of the investigations she says she carried out and to produce documents to show that the first Defendant’s title is a fraud.

(15) The first Defendant, on the other hand, has explained how he acquired the suit property and I have reproduced the relevant position of his replying affidavit in paragraph 5 of this ruling. Similarly, the relevant paragraphs in the second Defendant’s affidavit are set out in paragraph 7 hereinabove.

(16) For these reasons, both the Plaintiff’s application cannot succeed as she has failed to make out a prima facie case with a probability of success. The Plaintiff’s applications in the Notices of Motion respectively dated the 25th January, 2011 and the 10th March, 2011 both fail and each of them respectively be and is hereby dismissed with costs. It follows that the interim orders granted on the 28th January, 2011 be and are hereby discharged and vacated.

Orders accordingly.

Dated and delivered at Machakos this 28th day of July, 2011.

P. Kihara Kariuki
Judge