



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 281 OF 2009

ZAKARIA MUIGAI

GAKIBE.....PLAINTIFF

VERSUS

JOHN MWENJA NGUMBA.....1ST DEFENDANT

Sued as the Administrator of the estate of ANDREW KIMANI

NGUMBA

KENYA COMMERCIAL BANK.....2ND DEFENDANT

ROYAL BUILDERS LIMITED.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

(On behalf of the Principal Registrar of Government Lands)

RULING

There is before me a Notice of Motion under Sections 1A, 1B and 63 (e) of the Civil Procedure Act and Order 50 Rule 16 of the Civil Procedure Rules for the following substantive orders,

1. That pending the hearing and determination of the main suit the current status quo on the suit property be maintained.
2. That the officer in charge of Kiamumbi Police Station to assist in the enforcement of this order pending the hearing and determination of the suit.
3. That it is in the interests of justice that the suit herein be heard and determined expeditiously and on priority basis.

Several grounds have been set out on the face of the application and which are that,

- a) The plaintiff has been and remains in possession of all that parcel of land known as LR. No. 74/16

Kasarani, Nairobi having been put in possession by the late Andrew K. Ngumba in 1991 after a sale agreement in respect thereof.

b) Although the formal sale agreement was never executed due to trickery on the part of the late A.K. Ngumba, the plaintiff claims title and interest in the suit property herein on the basis of the resulting trust that sprung in his favour after he was granted possession thereof. The plaintiff has developed the suit property to the tune of Kshs. 160,000,000/= as at July, 2009.

c) On 28th and 29th May 2010 during the pendency of the above suit and Civil Application No. NAI 99/2010 at the Court of Appeal the respondent herein invaded the suit property and demolished the plaintiff's home to the ground alleging without any basis that it had been issued with an eviction order by the superior court.

d) The applicant despite the demolition retained the possession of the suit property where he continues to carry out farming of both subsistence as well as cash crops for the sustenance of his family.

e) On 21st October, 2010 a group of persons allegedly working for 3rd respondent once again descended on the suit property with a bull dozer and started digging up soil, crops and trees

thereat oblivious of the pendency of this suit. The invaders were repulsed by the applicant with the assistance of officers from Kiamumbi Police Station.

f) The 3rd respondent's actions are provocative and aimed at unjustly dispossessing the applicant of the suit property unfairly and before the hearing and determination of the pending suit.

g) The applicant, a 75 year old man, has been taken ill and has been diagnosed to suffer from acute diabetes and high blood pressure both of which are life threatening conditions.

h) It is in the interests of justice

i. That this application and the suit be certified urgent and fit for hearing on priority on a day to day basis until its eventual determination.

ii. That in the mean time the current status quo on the suit property be maintained to avoid imminent breach of peace.

iii. It is the overriding objective of the law that all suits be heard and disposed off as expeditiously as possible.

In support of the Notice of Motion there is an affidavit sworn by Zacharia Muigai Gakibe.

There are two replying affidavits in opposition to the Notice of Motion. The first is sworn by John Mwenja Ngumba the 1st defendant herein and the 2nd is by Julius Kamande Manyeki a director of the 3rd defendant. The two affidavits refer to the present suit and several other pleadings in previous suits relating to the same subject matter. The bottom line however is that, they dispute the plaintiff's interest in the suit property and that he should not be entitled to any orders he is seeking.

The plaintiff applicant had sought injunction orders against the defendants in an application dated 12th

June, 2009 which was heard by Sitati J. On 29th April, 2010 the learned Judge dismissed the plaintiff's application with costs to the defendants. Learned counsel for the parties herein have filed submissions which I have noted. It is clear from the submissions of the 3rd defendant that there is the mistaken impression that the application seeks injunction orders to restrain the defendants from evicting the plaintiff from the suit premises. I say mistaken because, the application for injunction was determined by Sitati J. as I have said above. I observe also that, the submissions of both the plaintiff and the 3rd defendants have gone into the merits or otherwise of the entire suit yet what is on record at this stage is affidavit evidence that has not been interrogated and subjected to cross-examination. For as long as the main suit remains pending for determination, some of the matters cannot be canvassed and addressed by way of submissions and or affidavits.

What is clear at this stage however is that, the 3rd defendant holds the title to the property, acquisition of which is being contested by the plaintiff. On the other hand, the plaintiff claims interest based on a resulting trust which is contested by the 1st and 3rd defendants. Those are crucial triable issues which can only be resolved in the main trial. Possession and or occupation is also an issue at this stage. I note however that for the last several months the parties have agreed to maintain the status quo and this has subsisted for over 7 months.

Returning to the Notice of Motion, I observe that no injunction orders are being sought by the plaintiff. It is clear from the wording of the application, the grounds and affidavit of the applicant that, he is moving the court for expeditious disposal of the main suit. Anything else would be canvassed during the hearing of the main suit.

I have gone through the record and note that the pleadings are closed and in fact some documents to be used during the trial have been filed. The main suit has been caught up by the new Civil Procedure Rules and in particular Order 11 thereof. That Order requires that parties comply with some pre-trial directions to facilitate the expeditious disposal of any suit before the court. In fact, had the parties herein addressed the contents thereof immediately after the commencement of the said rules this suit would have been heard by now.

I say so because the status quo has been maintained to date and the only issue remaining under the application before me is for listing the matter for hearing on priority basis, had the parties complied with the said rules. I believe no prejudice shall be befall any parties herein if I were to allow the plaintiff's application upon strict time table. Accordingly the plaintiff's application filed on 25th October, 2010 is hereby allowed on the following conditions,

- a) The parties shall ensure that the pleadings are closed (if not) within 30 days of today.
- b) Thereafter the parties shall comply with Order 11 of the Civil Procedure Rules.
- c) On compliance, this case shall be listed for hearing on priority basis on dates convenient to all parties.
- d) In the meantime the status quo in place, and which has been extended from time to time by the consent of the parties, shall be maintained.
- e) The costs shall be in the cause.

Orders Accordingly.

Dated, signed and delivered at Nairobi this 12th Day of July, 2011

A. MBOGHOLI MSAGHA

JUDGE