



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO. 225 OF 2019

TAMU NDOTO LIMITED PLAINTIFF

-VERSUS-

BAKARI KASSIM MJUSI..... 1ST DEFENDANT

THE LAND REGISTRAR KWALE 2ND DEFENDANT

RULING

1. The application before me is by the plaintiff. It is dated and filed on 16 December 2019. The plaintiff seeks inter alia orders of temporary injunction restraining the defendants from dealing in any way with the land parcel No. Kwale/Ramisi Kinondo S.S/54 (hereinafter, 'the suit land')
2. The plaintiff based his application on the ground that he is the registered owner of the suit land having purchased it from one Shabani Omar on 1st November 2013. The plaintiff averred that on 8th September 2014, the plaintiff registered a restriction over the suit land after a court order in ELC Case No. 113 of 2015. He claimed that when he later did an official search, the results showed that the 1st defendant was the registered proprietor of the suit land. He claimed that the green card issued is as a result of fraud by the 2nd defendant. The plaintiff has supported his application with an affidavit of Paul Va Beveren, the director of the plaintiff. He reiterated the contents of the grounds in the affidavit and further annexed to the affidavit a certificate of title as proof of ownership.
3. To put matters into context, this suit was commenced by way of a plaint filed alongside the application on 16th December 2019. It is the case of the plaintiff that it is the registered owner of the suit land, and through fraud the 2nd defendant inserted the name of the 1st defendant in the green card as registered proprietor of the suit land. The plaintiff has prayed for judgment to be entered against the defendants and the court to issue an order of permanent injunction against the defendants, and also for the court to compel the 2nd defendant to produce the original records to the suit land.
4. Back to the application at hand. The 1st defendant has not entered appearance despite there being an affidavit of service showing that he was duly served with the pleadings.
5. When this matter came up for *inter-partes* hearing, the court directed that parties canvass the matter by way of written submissions.
6. Mr. Matende counsel for the plaintiff submitted that the rights of a proprietor are indefeasible under Section 25 (1) of the Land Registration Act (LRA). Counsel submitted that under Section 26 of LRA, the certificate of title is a prima facie evidence of ownership and cannot be challenged except on grounds of fraud or where it is shown that title has been acquired illegally, unprocedurally or through corruption. Mr. Matende further submitted that Article 40 (3) of the constitution guarantees property rights of every person. Counsel submitted that unless it is established that the plaintiff's title is challengeable under Section 26 of LRA or it is found to fall within the exemption of protection under Article 40 (6) of the constitution, the title issued is indefeasible. In conclusion, counsel submitted that there might have been fraud occasioned by either the 1st or the 2nd defendant, and as a result, this court should exercise its jurisdiction by rectifying the records held by the 2nd defendant as per the provisions of section 80 of LRA, and further issue the orders in the application.
7. Counsel for the 2nd defendant, Mr. Mkok submitted that as per the 2nd defendant's records, Shabani Omar was allocated the suit land, and a further transfer was effected to Bakari Kassim Mjusi on 16th January 2021. Counsel further submitted that there exists a set of documents indicating that the first allottee, Shaban Omar had donated a power of attorney to one Omari Mbwana Zonga on 28th June 2013. Counsel submitted that there is a restriction on the title to prevent any dealings until the application is heard and determined.
8. I have considered the plaintiff's application and the rival submissions. The issue for determination is whether the plaintiff has met the

threshold for grant of orders of temporary injunction.

9. Order 40 Rule 1 of the Civil Procedure Rules provides for the conditions to be met before an order of temporary injunction is granted. It is drawn as follows:-

“Where in any suit it is proved by affidavit or otherwise—

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

10. The purpose of Order 40 Rule 1 aforementioned is to prevent a party from carrying out an activity that would damage or dispose the subject matter so that at the conclusion of the suit, the execution of the decree would be defeated. For an applicant to enjoy the relief provided under this order, he must establish that he has a *prima facie* case or that he will suffer irreparable loss or that the balance of convenience tilts in his favor. The principles for grant of a temporary injunction were also 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 the part of the defendant. Section 26 of the LRA provides that a certificate of title should be held as conclusive evidence of proprietorship. It is drawn as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

12. The allegations of fraud stem from the presence of a green card that was marked as “PVN4” on the plaintiff’s affidavit. The green card showed that the title to the suit property passed to the 1st defendant on 16th January 2012 from Shabani Omar. This green card differs from the certificate of title held by the plaintiff and the green card marked “PVB 3” on the plaintiff’s affidavit. This contradiction raises serious questions on ownership of the suit property. The plaintiff has proved that he has a triable issue that can only be heard and dealt with at trial with a preserved suit property.

13. Secondly, temporary 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 plaintiff has shown that if orders sought are not granted his interest to the suit land will not be safeguarded. The plaintiff will no doubt suffer irreparable damage if the 1st defendant asserts his rights over the suit land by dealing with it in any way. 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.

14. 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 plaintiff’s favor as he has presented before court a serious question of ownership of the suit property, and the court needs to preserve the suit property until this question is determined.

15. In view of the foregoing, the applicant has established that the application dated 16th December 2019 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 dealing, selling, disposing, dissipating and/or in any manner whatsoever interfering with the suit land until the disposal of the suit or until further orders.

b) Costs shall be in the cause.

Orders accordingly.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 22nd Day of July 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

N/A for the plaintiff

N/A for the defendant

C.K. YANO