



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 51 OF 2019

JOSEPH MARTIN NYANGAU.....PLAINTIFF/APPLICANT

VERSUS

NDATANI ENTERPRISES CO. LTD.....1ST DEFENDANT/RESPONDENT

RAILWAYS HOUSING

COOPERATIVE SOCIETY LTD.....2ND DEFENDANT/RESPONDENT

DANIEL NDOLO MUSYIMI3RD DEFENDANT/RESPONDENT

RULING

1. In the Notice of Motion dated 13th May, 2019, the Plaintiff has sought for the following orders:

a) That pending the hearing and determination of this suit temporary injunctive orders be issued barring the 1st, 2nd and 3rd Defendants, jointly and severally, by themselves, their directors, servants, agents or otherwise howsoever from interfering, transacting or dealing with the Plaintiff's property L.R. No. 7340/90/5.

b) That pending the hearing and determination of this suit eviction orders be issued against the 1st, 2nd and 3rd Defendants, jointly and severally from the Plaintiff's property L.R. No. 7340/90/5.

c) That costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that at all material times, the 2nd Defendant, which normally buys land and sells to its members and the public bought land title L.R. No. 7340/90 (*the suit property*) from the 1st Defendant; that on 18th February, 2004, he entered into a Sale Agreement with the 2nd Defendant in respect of the sub-divisions of the suit property and that the 1st Defendant delayed to surrender the mother title of L.R. No. 7340/90 to the 2nd Defendant.

3. It was the deposition of the Plaintiff that he is aware of the existence of Machakos HCCC No. 224 of 2009 between the 1st Defendant, Taita Consultants Company Ltd and the 2nd Defendant and that he is also aware of the injunctive orders that were issued in the said suit.

4. It was the deposition of the Plaintiff that the search he conducted established that the suit property had been sold and transferred to the 3rd Defendant in disregard of the orders of the court and that the acts of the 1st and 3rd Defendants of trespassing on his land is a violation of his right to own property.

5. In reply, the 1st Defendant's Director deponed that this suit is a non-starter *ab initio*, untenable, unmerited and a total abuse of the court process because the 1st and 2nd Defendants herein were all parties in Machakos ELC No. 224 of 2010 Ndatani Enterprises Co. Limited & Another vs. Railways Housing Co-operative Limited which matter was heard and determined and that no party appealed or sought for review of the Judgment

6. The 1st Defendant's Director deponed that at no time did they sell the suit property to the 2nd Defendant as alleged or at all; that the proprietorship of the suit property has never changed from the 1st Defendant; and that Machakos ELC No. 224 of 2010 had nothing to do with delay and or surrender and or transfer of the mother title for L.R No. 7340/90 as alleged or at all.

