



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 354 OF 2018

ABDIKADIR ALI IBRAHIM.....PLAINTIFF/APPLICANT

=VERSUS=

SAMUEL MAINA WANJIHIA.....1ST DEFENDANT/RESPONDENT

CAROLINE WAIRIMU WANJIHIA.....2ND DEFENDANT/RESPONDENT

RULING

1. This is the notice of motion dated 13th August 2018 brought under section 3A of the Civil Procedure Act, order 40 rule 1 of the Civil Procedure Rules, and all the enabling provisions of the law.
2. It seeks orders:-
 - (1) *spent.*
 - (2) *Spent*
 - (3) *The court be pleased to grant an injunction restraining the defendants whether by themselves, their agents and/or servants from trespassing or otherwise interfering with the plaintiff's quiet enjoyment of the property of LR Number 209/14389 pending the determination of this application and/or suit.*
 - (4) *The OCPD LANGATA be instructed to ensure that the orders herein provided by this honourable court are fully complied with.*
 - (5) *The costs of this application be provided for.*
 - (6) *The honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.*
3. The grounds are on the face of the applicant and are set out on paragraphs 1 to 6. The application is supported by the affidavit of Abdikadir Ali Ibrahim, the plaintiff/applicant herein sworn on the 13th August 2018.
4. The application is opposed. There are grounds of opposition filed by the defendant/respondents are dated 27th November 2018.
5. On the 20th November 2018, the defendants/respondents sought and were granted leave to file a notice of preliminary objection. I have gone through the court file and note that the same was not filed. I will go ahead and consider the notice of motion dated 13th August 2018.
6. On the 4th February 2019, the court directed that the application be canvassed by way of written submission.
7. It is the plaintiff's/applicant's submissions that he bought the suit property being LR No. 209/14389 for value without any knowledge of an ongoing matter. There was no restriction on the property as to any dealings. The plaintiff/applicant's right has been infringed and continues to be infringed unless the court steps in. He has a right to own and to the quiet enjoyment of the property under Article 40 of the Constitution.

8. The plaintiff/applicant further submits that he will suffer harm if his property is taken from him regardless of the possibility of compensation. He further submits that the inconvenience caused to him would be greater than which may be caused to defendants/respondents. He has put forward the case of **Moses C Muhia Njoroge & 2 Others vs Jane W. Lesaloi & 5 Others [2014] eKLR**. He prays that the application be allowed.

9. It is the defendant's/respondent's submissions that ELC 1829 of 2007 is still pending hearing and determination. The plaintiff/applicant bought the suit property during the pendency of ELC 1829 of 2007 from the 1st defendant in that suit. They have put forward the cases of **Heritage Insurance Co. Ltd vs Patrick Kasena Kisilu [2015] Eklr**; **Rose Wakanyi Karanja & 3 others vs Geoffrey Chege Kirundi & Another [2016] eKLR**. They pray that the application be disallowed.

10. I have considered the notice of motion dated 13th August 2018, the affidavit in support and the annexures. I have also considered the grounds of opposition, the written submissions made on behalf of the parties and the authorities cited. The issues for determination are:- (i) whether the plaintiff's/applicant's application meets the threshold for grant of temporary injunctions and (ii) who should bear costs?

11. It is not in doubt that there exists a matter, being ELC No. 1829 of 2007 between Samuel Maina Wanjihia vs Abdirahman Muhammed Abdi, the Commissioner of Lands & the Hon. Attorney General which suit raises issues pertaining to the ownership of the suit property. The plaintiff/applicant states that he bought the suit property from the 1st defendant in ELC 1829 of 2008. He has exhibited a title which shows that the said property was transferred to him on 18th January 2017. This was during the pendency of ELC 1829 of 2007, which is yet to be determined.

12. Section 6 of the Civil Procedure Act, provides that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

There is no doubt that the 1st defendant in ELC 1829 of 2007 allegedly sold the suit property to the plaintiff/applicant herein. The plaintiff/applicant however has not exhibited any sale agreement to confirm the said sale.

13. In the case of **Rose Wakanyi Karanja & 3 Others vs Geoffrey Chege Kirundi & Another [2016] eKLR** the Court of Appeal affirmed the decisions in **Mawji vs US International University & Another [1976] KLR 199** and **Bellamy vs Sabince IDeG & J 566** stated:-

“*It is therefore our considered finding, and we hold that the deceased and the respondents could not deal with the suit property as it was subject of contentious litigation pending in court.*”

I agree with the defendants'/applicants' submissions that the *subjudice* rule and the doctrine of *lis pendens* is to ensure good order within court proceedings and fundamentally to prevent abuse the court process.

14. In an application for injunction the onus is on the applicant to satisfy the court that it should grant injunction. The principles were laid down in **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Limited vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

15. In the Case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was)** held that:-

“*to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.*”

16. I am not satisfied that the plaintiff/applicant deserves this kind of protection. I also find that he has failed to establish a prima facie case with a probability of success at the trial. The upshot of the matter is that I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 5TH day of NOVEMBER 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

No appearance for the Defendants

Kajuju - Court Assistant `