



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. E 034 OF 2021

ALBERT MAINA GITHINJI.....PLAINTIFF

VERSUS

ZAMCO COMPANY LIMITED.....1ST DEFENDANT

ZAMCO DEVELOPERS AGENCY LTD2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

RULING

Introduction

1. This Ruling is in relation to a Notice of Motion Application dated 8th April, 2021 brought under **Article 40 (1) of the Constitution, Section 125 & 126 of the Land Registration Act, Order 40 Rule 1(a) and (b), Order 40 Rule 4(1) of the Civil Procedure Rules and Sections 1A, 1B, 3A & 63(c) of the Civil Procedure Act.** In the Application, the Applicant is seeking for the following orders:

a) This Honourable Court be pleased to grant an order of temporary injunction to maintain the status quo by restraining the Respondents whether by themselves, their agents and/or servants from wasting, constructing on, developing, alienating or otherwise interfering or dealing with the Plaintiff's property known as Syokimau Farm Ltd Plot No. 276 in Syokimau County until the hearing and final determination of the main suit.

b) The Officer Commanding Station (OCS) Mlolongo do enforce compliance of the above order.

c) The costs of this application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who deponed that he is the lawful owner of all that parcel of land known as Syokimau Farm Limited, **Plot No. 276** (hereinafter the "Suit Property") having bought the same from the original shareholder, Joseph Kalani Mutuku, on 4th December 1989.

3. The Plaintiff deponed that he has enjoyed quiet ownership and possession over the suit property since 1989; that the 1st Defendant fraudulently processed a title for the suit property and that when he undertook to fence the parcel of land in January 2021, the Defendants herein trespassed on the land and caused tension and disruption of the fence construction without any colour of right bringing the works to a standstill claiming ownership of the suit property.

4. The Plaintiff deponed that the trespass, interference and disruption by the 1st Defendant has occasioned him untold loss and inconvenience; that the 2nd Defendant agents are harassing him and that the Defendants have interfered with his property by trespassing and trying to evict him.

5. The Plaintiff further deponed that the 1st Defendant made a malicious report at Mlolongo Police Station causing his agents to be arrested on 6th April 2021 and his subsequent summoning by the area District Commissioner at Athi river on 7th April 2021 where he was shocked to be informed that the 1st Defendant has a title deed over the said suit property.

6. In response, the 1st Defendant's Director deponed that the 1st Defendant purchased the suit property from one Pius Musyoka Nthenge and Sarah Lilian Mutuku Nthenge sometime in 2011 for Kshs. 30,500,000; that prior to purchasing the suit property, the 1st Defendant engaged the services of a legal counsel who conducted due diligence and obtained an official search confirming the vendors as the registered proprietors and that the 1st Defendant also conducted a search at the National Registration Bureau to establish the *bonafide* of the vendors'

identity.

7. It is the 1st Defendant's Director's deposition that prior to the transfer of the suit property to the 1st Defendant, he paid stamp duty while the vendors paid land rent, and land rates and obtained the requisite clearance certificates; that the land office issued the consent to transfer the suit property; that the transfer dated 21st July 2011 was duly registered and that the 1st Defendant became the proprietor of the suit property.

8. The 1st Defendant's Director deponed that upon the transfer of the suit property to the 1st Defendant, the 1st Defendant was granted physical occupation and has had quiet possession of the land since 2011 to date; that the suit property was invaded by strangers sometime in mid-January 2021 claiming to be agents of Syokimau Farm Limited and that they proceeded to take forceful occupation of the 1st Defendant's Land and started erecting a wall fence around it.

9. According to the 1st Defendant, the dispute in respect of the suit property is the subject of **Machakos ELC E0225/2021 (sic), Zamco Developers Agency Limited – vs- Syokimau Farm Limited and The Attorney General** which is pending before this Honourable Court and that the Plaintiff herein is a stranger who has never engaged them before or laid any claim to the suit property which they have occupied peaceful for ten years now.

10. The 1st Defendant's Director's deponed that the Plaintiff's claim was premised on an alleged agreement for purchase of shares and land which is time barred having been allegedly entered into over 30 years ago and that if the ongoing construction of the perimeter wall is stopped, it will occasion the 1st Defendant great loss.

11. It was deponed that the Plaintiff has not provided any security for the consequent loss that will be suffered by the 1st Defendant if injunctive orders are granted as prayed by the Plaintiff; that the Plaintiff should be ordered to provide security for costs and that the suit should be dismissed with costs.