7. It was deponed by the 1st Defendant's Director that what the 1st and 2nd Defendants had was a Sale Agency Contract entered into on 24th December, 2003 wherein the 2nd Defendant was contracted to source for purchasers and to sell plots being the sub-divisions of L.R. No. 7340/90 of the suit property; that on 13th June, 2006, the 1st and 2nd Defendants herein did a reconciliation of the accounts and that as at that date, the Plaintiff herein had only paid the 1st Defendant Kshs. 48,570 in violation of the Sale Agreement of 25th February, 2004.
8. According to the 1st Defendant, the agency agreement was terminated on 13th June, 2006 after accounts were reconciled; that as per the sale agency agreement, the 1st Defendant had the right to repossess and sell the partly paid plots upon termination of the agreement with the purchasers' rights being a refund of their deposit less 10% of the purchase price.
9. It is the deposition of the 1st Defendant's Director that the 1st Defendant proceeded to sell the plots among them being Plots No. 5 L.R. No. 187 to the 3rd Defendant on 29th June, 2020 and that the Plaintiff's recourse for the breach of the court orders was to cite the 2nd Defendant for contempt, which he never did. It was deponed that as the duly registered proprietor of the suit parcel, the 1st Defendant could not have trespassed into its own property as alleged or at all.
10. The 3rd Defendant deponed that at all material times, he has been the registered proprietor of land known as Mavoko Municipality Block 52/187 having purchased the same from Gerald Maina Mwangi in June, 2018; that land known as Mavoko Municipality Block 52/187 is distinct from L.R. No. 7340/90 which the Applicant is alleging to have bought from the 2nd Defendant and that the Sale Agreement that the Plaintiff is relying on does not refer to Mavoko Municipality Block 52/187.
11. It was deponed by the 3rd Defendant that the 2nd Defendant did not have any good title to pass to the Plaintiff; that there is no evidence to show the existence of L.R. No. 7340/90/5 and that the orders being sought by the Plaintiff will unfairly deprive third parties, who are not parties to the suit, their interests and user of the properties located within L.R. No. 7340/90.
12. The Plaintiff's advocate submitted that the Plaintiff has demonstrated that he paid for the full properties; that the said payment was acknowledged by the 2nd Defendant and that the Plaintiff was unaware of the Decree in Machakos HCCC No. 224 of 2009.
13. The Plaintiff's counsel submitted that through the malicious actions of the Defendants, the Plaintiff has been denied rights to own property as enshrined under Article 40 of the Constitution and that the properties that the Defendants has suggested to transfer to the Plaintiff in lieu of the suit properties have never been valued.
14. It was submitted that the Plaintiff having developed the suit properties, he will suffer irreparable loss that cannot be compensated by way of damages; that the balance of convenience tilts in favour of the Plaintiff and that the Plaintiff has met the considerations for granting an injunctive relief.
15. The 1st Defendant's advocate submitted that Machakos ELC No. 224 of 2010 was heard and determined by a consent Judgment dated 17th November, 2017; that in the year 2018, when the 1st Defendant disposed off the parcel of land, there were no injunctive orders in force as alleged by the Plaintiff since the suit had already been concluded and that as per the court decree dated 13th November, 2017, the Plaintiff was not allocated parcel number Mavoko Town Block 52/187 and therefore cannot claim ownership of the said parcel of land.
16. It was submitted that the 1st and 2nd Defendants had an agency agreement which they entered into on 24th December, 2003 where the 2nd Defendant was contracted to source for purchasers and to sell plots being sub-divisions of L.R. No. 7340/90; that on 13th June, 2006, the 1st and 2nd Defendants, being parties to the sale agency agreement, did a reconciliation of the accounts and that as at that date, the Plaintiff herein had only paid Kshs. 48,570 towards the purchase of the suit property which was in violation of the Sale Agreement.
17. It was submitted that the sale agency agreement had a "sell and repossess" clause whereby the 1st Defendant had the right to repossess and sell partly paid plots that were repossessed upon termination of the sale agency agreement with the purchasers' rights being a refund of their deposit less 10% of the purchase price.
18. The 1st Defendant's advocate submitted that the 1st Defendant proceeded to repossess plots and among them was Plots No. 5 L.R. No. 187 which was transferred on 31st August, 2009 to one Gerald Maina who later sold the same to the 3rd Defendant and that the sale of the suit property to the 3rd Defendant was proper, valid, procedural and legal.
19. It was submitted that the 2nd Defendant never acquired any proprietary interest in the suit property and hence could not transfer ownership of the same to the Plaintiff as alleged; that the 2nd Defendant was at all times relevant to this suit an agent of the 1st Defendant and that having terminated the agency agreement and repossessed all the unpaid for parcels of land, the 1st Defendant retained the legal ownership of the said land and was not bound by any third party agreements entered into by the 2nd Defendant.
20. It was submitted that the Plaintiff is not the legal owner of the suit property pursuant to the provisions of Section 2(a) of the Land Act which defines a proprietor in relation to land or lease, as the person named in the register. It was submitted that the Plaintiff has not established a *prima facie* case with a probability of success; that the Plaintiff will not suffer irreparable loss and damage should the Application not be allowed and that the balance of convenience does not tilt in favour of the Plaintiff.
21. On his part, the 3rd Defendant's advocate submitted that in a claim for ownership, proof of title is key in establishing a *prima facie* case; that the Plaintiff does not have a legal title in respect to the suit property and that the 1st Defendant has denied ever selling the suit property to the Plaintiff or the 2nd Defendant.

22. It was submitted that the Plaintiff bought the suit property from the 2nd Defendant who did not have a title to pass to him; that the Plaintiff is using the process of the court to frustrate and deprive the 3rd Defendant of his constitutional right to property and that the Plaintiff has not demonstrated how the denial of the injunctive orders will occasion him irreparable damage.

23. The 3rd Defendant's advocate submitted that having purchased land known as Mavoko Town Block 52/187 from the registered proprietor, the Plaintiff's claim, if any, should lie as against the 1st and 2nd Defendants. Counsel relied on several authorities which I have considered.

24. The Plaintiff is seeking for injunctive orders in respect of L.R. No. 7340/90/5 (*the suit property*). The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages if the injunction is not granted and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (*See Giella vs. Cassman Brown & Co. Ltd (1973) EA 358 and Fellowes and Son vs. Fisher [1976] 1 QB 122*).

25. What amounts to a *prima facie* case, was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* case as follows:

“...In civil cases, it is a case in which on the material presented to the Court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

26. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR* the Court of Appeal explained that all the three conditions for the grant of an injunction at an interlocutory stage are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially.

27. The Plaintiff's case is that on 18th February, 2004, he entered into a Sale Agreement with the 2nd Defendant in respect of the suit property, which is a sub-division of L.R. No. 7340/90, and that the 1st Defendant delayed to surrender the mother title of L.R No. 7340/90 to the 2nd Defendant for the purpose of having the suit property transferred to him.

