



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC NO. 204 OF 2020**

**KATANA NZARO NGUWA & 52 OTHERS .....PLAINTIFFS**

**- VERSUS -**

**NAJMA ALI AHMED.....DEFENDANT/APPLICANT**

**RULING**

**I. INTRODUCTION.**

1. The application before me for determination is dated 19<sup>th</sup> November 2020. It is instituted by the Defendant/Applicant. It is brought under the provision of Order 40 Rules 1, 4 & 10 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act, Cap. 21

**II. The Defendants/Applicants Case**

2. The Defendant/Applicant seeks the following orders:

*a) Spent.*

*b) Spent.*

*c) THAT an order of status quo do issue over the suit property and that the Deputy Registrar visit the suit property to determine the status quo.*

*d) THAT a temporary injunction do issue against the Plaintiffs/Respondents jointly and/or severally either by themselves, their agents, servants or their assignees or any one claiming through them from continuing with any constructions, developments, subdivisions, transfer or undertaking any kind of conveyance over Plot No. 20948/I/MN or in any way whatsoever interfering with the Plaintiff/Applicant quiet possession over the suit property pending the hearing and determination of this suit.*

*e) THAT the OCS Bamburi Police Station be ordered to ensure compliance by all parties of court orders issued herein.*

*f) THAT costs of this application be provided for.*

3. The application is premised on the testimonies, grounds and the averments under the 24 Paragraphed Supporting Affidavit of NAJMA ALI AHMED Sworn and dated and the applicant herein. The applicant claimed ownership to the suit property Plot No. 20948/I/MN. She annexed NAA - 1(a) a Certificate of title No. CR. 63882 dated 21<sup>st</sup> October 2014 registered in the name of Wilfred Wambua David. She stated that the said Wilfred Wambua David has since transfer the same vide a transfer dated 12<sup>th</sup> November 2014, which is marked as NAA - 1(b). At the time of purchase, the Defendant/Applicant claimed the suit property was vacant, however in the year of 2018 when she surveyed it, she was informed there are squatters living on the suit property and had even uprooted the beacons.

4. She sought to resolve the issue by entering into a payoff agreement as seen on annexures NAA - 2, she paid off the squatters Kenya Shillings Two Million (Kshs. 2,000,000/=) in return they vacate the suit property. The Defendant/Applicant paid a sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/=) that was acknowledged by the Plaintiffs as seen on NAA - 3, but the squatters never vacated nor did they allow her to access the suit property. The Defendant/Applicant later reported the issue to the police OB/17/08/11/2020 after the Plaintiffs became adamant to vacate the suit property. The Defendant/Applicant has asked court to restrain the Plaintiffs from further constructing the informal structures on the suit property as well as their actions of subdividing and selling off portions to 3<sup>rd</sup> parties. The

Defendant/Applicant urged court to allow the application in the interest of justice.

5. When the application came up for inter parties hearing on 20<sup>th</sup> January 2021, Ms. Nabwana, Learned Counsel for the Defendant/Applicant was present but no attendance from the Learned Counsel for the Plaintiffs' Counsel. Court directed the application be disposed by way of written submissions. On 21<sup>st</sup> October 2021, when the application came up for mention to confirm filing of submissions, court noted that the Plaintiffs have never participated in the proceedings despite being served.

### **III. SUBMISSIONS**

6. On 4<sup>th</sup> March 2021, Learned Counsel for the Defendant/Applicant filed submissions. Learned Counsel submitted that the applicant had established a prima facie case with a probability of success, when she produced a certificate of title which is prima facie evidence of ownership as stated in Sections 24(a), 25(1), 26, 30 (3) and 35 (2) of the Land Registration Act. It was submitted that the applicant as met the requirements set in **Giella - Versus - Cassman Brown Co. Ltd (1973) EA 358**.

7. The Learned Counsel submitted that the applicant bought the suit property when it was vacant and has since been invaded by the Plaintiffs who have deprived her of her right to property. Learned Counsel claimed that the Plaintiffs also tricked the Defendant into a settlement while they rushed to court with an adverse possession suit with an aim of alienating her property rights. The court was called to tilt the balance of convenience in favour of the Defendant/Applicant, who is in full possession of the suit property save for the small portion which has been illegally occupied by the Plaintiffs. Counsel urged court to preserve the suit property pending the full determination of the suit by granting the orders sought.

