



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE E074 OF 2020

TIMOTHY MUOKA MUTISO.....1ST PLAINTIFF

LINDA RUTH ANDREE MUTISO.....2ND PLAINTIFF

=VERSUS=

MARTIN NGAO MUTHAMA.....DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 18th August 2020 in which the Plaintiffs/Applicants seek injunctive orders restraining the Defendant/Respondent from interfering with LR No.7785/631 (original number 7785/10/456) (suit property). The suit property is situate at Runda in Nairobi. The Applicants moved to court when unknown people invaded the suit property and violently removed the Applicant's caretaker and started construction.

2. The Applicants sought intervention of the Land Fraud Unit of the Directorate of Criminal Investigations who intervened and commenced investigations. The Applicants then went to Runda Police Station who initially assisted the Applicants to regain possession of the suit property. The invaders were arrested but were released without any charges. The Respondent thereafter regained entry into the suit property and has since been constructing on the suit property despite the fact that there is an injunction in force.

3. The Applicants contend that the Respondent seems to be having protection from unknown quarters because the police from Runda Police Station who fall within the jurisdiction of the area where the suit property is situate seem not to help. The Applicants state that they have received communication from the Lands office that the documents held by the Respondent did not emanate from the lands office. The Applicants whose documents were found to be authentic were advised to provide an indemnity as the copy of the title was missing from the file in the Lands office.

4. The Respondent on the other hand contends that he was allotted the suit property after which he was registered as proprietor on 12th June 1996 after he paid the requisite stand premium. The Respondent contends that the Applicants do not have locus standi to bring this suit as they transferred their interest in the suit property at a consideration of Kshs.12,000,000/-to one John Maina Njoroge on 10th February 2004.

5. The Respondent further argues that the Applicants are in the process of fraudulently making documents with a view to taking over the suit property. He contends that his Advocates wrote to the Lands Office who wrote back and confirmed that the Applicants had sold their interest in the suit property and that in any case, even if the Applicants' title was genuine, his title was the first in time and that it prevails.

6. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. Directions were given to the parties to dispose of the application by way of written submissions. It is only the Applicants who filed their submissions. Though there leave to the Applicants to file a further affidavit, that further affidavit seems not to have been filed. As I was preparing this Ruling on 24th February 2021, I asked my Court Assistant to retrieve the further affidavit and the Respondent's submissions if any were filed. The Court Assistant confirmed to me that no such documents are in the e-portal of the judiciary. I personally went to the system and could not see any such document. Though the system shows that there was a certificate of urgency filed on 12th February 2021, there are no documents filed on 12th February 2021. It is therefore save to assume that no documents were filed either on 12th February 2021 or thereafter.

7. Before I address the issue of whether the Applicants have established a case for grant of an injunction I must point out that this is one of the disturbing cases where officers from lands office assist fraudsters to tamper with the records at the lands office to achieve their ill motives. Regrettably after these officers are called to court to testify, they simply denounce any documents which purport to have emanated from their office.

8. In the instant case, the Applicants and the Respondent are each claiming the suit property. The deed plan is the same but the IR numbers

are different. Each of the disputants annexed copies of title documents attributed to each of them. My duty at this stage is not to say which of these documents are genuine or not. My duty is to determine whether on the materials presented before the court, the Applicants have demonstrated that they have a prima facie case.

9. The Respondent could not be seen until he was served with summons through substituted service. When he was served, he entered the suit property forcefully. The Respondent purports to have been allotted the suit property by the government. The Applicants purchased the suit property from Mae properties Limited. The document of title which the Respondent has annexed to the replying affidavit is neither a certificate of title nor a conveyance. The document is doubtful. The document which is attributed to the Respondent which the Applicants were given from the lands office and the DCI is quite different from the one he has annexed to the replying affidavit.