12. Paul Masila who described himself as the administrator of Syokimau Farm Limited, swore a Supplementary Affidavit, in which he deponed that the suit property belonged to the late Joseph Kalani Mutuku who was a shareholder of Syokimau Farm Limited holder of share certificate number 137; that the share certificate exhibited by the 1st Defendant as share certificate No. 742 did not originate from Syokimau Farm Ltd and the 1st Defendant's share certificate could not be used to process any title over the suit property.

13. Mr. Masila deponed that shares numbers 5771 to 5780 belonged to Mr. and Mrs. Pius Nthenge and not Mr. and Mrs. S Pius Nthenge as indicated in the fake share certificate No. 742; that Mr. and Mrs. Pius Nthenge were not the owners of Plot No. 276 and that the two could not transfer the same to anyone. He deponed that Syokimau Farm Ltd had 713 shareholders and that share certificate number 742 surpasses the total number of shareholders and therefore it was fake.

14. Mr. Masila deponed that for anyone to process a title from Syokimau Farm Limited, he/she must possess a genuine share certificate, pay the requisite subscription fees and obtain a letter of allotment issued by the company; that the 1st Defendant had not annexed any of the said documents and that there is no way a title could be issued without the said documents.

15. The 1st Defendant filed a Further Affidavit sworn by its Director who deponed that the purported appointment of one Paul Masila Kimeu as the administrator of Syokimau Farm Limited is unverifiable at the companies' registry and that his alleged roles are not known in law.

16. The 1st Defendant's Director deponed that the contents of paragraph 8 of Paul Masila Kimeu's Affidavit were meant to sow confusion; that the deponent did not proffer any evidence that there is a difference between Mr. & Mrs. Pius Nthenge and those that sold L.R. No. 12715/276 to the 1st Defendant and that he did not state the share certificate number that Mr. & Mrs. Pius Nthenge held other than share certificate number 742.

Submissions

17. The Application was canvassed by way of written submissions. The Plaintiff's Counsel submitted that the Plaintiff has shown that the 1st Defendant did not lawfully acquire the title to the suit property; that the Plaintiff has a genuine and arguable case and that the Plaintiff had established a prima facie case with chances of success.

18. The Plaintiff's advocate submitted that the Defendants have misused, damaged, wasted, destroyed, polluted and/or degraded the suit property thus depriving the Plaintiff the use and enjoyment of the suit property. Counsel relied on the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where the court stated as follows:

“It is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

19. Counsel for the Plaintiff submitted that land is unique and no one parcel of land can be equated in value to another; and that although the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damage. Counsel relied on the case of **Korari Agencies Limited Vs. Epco Builders Limited (2013) eKLR**

20. Counsel for the Defendants submitted that at paragraph 1 of the recitals of the Plaintiff's purported Sale Agreement, the property that

was being sold is identified as L.R. 12715/267 previously plot 312 which was hived from L.R No. 7149/11/R; that this is a different property from the 1st Defendant's property which is L.R. No. 12715/276, I.R. 44396 and that the Plaintiff did not offer any explanation why, if indeed he purchased the suit property in 1989, did not obtain a title.

21. The Defendant's counsel further submitted that the Plaintiff did not exhibit any evidence of payment to support the allegation that he purchased the suit land from the alleged owner, Joseph Karani Mutuku; and that the Plaintiff could not demonstrate the irreparable harm he will suffer having not owned or possessed the suit property.

22. According to counsel, the balance of convenience is in favour of the 1st Defendant which has demonstrated that it paid a valuable consideration of Kshs. 30,500,000 for the suit property and that the 1st Defendant subsequently occupied the suit property and has expended a substantial amount of money by constructing a perimeter wall around the property which is 5 Acres.

Analysis and Findings

23. I have considered the Application, the Affidavits and the submissions by counsel and the cited authorities. The only issue that arises for determination is whether the court should issue a temporary injunction against the Defendants in respect of all that parcel of land known as Syokimau Farm Ltd Plot No. 276.

24. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co. vs Ethicon Limited (1975) AC 396* case in which the court provided that for an injunction to issue, the Applicant must satisfy three elements, namely:

- i) *There must be a serious issue to be tried;*
- ii) *Damages are not an adequate remedy;*
- iii) *The balance of convenience lies in favour of granting or refusing the application.*

25. These are the same grounds that had been postulated earlier on in the case of *Giella vs Cassman Brown (1973) EA 358* as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages, and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience.

26. What amounts to a *prima facie* case was explained in *Mrao vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* as follows:

“So what is a prima facie case? I would say that in civil cases it is 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.”

27. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR*, the Court of Appeal analyzed the grounds upon which the court can grant temporary orders of injunction as follows:

“...These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

28. In the same case, the Court of Appeal stated that the party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained; the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

29. The Plaintiff has deponed in his Affidavit that he is the lawful owner of all that parcel of land known as Syokimau Farm Limited, Plot No. 276 (hereinafter the “*Suit Property*”) having bought the same from the original shareholder, Joseph Kalani Mutuku, on 4th December 1989.

30. According to the Plaintiff, he has enjoyed quiet ownership and possession over the suit property since 1989; that the 1st Defendant fraudulently processed a title for the suit property and that when he undertook to fence the parcel of land in January 2021, the Defendants herein trespassed on the land and caused tension and disruption of the fence construction without any colour of right bringing the works to a standstill claiming ownership of the suit property.

31. To support his claim, the Plaintiff annexed on his Supporting Affidavit a copy of the sale agreement dated 4th December, 1989 between

himself and one Joseph Karani Mutuku. The agreement shows that the Plaintiff purchased L.R No. 12715/267, previously plot 132 which was hived from LR No. 7149/11/9. The purchase price for the said land is said to be Kshs. 10,000,000.

32. According to the Plaintiff, the vendor was a holder of share numbers 1361-1370 in Syokimau Farm Limited and that on the basis of the said shares, he was allocated plot number 276, which is the same plot that was sold to him by the vendor. The Plaintiff has annexed the copy of the share certificate and the purported register of Syokimau Farm Limited.

33. According to the Plaintiff, in the Minutes of 26th June, 2013, Syokimau Farm Limited, the administrator of the company was authorized to issue him with the title deed for the land. The Plaintiff annexed the said minutes and the copy of gazette notice number 11485 of 26th July, 2013 which shows the voluntary winding up of Syokimau Farm Limited.

34. On the other hand, the Director of the 1st Defendant has annexed a copy of the grant showing that the 1st Defendant was registered as the proprietor of LR No. 12715/276 in the year 2011. The said grant shows that the grant was issued to Syokimau Farm Limited on 19th May, 1988. Syokimau Farm Limited transferred the land to Pius Musyoka Nthege and Lilian Nthege on 14th September, 1988. The two proprietors then transferred the land to the 1st Defendant.

35. In addition to the grant, the 1st Defendant has exhibited the share certificate that was issued to Mr. and Mrs. Nthege on 16th September, 1981 in respect of share numbers 5771 to 5780. While challenging the grant that was issued to Mr. and Mrs. Nthege, the Plaintiff deponed in his Supplementary Affidavit that LR No. 12715/276 is one of the properties that had been allocated to Mr. Joseph Kalani Mutuku by Syokimau Farm Limited.

36. The evidence before this court shows that at paragraph 1 of the recitals of the Plaintiff's purported Sale Agreement, the property that was sold to the Plaintiff is identified as L.R. 12715/267, previously plot 312, which was hived from L.R No. 7149/11/R; This is a different property from the 1st Defendant's property which is L.R. No. 12715/276, I.R. 44396. Indeed, the Plaintiff did not produce any document from Syokimau Farm Limited, or a surveyor to show that the land he purchased, being L.R. 12715/267, previously plot 312, is the same as L.R. No. 12715/276.

37. If it is true that the Plaintiff purchased a surveyed parcel of land being L.R. 12715/267, in 1989 for a sum of Kshs. 10,000,000, then why did he not process a title for the said land? Indeed, the evidence before me shows that by the time the Plaintiff purported to purchase L.R. 12715/267 on 4th December, 1989, the grant in respect of LR No. 12715/276 had already been registered in favour of Syokimau Farm Limited, which then transferred the land to Mr. and Mrs. Nthege. That being the case, it is unlikely that the land that the Plaintiff purchased was LR No. 12715/276.

38. Furthermore, the Plaintiff is seeking for an injunction in respect of "Plot number 276" while the documents in support of his case shows that he purchased L.R. 12715/267, previously plot 312. Considering that the 1st Defendant is in possession of a grant which was issued in 1988, way before the Plaintiff's right crystallized, if at all, and in view of the absence of evidence to show that the Plaintiff purchased "plot number 276," it is my finding that the Plaintiff has not established a prima facie case with chances of success.

39. For those reasons, I dismiss the Application dated 8th April, 2021 with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 8TH DAY OF OCTOBER 2021.

O. A. ANGOTE

JUDGE

In the presence of:

.....**for the Plaintiff**

.....**for the Defendant**

Court Assistant- John Okumu