### **IV. ANALYSIS AND DETERMINATION**

8. I have read and taken onto consideration the filed pleadings, written submission, the cited authorities and the relevant provisions of the law with regard to filed application by the Defendant/Applicant. I have also taken notice of the passive participation role played by the Plaintiffs throughout the hearing of this application. In order to arrive at an informed and just decision, I have framed the following issues for consideration. These are:

***a. Whether the Defendant/Applicant has met all the requirements to be granted orders of temporary Injunction as stated out under the provisions of the Civil Procedure Rules, 2010?***

***b. Who will be the Costs of the application?***

**ISSUE No. a). - Whether the Defendant/Applicant has met all the requirements to be granted orders of temporary Injunction as stated out under the provisions of the Civil Procedure Rules, 2010?**

#### **The brief facts.**

9. The brief facts of the case are that the Defendant/Applicant claims the ownership to the suit property. She has annexed a copy of the title deed to that effect dated 21<sup>st</sup> October 2014. It is registered in the name of Wilfred Wambua David. She stated that the said Wilfred Wambua David had since transferred the land to her vide a transfer dated 12<sup>th</sup> November 2014. At the time of purchase, the Defendant/Applicant claimed the suit property had been vacant. However, in the year of 2018 when she surveyed it, she was informed there were squatters living on it. They had even uprooted the beacons. She sought to resolve the issue by entering into a payoff agreement. She paid off the squatters a sum of Kenya Shillings Two Million (Kshs 2,000,000/=). In return they vacated the suit property. She further paid a sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/=) that was acknowledged by the Plaintiffs. Despite of all these, squatters never vacated nor did they allow her to access the suit property. The Defendant/Applicant later reported the issue to the police. At the time of purchase, the Defendant/Applicant claimed the suit property was vacant. However, in the year of 2018 when she surveyed it, she was informed there are squatters living on the suit property and had even uprooted the beacons. She sought to resolve the issue by entering into a payoff agreement. She paid off the squatters Kenya Shillings Two Million (Kshs 2,000,000/=) in return they vacate the suit property. The Defendant/Applicant paid a sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/=) that was acknowledged by the Plaintiffs. But the squatters never vacated nor did they allow her to access the suit property. The Defendant/Applicant later reported to the police after the Plaintiffs became adamant to vacate the suit property. The Defendant/Applicant asked court to restrain the Plaintiffs from further constructing the informal structures on the suit property as well as their actions of subdividing and selling off portions to 3<sup>rd</sup> parties. The Defendant/Applicant instituted this case and urged court to allow the application in the interest of justice. The Plaintiff have been very inactive in this matter.

10. Ideally, at the an interlocutory application, the dispute between the parties is pending, the court is careful not to venture into making definitive findings on facts of law or facts. The power of court in an application for an interlocutory injunction is discretionary, that will be judicially exercised on the basis of law and evidence. The conditions for granting a temporary injunction are well known. Firstly, the 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. In the instant case, there some issues which may require indepth interrogation, These are the Defendant/Applicant has annexed a certificate of title, not in her name but rather in the name of the transferor. She claims ownership to the suit property. The Plaintiffs are in occupation as squatters. The applicant's claim of ownership of the suit property is an arguable case that raises a serious question that ought to be tried by court during a full trial. A prima facie case was defined in the case of **Mrao Limited – Versus - First American Bank of Kenya Ltd & 2 others (2003)KLR 125** “***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 person as to call for an explanation or rebuttal from the latter.***” The material that has been placed before me, is sufficient enough to find that the applicant has an interest in the suit property, this calls for an explanation from the Respondents during the full trial.

12. On the second factor, the applicant must establish that she stands to suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction. The applicant's case is that the respondents have refused to vacate the suit property despite a written agreement to do so as well as a police report being made. The actions of the Respondents of uprooting beacons on the suit property are wanton threat to the Applicant's rights. The Plaintiffs/Respondents have not responded to the application to explain or rebut the facts stated by the applicant despite being served. A temporary injunction is needed to protect the rights of the Defendant/Applicant from violation or threats of violation of acts that she cannot be compensated by an award of damages.

13. The balance of convenience tilts towards preserving the property in dispute in the suit until the suit is determined. The suit property could only be preserved if the actions of the Plaintiffs/Respondents were restrained pending the final disposal of the suit. It is for these reasons that, on preponderance of probability, I therefore find the Notice of Motion dated 19<sup>th</sup> November 2020 is merited and is hereby allowed. I order as follows:-

**a) THAT a temporary injunction do issue against the Plaintiffs/Respondents jointly and/or severally either by themselves, their agents, servants or their assignees or any one claiming through them from continuing with any constructions, developments, subdivisions, transfer or undertaking any kind of conveyance over Plot No. 20948/I/MN or in any way whatsoever interfering with the Plaintiff/Applicant quiet possession over the suit property pending the hearing and determination of this suit.**

**b) THAT for the sake of expediency, this matter has to be heard within the next ninety (90) days from this date. There shall be a mention of the matter on 14<sup>th</sup> February, 2022 for the Pre – trial Conference session pursuant to the provision of Order 11 of Civil Procedure Rules, 2010.**

**c) THAT the costs of the application shall be in the cause.**

**IT IS ORDERED** accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF DECEMBER 2021**

**HON. JUSTICE L. L. NAIKUNI**

**JUDGE**

**ENVIROMNENT AND LAND COURT**

**MOMBASA**

**In the presence of:**

*Yumna Court Assistant*

*Non appearance for the Plaintiff/Respondent*

*M/s. Nabwana for the Defendant/Applicant.*