10. The Respondent does not deny the Applicant's contention that he gained entry into the suit property through force. He quickly put up some permanent structures. This is despite there being an injunction in force. Prior to the forceful entry by the Respondent, it is the Applicants who were in possession. A look at the materials presented by the Applicants show that the Applicants have a strong prima facie case with probability of success.

11. Even on consideration of irreparable loss, the Applicants will suffer loss which will not be compensatable in damages. The court cannot simply hold that since the Respondent is the one in possession, the status quo ought to be maintained. The Respondent gained forceful entry and this court cannot say that an injunction should not issue because the Respondent has already taken possession. The status quo which should be maintained is the status obtaining before the violent invasion.

12. In **Kamau Muchuha Vs Ripples Ltd (1993) e KLR Hancox C J** stated as follows:-

“The statements contained in these passages, however, leave out of account, the situation when, as here, it is alleged that the defendant has taken the law into his own hands and taken direct action instead of going through the legally prescribed procedure. In other words he has, by his own act, disturbed the status quo. Is it to be said that the plaintiff may not go to the Court to seek an order which is mandatory in the sense that it compels the other party to do some act which restores the status quo.

The point is neatly illustrated by the decision of Goddard LJ in Thompson v Park [1944] 2 All ER 477 in which the question arose as to which of two rival prep schools should occupy the premises which belonged to the defendant but which had been demised to the plaintiff. The Court of Appeal held that it is fallacious for a person who forcibly and riotously enters premises to maintain that his occupation of these premises is the status quo which must be maintained, and not disturbed, which of course in very many cases is the object of a temporary injunction – to keep things in status quo so that the property in question is maintained, as far as possible, intact until the final determination of the suit. Goddard, LJ held in Thompson v Park that the status quo was not that which existed after the intruder's illegal acts, but that which existed beforehand.

In the United Kingdom those who forcibly enter premises especially if the term demised has not expired, may expose themselves to punishment under the statutes of forcible entry, the first of which was the reign of Richard II, and also to an action for trespass quare clausum freigit – see Hemmings v Stoke Pages Golf Club [1918-1919] All ER 798.

13. In the **Kamau Mucuha Vs Ripples Ltd (supra) Justice Kwach J A** had this to say:-

“For my part, I am content to, decide this application purely on the track record of the applicant since the order complained of was made last September. He was required to do three things. First, he was ordered not to alienate or demise the suit premises. Secondly, he was required to reinstate the tenant. And thirdly, he was required either to return the goods of the tenant or pay him compensation. Up to this day, he has made no attempt to comply with any of these orders. With regard to the first and the second, he could have gone back to the judge and explained his difficulties having in the meantime put a new tenant into possession. But with regard to the return of the goods wrongfully attached, what possible excuse can he have for not complying? None at all. He is, in my opinion, in flagrant disobedience of the order of the judge and now comes to this court for temporary dispensation. He should not be allowed to use the process of this court for such a patently mischievous purpose. As Lord Goddard LJ said in the case of Thompson v Park [1944] 2 All ER 477 at page 479 - E: Having got back into the house with strong hand and with multitude of people, he has established himself in the house, and, he then says:

‘I ought not to have an injunction ‘given against me to make me go because I got back here and got my boys back and, therefore, the status quo preserved.’

The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a Court of law that we ought to help the defendant, who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the status quo and that it would be a good reason for not granting an injunction “.

14. Even if the court were to be in doubt which is not the case, the balance of convenience tilts in favour of the Applicants who were in possession before they were violently dispossessed of the suit property. I therefore find that the Applicants have made out a strong case for grant of injunction. I allow the Applicants' application dated 18th August 2020 in terms of prayer (5) and (6). The Applicants shall have costs of this application. For avoidance of doubt the O.C.S Runda Police Station is directed to ensure that the Applicants are put back into the suit properly pending hearing and determination of this suit. The Applicants shall give an undertaking as to damages within 14 days .

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF FEBRUARY 2021.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Litoro for Applicant

Mr Chege for Respondent

Court Assistant: John

E.O.OBAGA

JUDGE