

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. CASE NO. 34 OF 2020

PERFORMANCE APPRAISAL AND INVESTMENT LIMITED.....PLAINTIFF

VERSUS

KENNETH MBURU NDUNGU.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 12th June, 2020 brought pursuant to section 3 and 13(7) of the Environment and Land Court Act; Sections 1A, 3A and 63 (c) & (e) of the Civil Procedure Act and Order 40 Rules 1 & 4 of the Civil Procedure Rules. The Plaintiff seeks orders of temporary injunction including eviction against the Defendant and his agents in respect to land parcel number NGONG/ NGONG/ 16445, hereinafter referred to as the 'suit land' pending the determination of this suit. The application is premised on the grounds on the face of it as well as the supporting affidavit of MATHEW GICHAGA NDEGWA, its Director where he deposes that the Plaintiff is the registered owner of the suit land, which it acquired on 29th March, 2017 from one Mithamo Karubio for valuable consideration. He claims at the time the Plaintiff conducted due diligence including a search, the records at the Land Registry confirmed that Mithamo Karubio was the proprietor of the suit land. He contends that the Plaintiff has never disposed of the suit land nor given permission to anyone including the Defendant to enter, put up or deal with it. He avers that sometime in 2019, the Defendant, his servants and agents fraudulently entered into the suit land, fenced it off and put up structures thereon. Further, that the Defendant has misrepresented himself to the public that he is the owner of the suit land. He avers that despite calling the Defendant, his agents or servants to desist, the Defendant has continued with his acts of trespass. Further, that the Plaintiff reported the matter to the Kiserian Police Station and the same was recorded under OB No. 31/9/6/2020. He reiterates that the Defendant has remained on the suit land and interfered with the Plaintiff's quiet possession thereon. Further, that the Plaintiff risks losing the suit land and will suffer irreparable loss.

The application is opposed by the Defendant who filed a replying affidavit and deposes that the suit land belonged to his late father Alexander Mburu Muiyuro and upon his death, it has been in the custody and physical possession of this family since 1st February, 1994. He denies knowledge of the Plaintiff and contends that the purported title deed issued to them on 10th October, 2017 is a forgery. He explains that after the demise of their father, on 26th August, 2011, the family applied for Letters of Administration in respect of his estate which were granted to his brothers, Anthony Muiyuro Mburu and George Kagucia Mburu, making them administrators of the estate which included the suit land. Further, the Grant was confirmed on 28th October, 2015. He contends that since the demise of his father, he has personally been visiting the suit land and in August, 2019 he was informed by a Pastor from Deliverance Church which is adjacent to it, that someone was trying to sell the said land to him. He confirms that after consulting his family, he has undertaken developments on the suit land and so far spent Kshs. 8,000,000/=. He challenges the Plaintiff's failure to enjoin the Land Registrar and the vendor. Further, that the Plaintiff has been indolent and seeks injunctive reliefs only when the developments on the suit land is 70% complete.

The Plaintiff filed a further affidavit sworn by MATHEW GICHAGA NDEGWA where it reiterated its claim and insists it conducted due diligence at the Land Registry and is hence a bona fide purchaser for value. He contends that together with a co director JENNIFER NDEGWA, they called the Defendant's caretaker several times to resolve the dispute but in vain. Further, their efforts to resolve the matter through Police and Court were impeded by the COVID – 19 pandemic. He insists they did not enjoin the Land Registrar and Vendor as this is a dispute between an owner of land and a trespasser thereon. Further, they even filed Ngong SPM Miscellaneous Criminal Cause No. 54 of 2020 to compel the Land Registrar to produce documents in their custody in respect to the suit land but he said the Green Card was missing. He states that stopping the construction on the suit land is for the benefit of both parties and the Defendant's claim to have spent Kshs. 8,000,000 is unsubstantiated.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 12th June, 2020 including the respective affidavits and revalling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of this suit.

