



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 14 OF 2019

MWAMBI INVESTMENT LIMITED.....PLAINTIFF

VERSUS

PHILIP MBITI KAVISU.....1ST DEFENDANT

WILSON MBITHI MUNGUTI *t/a*

KLENQUITE SERVICES2ND DEFENDANT

OCPD ATHI RIVER, MAVOKO POLICE STATION.....CONTEMNOR

RULING

1. In the Notice of Motion dated 27th February, 2019 and filed on the same day, the Defendants are seeking for the discharge of interim orders in the following terms:

a) An order do issue discharging the interim orders issued on 28th July, 2016 where upon the court ordered:

(i) That the Plaintiff/Respondent by themselves, their servants and/or agents be and are hereby restrained from invading, trespassing, selling, transferring, or in any other manner interfering with the Plaintiff's/Applicant's property known as L.R. No. 17847 (I.R.64883) situated within Athi River Township, pending the hearing and determination of the instant suit.

(ii) That the OCPD Athi River/Mavoko Police Division is hereby ordered to supervise and ensure compliance of the orders granted.

b) This Honourable Court be pleased in the alternative to order that status quo be maintained and/or any other order as it may deem fit to issue pending hearing and determination of this suit.

c) Costs be provided for.

2. The Application is supported by the Affidavit of the 2nd Defendant who has deponed that he is the purchaser from British American Tobacco(K) Limited, the original grantee, who divided the larger parcel of L.R. No. 17847.

3. According to the 2nd Defendant, the vendor transferred to him the suit property; that he has been occupying the suit property since then; that using forged Certificate of Title, the Plaintiff unlawfully misled the court into granting the injunctive orders; that interim orders cannot stay in place for a period of more than three (3) years and that the suit land is subject of litigation in ELC No. 527 of 2016 where the Plaintiffs are claiming to be the registered proprietors.

4. The 2nd Defendant finally deponed that the Plaintiff previously obtained ex-parte interim orders without serving him and that the said orders were vacated by the court and the court ordered that the *status quo* be maintained. The Applicant deponed that it is most likely that the same parties have fashioned themselves differently under different names to obtain orders by misleading the court.

5. The Plaintiff's Managing Director deponed that the original title for L.R. No. 17847 has remained in the company's possession since its acquisition; that having established a prima facie ownership the orders of injunction were granted; that the said orders were executed against the trespassers and vacant possession given and that the suit property has been properly secured by a perimeter wall and security guards employed to ward off would be grabbers.

6. The Plaintiff's Director deponed that the Plaintiff is a total stranger to the suit filed by Lucy Muthoni and the Defendants in ELC No. 40 of 2017 and that in any event, the suit property in ELC Number 40 of 2017 is different from the suit property herein.
7. In his submissions, the Defendants'/Applicants' advocate submitted that the court has unfettered discretion to set aside or vary any order; that there is a contention of the titles in respect of the suit property and that the Application should be allowed.
8. The Plaintiff's/Respondent's advocate submitted that the Applicants have not demonstrated any change of circumstances or that they have acquired a better title to L.R. No. 17847 since the orders were issued on 28th July, 2016; that the Applicants have admitted that they have also been sued in ELC No. 527 of 2016 and that it is the Plaintiff who is in possession of the suit property.
9. In the Notice of Motion dated 20th April, 2016, the Plaintiff sought for an order of injunction restraining the Defendants from invading, trespassing, selling, transferring or in any manner interfering with L.R. No. 17847.
10. Although the Defendants were served with the said Application, they never opposed the Application. The court allowed the Application by granting an order of injunction pending the hearing of the suit.
11. The 2nd Defendant is seeking for the discharge of the injunctive orders on the ground that he is the one who is in occupation of the suit; that the orders of the court were obtained upon material non-disclosure and that the Plaintiff used forged documents to obtain the said orders.
12. The 2nd Defendant further deponed that the fact that they have been sued by another party in ELC. No. 527 of 2016 creates a serious credibility on the title being relied upon by the Plaintiff.
13. In the case of *Reef Building Systems Limited vs. Nairobi City Council, Nairobi HCCC No. 1357 of 2001 (UR), Ringera J.* set out the circumstances under which a court may exercise its discretion to discharge an order of injunction as follows: If it is shown that the order was irregularly obtained; or there was a subsequent change in circumstances that it was unjust to maintain it in force or is otherwise unjust and inequitable to let the order remain.
14. The issues raised in the current Application should have been raised by the 2nd Defendant in opposition to the Plaintiff's Application dated 20th April, 2016. Indeed, the issue of whether the title being held by the Plaintiff is a forgery or not can only be addressed at trial, and not after the court has already found that the Plaintiff has a prima facie case with chances of success.
15. Indeed, the 2nd Defendant has not shown, by way of documentary evidence, that he is the one in possession of the suit property. Considering that the 2nd Defendant did not oppose the Application dated 20th April, 2016, the 2nd Defendant's claim can only be addressed by the court at trial, and not at this stage. In fact, the 2nd Defendant has not shown that the injunctive order was obtained irregularly or that it is unjust and inequitable to let the order remain in force.
16. The Application dated 27th February, 2019 is therefore unmeritorious. The Application is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020.

O.A. ANGOTE

JUDGE