



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 95 OF 2020

MICHAEL M. MWAKIO.....PLAINTIFF/APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF P.C.E.A

BAMBURI CHURCH.....1ST DEFENDANT/RESPONDENT

LAND REGISTRAR, MOMBASA COUNTY.....2ND DEFENDANT/RESPONDENT

RULING

1. The application for determination is the plaintiff's Notice of Motion dated 30th July 2020 brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 1, 2, 4 Order 51 Rule 1 of the Civil Procedure Rules and seeks the following orders:-

a. Spent

b. Spent

c. Pending the hearing and determination of this application or until further orders of this court this honorable court does issue a temporary injunction restraining the defendants by themselves, agents, servants, employees or otherwise whomsoever from interfering with the applicants development on all that property known as Mombasa/Mwembelegeza/570 pending the hearing and determination of this suit.

d. Pending the hearing and determination of this suit, or until further orders of this court this honourable court does issue an injunction restraining the defendants by themselves, agents, servants, employees or otherwise whomsoever disposing, alienating and/or in any manner whatsoever disposing, alienating, wasting or in any way interfering with, dealing with or purporting to deal with all that land known as Mombasa/Mwembelegeza/570

e. Costs of this application.

2. The application is supported by the affidavit of Michael M. Mwakio where he avers that he is the registered proprietor of all parcel of land known as Mombasa/Mwembelegeza/570. The applicant states that in 2002 he purchased the suit premises from one Hassan A Amin and was issued with a certificate of title dated 11th March 2005. That the applicant did not take actual possession after purchase but he paid land rates to the now defunct Municipal Council of Mombasa.

3. The applicant further stated that when he moved into the suit property to develop it, the 1st respondent laid claim on it. When the applicant perused the green card he learnt that through an entry made on 13th October 2013, the title was passed to Settlement Fund Trustee and on the same day, an entry was issued to the interested party with a title to the suit premises and later on 6th September 2017 an entry was made issuing a title deed to the 1st respondent.

4. The applicant also stated that on perusing the transfer instruments he discovered that on 30th December 2016, the Settlement Fund Trustees transferred the suit property to the interested party. That on 2nd March 2017, through a discharge of charge, the Fund discharged the suit property to the interested party and who later on 24th August 2017 transferred it to the 1st respondent. The applicant avers that there is illegality as to how the interested party obtained title as she had title passed to her on two diverse dates; in 2013 and 2017. That since the interested party's title was obtained by fraud she could not pass good title to the 1st respondent who is in the process of developing the suit

property. That the 2nd respondent did not properly verify the documents leading to two titles being issued on the same land. The applicant concluded by asking the court to grant the prayers sought as the respondents may further sell, transfer or deal with the suit property in a manner prejudicial to his interest.

5. The 1st respondent opposed the application vide a replying affidavit dated 25th September 2020 sworn by Venanzio Gathu Mwangi the treasurer of 1st respondent in which it is averred that the 1st respondent purchased the suit premises from the interested party and attached the sale agreement. That the sale was proceeded after the 1st respondent's advocate at the time conducted an official search that confirmed the interested party was the registered owner. That the 1st respondent was informed by the interested party that she purchased the suit premises from Settlement Fund Trustees and title transferred to her on 30th December 2016. Further to the transfer, the interested party informed her that the Fund discharged the charge and she acquired title to the land.

6. That after executing the sale agreement the interested party transferred title to the 1st respondent vide a transfer of title dated 24th August 2017 and registered on 6th September 2017. In poking holes to the application, the 1st respondent stated that the applicant's transfer documents as attached to the supporting affidavit were not stamped by the 2nd respondent, they were undated and further that they did not show who prepared them and they cannot be said to have passed ownership to the applicant. That the valuation report also was not dated and it cannot be ascertained when it was done and if it was applicable at that time and asked court to dismiss the application.

7. The interested party filed her replying affidavit on 27th September 2020 in opposition of the application and averred that she was the duly registered owner of the suit premises from the Land Settlement Scheme on 30th December 2016 and obtained a valid title. That she sold the suit premises to the 1st respondent on 10th April 2017 and passed a valid title to the 1st respondent.

8. I have duly considered the application together with the evidence by affidavit in support of the application as well as the replying affidavits in opposition. I have also considered the principles of law for the grant of a temporary injunction and the written submissions by the parties herein.

9. The application is premised on Order 40 Rule 2 of the Civil Procedure Act which states:-

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

10. Order 40 rule 2 grants court discretion to grant a temporary injunction for purposes of maintaining the status quo and preserving the subject matter in its current state until the question to be investigated in the suit is tried on the merits and determined. The principles for grant of a temporary injunction have been settled in the case of **Giella vs. Cassman Brown & Co Ltd [1973] 1 EA 358 where Spry VP at 360** held that:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.”

11. The conditions for the grant of an injunction are first that; the applicant must show a Prima facie case with a probability of success. The applicant has produced a certificate of title to the suit property and has alleged fraud on part of the interested party who he stated could not consequently pass a good title to the 1st respondent. The allegations of fraud stem from the presence of a Green Card that was marked as “MK3” on the applicant's affidavit. The Green Card showed that the title to the suit property passed to the interested party on 13th October 2013 from Settlement Fund Trustees. The Green Card differs with the Transfer of land in Settlement Scheme dated 30th December 2016 that is marked VM3 on the 1st respondent's replying affidavit. This contradiction raises serious questions on ownership of the suit property. The applicant has proved that he has a triable issue that can only be heard and dealt with at trial with a preserved suit property.

12. Secondly, such 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. The applicant has stated that the presence and actual possession of the 1st respondent on the suit property is detrimental to his rights. The applicant has further attached photographs that show the 1st respondent has commenced development on the suit property. Both the applicant and the 1st respondent lay claim to the suit property. The applicant will no doubt suffer irreparable damage when the 1st respondent asserts rights over the suit property by dealing with it in any way including continuing with the construction. For the interest of justice, the suit property needs to be preserved. The intention of the preservation is to ensure that the character and value of the suit property is conserved until the court can make a determination on the ownership.

13. Thirdly if the court is in doubt, it will decide an application on the balance of convenience. In this case, the balance of convenience are tilted to the applicant's favour as he has presented before court a serious question of ownership of the suit property and court needs to preserve the suit property until this question is determined.

14. In the result and for the reasons given hereinabove in this ruling the applicant has established that the Notice of Motion dated 30th July

2020 has merit and it ought to succeed. I therefore allow the application and make the following orders:-

a. A temporary injunction is granted restraining the defendants whether by themselves, their servants, employees or agents or otherwise whomsoever from wasting, damaging, alienation, sale, removal, or disposition of the suit property until the disposal of the suit or until further orders.

b. Costs shall be in the cause.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 26th day of May, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE