



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NYERI

ELC CASE NO. 4 OF 2019

JOHN NGUGUNA KIKUMBA.....PLAINTIFF

-VERSUS-

HUSSEIN HASSAN HUSSEIN.....1ST DEFENDANT

THE LAND REGISTRAR – NYERI.....2ND DEFENDANT

RULING

A. INTRODUCTION

1. By a plaint dated 18th February, 2019 and amended on 25th April, 2019 the Plaintiff sought recovery of *Title No. Nyeri Municipality/Bloc 2 (Majengo)/567 (the suit property)* from the 1st Defendant. The Plaintiff also sought general damages for trespass and costs of the suit among other reliefs against both Defendants.
2. The Plaintiff pleaded that he was the administrator of the estate of the late Ernest Kihumba Chege (*the deceased*) who was the legitimate owner of the suit property. It was pleaded that the deceased had bought the same from one Osopu Wembe who was said to be the wife of Hassan Hussein in 1969 or thereabout.
3. It was further pleaded that in spite of the foregoing the Defendants had fraudulently transferred the suit property into the 1st Defendant's name without following due process. It was contended that despite issuance of a demand and notice of intention to sue the Defendants had failed to make good the Plaintiff's claim hence the suit.

B. THE PLAINTIFF'S APPLICATION

4. Simultaneously with the filing of the suit the Plaintiff filed a notice of motion dated 18th February, 2019 brought under the provisions of **Order 40 Rule (1) and (2) of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act** and all **other enabling provisions** of the law seeking the following orders:-

(a) Spent.

(b) Spent.

(c) *That the honourable court be pleased to issue an inhibition Order restricting the Defendant, his agents and/or servants from disposing off, charging, leasing, erecting any building and/or from dealing with the suit property namely L.R. Nyeri Municipality/Block 2 (Majengo)/567 in any other manner pending the hearing and determination of this instant suit.*

(d) *That the costs of this application be in the cause.*

5. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 18th February, 2019. It was contended that upon the 1st Defendant's fraudulent acquisition of the suit property, he had advertised it for sale. It was contended that if the suit property were to be alienated before conclusion of the suit, the Plaintiff's interest therein might be defeated. In a bid to demonstrate his claim the Plaintiff annexed a bundle of documents to his supporting affidavit including a sale agreement, rates demand notices, receipts for payment of rates and a statement of rates arrears amongst other documents.

C. THE 1ST DEFENDANT'S RESPONSE

6. The 1st Defendant filed a replying affidavit sworn on 12th March 2019 in opposition to the application. He stated that he was the absolute owner of the suit property which he claimed was allocated to his late father Hassan Hussein in 1940. He referred to the Plaintiff's annexure JNK 3 which was an agreement dated 1st July, 1940 granting a license to one Hassan Hussein to occupy Plot No. 19 line one in Nyeri Township.

7. The 1st Defendant stated that the Plot No. 19 was redesignated as *Plot No. MAJ-S5 Majengo Estate* after independence and that it was ultimately registered as *Nyeri Municipality/Block 2 (Majengo)/567*. He denied that the suit property was ever sold to the deceased by one Osofu Wembe. He further denied that his late father had a wife by that name. In further response, he stated that in any event the said Osofu Wembe had no letters of administration to the estate of his late father to enable her dispose of the suit property.

8. The 1st Defendant denied the existence of any transfer between the deceased and Osofu Wembe and stated that the document marked JNK2 was merely a sale agreement which had been altered by hand to create a false impression that it was a transfer document.

9. It was the 1st Defendant's case that there were attempts by the deceased and officials of the predecessor in title of the 2nd Defendant to illegally transfer the suit property to the deceased but they did not succeed in doing so. Finally, the 1st Defendant contended that the suit and application were misconceived since the Plaintiff's agents had already been evicted from the suit property through a lawful decree issued in Nyeri CMCC No. 98 of 2018. It was further contended that the Plaintiff's application to join that suit was dismissed hence the instant suit was an abuse of the court process.

D. THE 2ND DEFENDANT'S RESPONSE

10. The 2nd Defendant's advocates informed the court that the matter was essentially a dispute between the Plaintiff and the 1st Defendant hence they did not intend to file any response or submissions on the application.

E. DIRECTIONS ON SUBMISSIONS

11. When the application was listed for *inter parties* hearing on 2nd July, 2020 it was directed that it shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff filed his submissions on 10th September, 2020 whereas the 1st Defendant filed his on 17th March, 2021. However, the 2nd Defendant did not file any submissions.

