



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 604 of 2006

HASSANALI ASARIA PLAINTIFF

VERSUS

SARBJIT SINGH RAI 1ST DEFENDANT

THE REGISTRAR OF TITLES 2ND DEFENDANT

MICHAEL OMBALO UNGONDA 3RD DEFENDANT

RULING

I: Background of application for injunction temporary and mandatory

1. What I have before me is an application for an injunction to restrain the 1st defendant Sarbjit Singh Rai from disposing selling, building or the suit land known as LR214636 formerly LR 214/624/8 Muthaiga; Secondly a mandatory injunction to put the plaintiff back to the suit premises.

2. Briefly, the plaintiff Hassanali Asanai bought land in Muthaiga within the Nairobi area from the 3rd defendant one Michael Ombalo Ungonda. The said land was allegedly transferred to him sometime in August 2004. He had paid a consideration of Ksh.16 m.

3. The piece of land in question was vacant. The plaintiff placed his employees on the land. In August 2005, the 1st defendant evicted the said workers from the land. The plaintiff filed this suit against the defendants seeking a declaration that he is the rightful owner of the land; a declaration that the Chief Land Registrar letter of 15 December 2005 alleging that the transfer of land to the third defendant was a fraud to be declared null and void a declaration that the plaintiff is the rightful owner, a mandatory injunction to evict the defendant No.1 from the suit land, an injunction restraining the defendant No.1 from building and or constructing on the said property, in the alternative he sought damages.

4. The defendant filed a defence and counter claim on 18 July 2006 and also sought declaration that he was the rightful owner.

II: Application 9 June 2006

5. The plaintiff applicant sought from this court prohibitory and mandatory injunction against the defendant. The first is to restrain the defendant from parting with the property and or constructing on the same, the second is to put himself back into possession.

6. I did confirm from the advocate for the plaintiff that suit property is vacant. No one had actually

build on it. All the plaintiff had done was to clean the land. The defendant took possession by objecting the plaintiff's workers.

7. Pending the finalization of this suit the plaintiff wants that he be put in possession of the land suit premises and be permitted to continue to have dealings with the same.

8. According to his arguments through his advocate – we are under the torrent system of registration of land. He was thus registered at the lands office and therefore his title to indivisible. Whether there was fraud or not he indeed was the registered owner now and should therefore be permitted to dealing with the land. The advocate for the applicant relied on several case law before the court to support this application.

9. In reply the respondent stated the issue herein is not of the indivisible title on registration on the issue of ownership. Who owes the suit premises? The title in question to the plaintiff was issued against a provincial title said to have been lost. No notice had been given before the personal title was issued.

The defendant respondent asked that the application be dismissed.

II: Finding

10. The suit property requires to be preserved till the determination of the main suit. There is no doubt of this herein of this position and would be agreeable to both parties.

11. I recognize that the property is vacant. The 1st defendant lives out side Kenya. There is in effect no one on the land until 2005 when the 1st defendant placed a gate in order to secure the said premises.

12. It is true the applicant plaintiff referred to me the issue of title and that the law protects him as the owner of the said piece of land. I nonetheless require to consider whether the plaintiff applicant is entitled to the orders sought?

13. Under the case law of Morris v Kenya commercial bank & Others Ltd 2007/62 EA 600 and Salume Nakusi v Yozefu Bukuya (1966) EA 433 where the issue of application for an interlocutory judgment and mandatory judgment was considered to be incorrect.

14. I also am of the opinion that it is inappropriate to state that the plaintiff be put in possession of the suit land when in effect there is nothing on the land. I could consider ordering that both parties bear the costs of guards placed on the property jointly. What suffice is that the status of the property remains vacant title the determination of this suit.

15. I accordingly dismiss the application for mandatory injunction. The status of the property do remain vacant as of today with the exception for security purposes of guards being permitted on the said land.

16. I accordingly award the costs of dismissing this application to the defendants/respondent.

Dated this 31st day of July 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

Kiragu Kimani for Hamilton Harrison & Mathews advocate plaintiff/applicant – present

V. Oraro leading V. Goswami & Co. Advocates for the 1st defendant/respondent- present