28. It was the deposition of the Plaintiff that he was aware of the existence of Machakos HCCC No. 224 of 2009 between the 1st Defendant, Taita Consultants Company Ltd and the 2nd Defendant and that he is aware of the injunctive orders that were issued in the said suit.

29. According to the Plaintiff, the search he conducted established that the suit property had been sold and transferred to the 3rd Defendant in disregard of the orders of the court and that the acts of the 1st and 3rd Defendants of trespassing on his land is a violation of his right to own property.

30. The Plaintiff annexed on his Affidavit a copy of the Sale Agreement dated 20th February, 2006 between himself and the 2nd Defendant. In the said Agreement, it is stipulated that the 2nd Defendant is the proprietor of land known as L.R. No. 7340/90 which has been subdivided into sub plots measuring 40 x 80 feet and that the 2nd Defendant had agreed to the Plaintiff one of the sub plots at a consideration of Kshs. 30,000.

31. Clause 2 of the Agreement provides that the Plaintiff was to pay to the 2nd Defendant Kshs. 70,000 in instalments of Kshs. 30,000 and 40,000 within six months and that upon completion of the purchase price, the 2nd Defendant shall transfer the suit property to the Plaintiff free of encumbrances.

32. Prior to entering into the above Agreement, the Plaintiff had entered into another Agreement dated 18th February, 2004 in which the 2nd Defendant described itself as the “*sole agent*.” In the said Agreement, it was agreed that the Plaintiff will pay the 2nd Defendant Kshs. 70,000 for the said land in instalments of Kshs. 30,000 and Kshs. 40,000 within six months.

33. The Plaintiff annexed on his Affidavit the ‘*sub-division scheme approval*’ dated 18th May, 2005. The said approval by the Commissioner of Lands shows that land known as Mavoko Town/Block 52/187 was a one of the sub-division of L.R. No. 7340/90. The ‘*sub-division scheme approval*’ was addressed to the 1st Defendant.

34. The Plaintiff has annexed on his Affidavit several receipts that were issued to him by the 2nd Defendant in the year 2004 and 2006. The said receipts show that the Plaintiff paid to the 2nd Defendant an amount in excess of Kshs. 500,000 for several sub-divisions of L.R. No. 7340/90.

35. The 1st Defendant herein sued the 2nd Defendant in Machakos HCCC No. 224 of 2009. According to the order annexed on the Plaintiff's Affidavit, the court restrained the 1st Defendant herein from selling, transferring or charging the sub-division of L.R No. 7340/90 Embakasi Phase III; LR No. 7340/90 Phase I; LR No. 10426/11; Kitengela L.R. No. 2209 and L.R. No. 2217.

36. It is the Plaintiff's case that despite the order of the court in Machakos HCCC No. 224 of 2009, the 1st Defendant transferred Mavoko Town Block 52/187 to the 3rd Defendant. The Plaintiff annexed on his Affidavit the official search showing the registration of the said parcel of land to the 3rd Defendant on 29th June, 2018.

37. From the copy of the Decree annexed on the 1st Defendant's Affidavit, it would appear that Machakos HCCC No. 224 of 2009 was compromised on 7th November, 2017. In respect to L.R. No. 7340/90, the parties agreed as follows:

“That Ndatani enterprises company limited received a total of Kshs. 13,727,253 from Railways Housing Cooperative Society Limited on account of L.R. No. 7340/90 Embakasi which is equivalent to 187 plots inclusive of Kshs. 380,000...That Ndatani Enterprise Company Limited and Railways Housing Cooperative Society will jointly undertake to relocate the 23 buyers...”

38. The 1st Defendant has annexed on its Affidavit the list of the purchasers that were supposed to be relocated pursuant to the consent order, which was adopted as a decree of the court. The list shows that the Plaintiff was to be relocated to parcel number Mavoko Town Block 52/157 and 158 to plot numbers 93 and 94. The said relocation is part and parcel of the court order.

39. Although the Plaintiff was not a party to Machakos HCCC No. 224 of 2009, he seems to have been aware of the suit, and the injunctive order that was issued on 12th March, 2010. That being the case, the Plaintiff should have applied to be enjoined in the said suit to protect his interests.

40. Indeed, considering that the transfer of the suit property was sanctioned by way of the Decree of the court in Machakos HCCC No. 224 of 2009, and the same Decree having sanctioned the relocation of the Plaintiff to another parcel of land, the Plaintiff's only option is to have the said Decree set aside.

41. That being the case, it is my finding that the Plaintiff has not established a *prima facie* case with chances of success. The Plaintiff's Application dated 13th May, 2019 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF JANUARY, 2021.

O.A. ANGOTE

JUDGE