The Plaintiff in its submissions contends that it has established a prima facie case with a probability of success as it undertook due diligence before it acquired the suit land. It insists it is a bona fide purchaser for value and is protected by law. Further, that it will suffer irreparable harm and the balance of convenience tilts in his favour. To buttress its averments, it has relied on the following authorities: **Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) eKLR; Lawrence P. Mukiri V Attorney General & 4 others (2013) eKLR; Nguruman Limited Vs Jan Bonde Nielsen & 2 others (2014) eKLR; Olympic Sports House Limited V School Equipment Centre Limited (2012) eKLR; Catherine Nasimiyu Khisa & Gladys Nakhumicha Khisa (Suing as the Administrators and Legal Representatives of the Estate of the late Shadrack Khisa Naliakho – Deceased) V Jacob Wangila Wanyama & Another (2020) eKLR; Ali Elmi Abdi V Nairobi County Government (2018) eKLR; and Kenya Electricity Transmission Company Limited V Kibotu Limited (2019) eKLR.**

The Defendant in his submissions insist the estate of the late Alexander Mburu Muiyuro and its beneficiaries have a superior claim as its title

was issued in 1995 compared to the Plaintiff's which was issued in 2017. He insists the Plaintiff has not established a prima facie case with a probability success. Further, that it will not suffer irreparable injury and the balance of convenience does not tilt in its favour. He reiterates that the Plaintiff has been indolent and is not in pursuit of the truth. Further, that the Plaintiff failed to enjoin the estate of the late Alexander Mburu Muiyuro. To support his arguments, he relied on the following decisions: **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358; Nguruman Limited Vs Jan Bonde Nielsen & 2 others (2014) eKLR; Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) eKLR; Civil Appeal No. 295 of 2001 – Nakuru CMC Motors Group Limited, CMC Holdings Limited and Evans Kageche Boro; and Onyango Oloo V Attorney General (1986 – 1989) EA 456.**

As to whether the Plaintiff has established a prima facie case with probability of success at the trial, I will proceed to peg my analysis on the principles established in the case of **Giella Vs Cassman Brown & Company (1973) EA 358** as well as the definition of a prima facie case as stated in the case of **Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125.**

The Plaintiff claims to be the owner of the suit land that it purchased from one Mithamo Karubio which fact is disputed by the Defendant who contends that the said land belongs to the estate of his late father. The Plaintiff avers that the Defendant has trespassed on its land and constructed thereon. The Defendant on the hand confirms having developed the suit land which belonged to his late father. From the annexures in the supporting affidavit, I note the Plaintiff has produced a copy of a title which he obtained on 10th October, 2017 while the Defendant has produced a copy of a title indicating that his late father Alexander Mburu Muiyuro was registered as the proprietor of the suit land on 1st February, 1995. The Plaintiff produced a Sale Agreement dated the 29th March, 2017 to confirm he purchased the suit land from Mithamo Karubio. The Plaintiff further produced a Certificate of Official Search dated 28th February, 2017 indicating that the said Mithamo Karubio was registered as proprietor of the suit land on 30th November, 2016 and a Certificate of Title issued to him on the said date. The Defendant has produced a Certificate of Confirmation of Grant dated the 28th October, 2015 confirming the suit land formed part of the estate of the late Alexander Mburu Muiyuro. I note the Plaintiff did not include the vendor in these proceedings and insists this is not necessary as the Defendant has trespassed on its land. Further, that it failed to enjoin the Land Registrar as this is a claim strictly against the Defendant. It is my considered view that for this court to make a proper determination of the dispute at hand, joinder of all the relevant parties is pertinent. The Plaintiff further insists that it is a bona fide purchaser for value. At this juncture, I do not need to delve into the merits or demerits of the Plaintiff's claim or whether it is a bona fide purchaser for value. I also note the parties have relied on very many authorities which I deem relevant but to my mind, the only issue for determination is whether the Plaintiff has demonstrated a prima facie case as against the Defendant.

However, based on the facts as presented while associating myself with the decisions cited above, I find that the Plaintiff has not established a prima facie case as against the Defendant whose late father was registered as owner of the suit land before the vendor Mithamo Karobia who in turn sold it to the Plaintiff. It is my considered view that the Plaintiff can always be compensated by way of damages.

In further associating myself with the decision of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where the Court of Appeal held that in instances when a party has failed to establish a prima facie case, the court need not proceed to make a determination of the other two limbs on injunctions and I will hence decline to do so.

It is against the foregoing that I find the Notice of Motion application dated the 12th June, 2020 unmerited and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE