



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC CASE NO. E009 OF 2021

KANZIWA LIMITED.....PLAINTIFF

VERSUS

JOSEPH KIPSABUL KIPKISUI.....1ST DEFENDANT

PETER GETARE NDUBI T/A MISGET COMPANY.....2ND DEFENDANT

JULIUS OMBOTO.....3RD DEFENDANT

TITUS NGATHU T/A GATHU GROUP.....4TH DEFENDANT

ANDREW MUIA T/A KINGSGATE VENTURES.....5TH DEFENDANT

RULING

The Application

1. This ruling is in respect of the plaintiff/applicant's Notice of Motion application dated **01/02/2021** which seeks the following orders:

(1) ...spent

(2) ...spent

(3) That the Officer Commanding Station (OCS) Njoro Police Station do oversee and enforce the implementation of this order, to forestall any violence or breach of the peace on the suit land.

(4) That pending the hearing and determination of this suit, the 1st, 2nd, 3rd, 4th and 5th defendants by themselves, their servants, agents, employees, heirs, legal representatives, successors, assignees, or anyone claiming through or under any of them, be and are hereby restrained by order of temporary injunction from entering, remaining on, selling, offering or advertising for sale, alienating, disposing, wasting or in any other way whatsoever interfering with or with the plaintiff's quiet possession of and from holding themselves out as the owners of the suit land, being all that land known as Titles LR No. 9726/2, LR 9726/3 and LR No. 9726/4 being subdivisions from the mother land parcel Title LR No. 9726, all situate in Njoro and registered in the name of the plaintiff Kanziwa Limited.

(5) That costs of this application be borne by the defendants.

2. The application is supported by the affidavit sworn on **1/02/2021** by the plaintiff's director. The grounds on the face of the application and supporting affidavit are that the plaintiff is the sole registered owner of land parcel No's **LR No. 9726/2, 9726/3 and 9726/4**; that the suit land was previously compromised of a single mother title No. **LR No. 9726**; that in the year **2015** it was subdivided into three different parcels that were registered in the name of the plaintiff; that he has lived on the parcel of land since **1997**; that on **23/01/2021** the 2nd and 3rd defendants went to the suit property to survey it; that the 2nd defendant claimed to have bought the suit property from the 1st defendant whom he claimed to be the registered owner of the suit property; that he resisted their efforts to survey the land and reported the matter to Njoro Police Station; that the 4th and 5th defendants have unlawfully advertised the suit property for sale at **Ksh. 2,000,000/= (two million)** per acre; that the plaintiff has never sold or transferred the land to any of the defendants; that the 2nd and 3rd defendants have threatened to come back to the suit property and take possession and evict the plaintiff from the land.

The Response

3. The 1st defendant filed a replying affidavit sworn on **17/05/2021** in response to the application. The plaintiff through its director then filed a supplementary affidavit sworn by David Kahumbu on **24/06/2021**.

Submissions

4. The 1st defendant filed his submissions on **18/10/2021**. The plaintiff filed its submissions on **2/11/2021**. Upon perusal of the file, there are no submissions filed on behalf of the 2nd, 3rd, 4th and 5th defendants.

Determination.

5. Upon perusal of the pleadings, the only issue for determination is whether the court should grant a temporary injunction restraining the defendants from dealing in any way with land Parcel No's **LR No. 9726/2, LR No. 9726/3 and LR No. 9726/4** pending the hearing and determination of this suit.

6. For an injunction to be issued, the applicant must establish the conditions set out in the case of **Giella vs Cassman Brown & Company Limited (1973) EA 358** where the court stated as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

7. The court in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** defined a *prima facie* case to be:

"... a case in which on the material presented to the court 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... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

8. In the case of **Habib Bank AG Zurich vs. Eugene Marion Yakub Civil Application Number Nairobi 43 of 1982** (unreported), Madan, Law and Potter JJA. held that:

"Probability of success means the court is only to gauge the strength of the plaintiffs case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."

9. From the material placed before the court, the plaintiff alleges to be the registered owner of the suit properties pursuant to certificate of titles that were issued on **14/07/2015**. The 1st defendant alleges to be the registered owner of the mother title LR No. **9726** which mother title was, according to the plaintiff, subdivided and resulted in land parcel No's **LR No. 9726/2, LR No. 9726/3 and LR No. 9726/4** which are the suit properties herein. The 1st defendant did not attach any evidence to that effect; no certificate of title is annexed to his replying affidavit.

10. As the registered owner, the plaintiff is entitled to the rights, privileges and the benefits under **Section 24** of the **Land Registration Act. Section 26** of the same **Act** obligates the court to accept the plaintiff's certificate of title as conclusive evidence of ownership unless fraud or misrepresentation is proved or where the certificate of title had been acquired illegally or unprocedurally. This is provided for under **Section 26 (1) (a) and (b)** of the **Land Registration Act**. It is therefore my opinion that the plaintiff has established a *prima facie* case with a probability of success.

11. On whether or not the plaintiff will suffer irreparable loss that cannot be compensated by an award of damages if the application is not allowed, I have some doubt. However, where in doubt this court is entitled to apply the balance of convenience test.

12. It is this court's opinion that since interlocutory injunctions are meant to preserve the suit property pending the hearing and determination of the suit, the balance of convenience lies in granting the order of temporary injunction sought.

13. Consequently I allow the notice of motion application dated **1/2/2021** as prayed in **prayers no 3 and 4** thereof. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 4TH DAY OF NOVEMBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.