F. THE ISSUES FOR DETERMINATION

12. The court has considered the Plaintiff's notice of motion dated 18th February, 2019, the 1st Defendants replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the Plaintiff has made out a case for the grant of the interim orders sought.*

(b) *Who shall bear costs of the application.*

G. ANALYSIS AND DETERMINATION

(a) Whether the Plaintiff has made out a case for the grant of the interim order sought

13. The court has considered the material and submissions on record on this issue. It is not so clear at first glance whether the Plaintiff is seeking an interim injunction within the meaning of **Order 40** of the **Rules** or an order of inhibition to prevent further dealings within the meaning of **Section 68** of the **Land Registration Act, 2012**. The confusion arises from the fact that the Plaintiff seeks an order of inhibition to restrain the 1st Defendant from, *inter alia*, erecting any building on the suit property. An order of inhibition would normally be entered in the land register to prevent the registration of any transactions or dealings in respect of a given parcel of land. Such an order would not be effective to restrain a proprietor from undertaking construction on the property in issue hence an injunction may still be required.

14. The court shall, therefore, consider the material on record to determine whether the Plaintiff has made out a case for the grant of either one or both orders. The principles for the grant of an interim injunction were summarized in the case of **Giella v Cassman Brown & Co. Ltd [1973] E.A 358** as follows:

(a) *First, an applicant must demonstrate a prima facie case with a probability of success at the trial.*

(b) *Second, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages.*

(c) If the court is in doubt on the second principle, it shall decide the case on a balance of convenience.

15. The gist of the Plaintiff's case is that his deceased father bought the suit property from Osopu Wembe who was the wife of Hassan Hussein in 1969. He further contended that the suit property was thereafter transferred to the deceased by the defunct Municipal Council of Nyeri. The Plaintiff exhibited copies of a sale agreement and transfer document in a bid to demonstrate his claim. The Plaintiff also exhibited a copy of an agreement dated 1st July, 1940 between the Government and Mr. Hassan Hussein granting the latter a licence over the suit property.

16. The court has noted from the copy of the exhibited agreement that Osopu Wembe purported to sell the suit property to the deceased on behalf of one Hussein whose full names were not indicated. There is no indication if she had a power of attorney or other legal authority from the said Hussein to sell it on his behalf. There is also no indication if the said Osopu Wembe was the legal representative of Hussein if he was already deceased.

17. It is also apparent from the material on record that the said sale agreement dated 9th November, 1969 is the same document which has been altered by hand and titled "TRANSFER" to make it appear like a transfer document for the conveyance of the suit property from Osopu Wembe to the deceased. There is no indication on the face of the said "Transfer" that it was ever registered by any competent authority in the Republic of Kenya.

18. The court is thus far from satisfied that the Plaintiff has demonstrated that his late father ever acquired a legal interest over the suit property. The mere fact that the name of the deceased

was entered in the rates records of the Municipal Council of Nyeri is not evidence that he lawfully acquired the suit property from Hussein Hassan who appears to have been the legitimate owner at all material times since 1940.

19. In the circumstances, the court is not satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial. Accordingly, it shall not be necessary to consider the other two principles for the grant of an injunction. In any event, the Plaintiff has not pleaded and demonstrated that a monetary award of damages shall not adequately compensate him should he ultimately succeed at the trial.

20. In the case of **Joseph Mumita Kipees (Suing as legal representative of the estate of Moses Kisento) v Nteri Merik Obo Kipaika and 2 Others [2014] eKLR** the court considered the factors to be considered in an application for an order of inhibition. The court held, *inter alia*, that:

"...under Section 68(1) of the Land Registration Act, the court has power to grant inhibition orders against a suit land restricting registration of any dealing with the suit land for a particular period or until the occurrence of a particular event. The court have severally held that in an application for orders of inhibition the applicant has to satisfy the court that:

(a) That the suit property is at risk of being disposed of or alienated to the detriment of the applicant unless preservative orders of inhibition are issued.

(b) That the refusal to grant orders of inhibition would render the Applicant's suit nugatory.

(c) That the applicant has an arguable case".

21. As indicated earlier, the court is not satisfied from the material on record that Plaintiff's suit shall be rendered nugatory unless the order of inhibition is granted. The Plaintiff has not demonstrated that damages would not afford him adequate compensation should he ultimately succeed at the trial. The court is neither satisfied from the material on record that the Plaintiff has an arguable case on his alleged interest in the suit property. It is simply not enough to show that there is a risk of alienation. The Plaintiff must satisfy the other two requirements for the grant of an order of inhibition. In the premises, the court is not inclined to grant an order of inhibition to prevent any dealings with the suit property.

(b) Who shall bear costs of the application

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant should not be awarded costs of the application. Accordingly, the 1st Defendant shall be awarded costs.

H. CONCLUSION AND DISPOSAL

23. The upshot of the forgoing is that the court finds no merit in the Plaintiff's application for interim orders. Accordingly, the Plaintiff's notice of motion dated 18th February, 2019 is hereby dismissed with costs to the 1st Defendant only.

It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 21ST DAY OF APRIL, 2021.

In the presence of:

Mr. Warutere for the Plaintiff

Mr. Peter Muthoni holding brief for Mr. Wamahiu for the 1st Defendant

No appearance for the 2nd Defendant

HON. Y. M. ANGIMA

JUDGE

21.04.2021