



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 508 OF 2010

JARED ODUOR OSODO.....1ST PLAINTIFF
CRISPUS KINENE.....2ND PLAINTIFF
AVITION ENTERPRISES.....3RD DEFEDANT

VERSUS

HABIB OMAR KONGO.....1ST DEFENDANT
AVITON ENTERPRISES.....2ND DEFENDANT

RULING

The plaintiffs brought this suit against the defendants in the capacity as secretary, chairman and patron of Wazee Madakara Self Help Group. The said Wazee Makadara Self Help Group is said to be a duly registered self help group comprising of various members within Nairobi City. It is their case that they are the sole registered proprietor of all that parcel of land known as Nairobi/Block 83/893 situate within the City of Nairobi. The defendants are alleged to have engaged private surveyors to go onto the said parcel of land and establish boundary beacons to the detriment of the plaintiffs. When the plaintiffs reported to the O.C.P.D Buruburu the surveyor was stopped and the plaintiffs advised to go to court.

It is their case that the defendants have no legal, beneficial or any other interest or claim in or all over the said land and their actions therefore amount to trespass. The plaintiffs had previously filed HCCC No. 193 of 2006 regarding the same subject matter which was however withdrawn by their advocates without their consent. They now seek orders to restrain the defendants from entering, utilizing, occupying, trespassing in any other manner whatsoever interfering with the said parcel of land.

Following the filing of this suit, the plaintiffs moved the court by way of Chamber Summons under order XXXIX of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for injunction orders against the defendants. An interim order was granted pending the hearing of the application *inter partes*. Upon service, the defendants filed an application for security for costs and yet another application to discharge the ex parte injunction issued in favour of the plaintiffs.

In effect there are 3 applications on record. The first is the plaintiffs' Chamber Summons dated 25th October, 2010 seeking a temporary injunction, the second is the defendants' application by way of Chamber Summons dated 8th November, 2010 seeking security for costs and the third is the defendants'

Notice of Motion dated 27th January, 2011 seeking the discharge of the ex parte injunction issued on 21st January, 2011

Both learned counsel have filed submissions to address all the applications on record and cited some authorities. I have gone through all the material before me. The plaintiffs have annexed copies of letters of allotment in respect of the said parcel of land resting on the title issued in their favour by way of a certificate of lease dated 27th October, 2005. The face of this certificate bears three names that is Jared Oduor Osodo, Julius Nderitu Miiti and John Wachira Macharia. Part A which reads Property Section bears the name of Nairobi City Council as the lessor and Wazee Makadara Self Help Group as the lessee. On the other hand Part B that is the Proprietorship Section bears the three names set out above (as trustees of Wazee Makadara Self Help Group) It is the defence case that these documents are forgeries and that the land in question does not exist. Further, the three persons named above are facing criminal charges at the Chief Magistrate's Court at Kibera, Criminal Case No. 2168 of 2006 in respect of several charges of forgery, uttering a false document and procuring execution of a document by false pretenses.

It would appear that the accused persons before the magistrate at Kibera Law Courts moved to the High Court and obtained a court order staying the hearing of the criminal case aforesaid. This is contained in paragraph 9 of an affidavit sworn by the 1st plaintiff Jared Odour Osodo on 8th February 2011. The defendants have declared variously that they have no interest whatsoever in the land being claimed by the plaintiffs which in any case does not exist. On that basis they filed the application for security for costs and discharge of the ex parte injunction orders.

At this stage the plaintiffs are supposed to show that they have a *prima facie* case with a probability of success and that if the order is not granted, they are likely to suffer irreparable loss which may not be compensated by an award of damages. If the court is in doubt, it shall decide the matter on a balance of convenience.

Whether or not the documents annexed to the plaintiff's application are forgeries is a matter to be determined in the criminal trial which is yet to start. The interest of the plaintiffs in the said parcel of land is also a matter for trial. Whether or not the defendants have an interest in this parcel of land or any other for that matter wherein the plaintiffs have interfered is also a matter for trial.

The plaintiffs have *prima facie*, shown that they have a title to the property. The evidence if it is a forgery is not before me now. *Prima facie*, if they have a title to that property then they are not people of straw. It will not be proper therefore, to impose any order for security for costs in the circumstances. There is a well founded fear that if this order is not maintained, interference may set in by the defendants and or any other person intent on frustrating the interest of the plaintiffs. I bear in mind that there was a previous suit relating to the same property which however was withdrawn. A case that has been withdrawn does not exist. It matters not that there is a pending application filed by the plaintiffs to reinstate the said suit. For now no orders have been made upon that application.

The bottom-line is that, the plaintiffs have established a *prima facie* case with a probability of success. In that case therefore they are entitled to injunction orders to protect their interest in the cited parcel of land. I have seen no reason why the said order should be discharged or why I should order them to deposit security for costs.

In the end their application dated 25th October, 2010 hereby succeeds and the injunction orders now issued shall last until the final determination of this suit. On the other hand the defendants applications dated 8th November, 2010 and 27th January, 2011 respectively are hereby dismissed. The plaintiffs shall have the costs of the three applications against the defendants.
Liberty to apply reserved.

Orders accordingly.

Dated, signed and delivered at Nairobi this 14th day of June, 2011

A. MBOGHOLI MSAGHA

JUDGE