



IN THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 224 OF 2018

MARY WERE ONYANGO.....PLAINTIFF

=VERSUS=

CRISPINE OMONDI OPONDO.....DEFENDANT

RULING

1. This is a Ruling in respect of two separate applications. The first application is brought by the Plaintiff/Applicant. The application is dated 5th March 2018 and it seeks the following orders:-

1. Spent

2. Spent

3. That the Honourable Court be pleased to grant an order of injunction restraining the Defendant whether by himself, servants, workmen, agents, clients or otherwise howsoever from continued construction, trespassing, encroaching or further alienating the parcel of land known as Title number Nairobi/ Block 82/4580 pending the hearing and determination of the suit herein.

4. That the Honourable Court be pleased to grant an order of mandatory injunction compelling the Defendant whether by himself, servants, workmen, agents, clients or otherwise howsoever to remove all the structures and building he has put up on the Plaintiff's parcel of land Title Number Nairobi/Block 82/4580 pending the hearing and determination of the suit herein.

5. That the Plaintiff be awarded the costs of this application.

2. The second application is dated 29th November 2018. The application is brought by the Defendant/Applicant. The Application seeks the following orders:-

1. That this Honourable Court be pleased to grant leave and order the firm of Amolo & Gachoka Advocates be enjoined as the 1st interested party to this suit herein.

2. That this Honourable Court be pleased to grant leave and order the Chief lands Registrar be enjoined as the 2nd Interested party to this suit.

3. That costs of this application be provided for.

The First Application

3. The applicant in this application is the registered owner of **LR No. Nairobi/Block 82 /4580** (suit property). The applicant purchased the suit property from Harambee Co-operative Savings and Credit Society Ltd (Harambee Sacco) in 1994. Title was processed in the Applicants name and issued on 29th May 2013. Prior to the title being processed in the Applicants name, the Defendant/Respondent purported to move into the suit property on the basis that he had purchased the same from *Evelyn Kagai Musiji*.

4. When the Applicant found that the Respondent had started construction on the suit property, a complaint was made at Buruburu Police Station where initial investigations showed that *Evelyn Kagai Musiji* who purported to sell the suit property to the Respondent had forged title documents. Despite this being brought to the attention of the Respondent, the Respondent continued to construct forcing the applicant to move to court for injunction.

5. The applicant contends that the Respondent has no basis upon which he is on the suit property and that the Respondent has continued to construct despite the pendency of the suit and that the Respondent is trying to do this with the sole intention of defeating her interest in the suit

6. The Respondent opposed the Applicant's application through a replying affidavit sworn on 25th October 2018. The Respondent contends that he had started purchasing the suit property which he believed belonged to *Evelyn Kagai Musiji* through the law firm of *Wagunda & Co. Advocates*. This is after a search done at the lands office revealed that the said *Evelyn Kagai Musiji* was the registered owner of the suit property.

7. After the purchase, he took possession and started construction of two bungalows. After the bungalows were 85% complete, the Applicant came and claimed that she was the owner. The two parties went to Buruburu Police Station where it became apparent that the suit property did not belong to Evelyn Kagai Musiji. The Respondent claims that it was mutually agreed between him and the Applicant that the firm of Amolo & Gachoka were to process title in the Applicant's name but that title was to be kept by the firm in trust for the two parties and that the Respondent was to pay the Applicant Kshs.1,800,000/= so that the Applicant could transfer the suit property to the Respondent.

8. The Respondent claims that he is the one who paid Kshs.200,000/= for stamp duty and that he did this after being assured by Francis Mugo Mwoya that the title which was to be processed in the Applicant's name was not going to be released to the Applicant. The Respondent states that the Applicant went to the firm of Amolo & Gachoka where she claimed that she wanted the original title to go and make a photocopy so that she could go and show her children. The Respondent claimed that the Applicant never returned the original. The Respondent further contends that he caused the said Advocate Francis Mugo Mwoya to record a witness statement explaining how the Applicant tricked them and ran away with the original title.

9. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties. There is no contention that the suit property is registered in the name of the Applicant. When the parties appeared before me on 26th July 2018, an order of maintenance of the status quo was agreed on. The Defendant was to remain in possession but there was to be no further construction. The only issue for determination is whether the Applicant has demonstrated grounds for grant of both temporary and mandatory injunction.

10. In the instant case, it is clear that it is the Applicant who purchased the suit property from Harambee Sacco in 1994. Title was subsequently processed in the name of the Applicant. The Respondent concedes that he was conned by *Evelyn Kagai Musiji* who purported to sell a property which did not belong to her. The Advocate who acted for *Evelyn Kagai Musiji* was struck off the Roll of Advocates. He was supposed to face criminal charges which apparently did not go through despite his arrest and release. The Respondent's lawyers were well aware of this.

11. The Respondent who was well aware that he had been conned again went to another person known as Francis Mugo Mwoya who received Kshs.200,000/ purportedly for processing title in the name of the Applicant who was then to transfer the same title to the Respondent. The Respondent has not tabled any evidence to show that the Applicant had agreed to sell the suit property to him upon payment of Kshs.1, 800,000/=.

12. The principles for grant of a temporary injunction and a mandatory injunction are well known. For grant of temporary injunction, the Applicant is expected to show that he has a prima facie case with probability of success. For a mandatory injunction, the same can only be granted where it is clear that the case is a simple one which can be remedied in a summary manner.

13. There is no issue of which title is genuine or not. The Respondent has already conceded that he was conned by *Evelyn Kagai* and her lawyer who has since been struck off the Roll of Advocates. The Respondent in a desperate move to retain the Applicant's property went to a person who also conned him of Kshs.200,000 purporting to have the Applicant sell the suit property to him. The Respondent has since complained to the law society of Kenya over the conduct of Francis Mugo Mwoya. This being the case, there is no basis upon which the Respondent can lay claim to the suit property. The Respondent cannot coerce the Applicant into selling the property to him.

14. The Respondent is not an innocent purchaser for value without notice. He had all indications to doubt the transaction but he still went ahead. Even during the pendency of this case he is still going on with construction despite there being an order that no further construction should go on. What the Respondent is trying to do by continuing with the construction is to steal a march against the applicant. I find that this is clear case where both temporary and mandatory order can be granted. I therefore allow the Applicant's application in terms of prayers (3), (4) and (5).

It is so ordered.

The Second Application.

15. In this Application, the Applicant is seeking to enjoin the firm of Amolo Gachoka in this suit as an interested party. The Applicant also seeks to enjoin the Chief Land Registrar as an interested party as well. The reason why the Applicant wants to enjoin the firm of Amolo & Gachoka as an interested party is that One Francis Mugo Mwoya purported to be an advocate in the firm and received Kshs.200,000/= for processing title in the name of the Respondent with a view to having it transferred to him upon payment of Kshs.1,800,000/= to the Respondent.

16. On the part of the Chief Land Registrar, the Applicant wants to enjoin him because of a search which was issued from the Lands office upon which he relied to purchase the suit property from *Evelyn Kagai Musiji*.

17. The Applicant's application was opposed by the 1st Interested Party /Respondent based on grounds of opposition filed on 13th March 2019 and a replying affidavit sworn on 28th May 2019. The Respondent contends that *Francis Mugo Mwoya* does not work at the firm and

that in any case, that person has recorded a statement and therefore there is no need for joinder of the Respondent. The Respondent also argues that the Applicant is not the firm's client and if any money was paid by him, then the same was not paid to the firm. The firm never gave any professional undertaking and that the firm has no interest in the suit property as to call for its joinder.

18. I have considered the Applicant's application as well as the opposition thereto by the Respondent. I have also considered the submissions by the parties herein. The only issue for determination is whether the Applicant has demonstrated grounds to enjoin either the firm of Amolo & Gachoka or the Chief Land Registrar. The grounds upon which one is enjoined as an interested party in a suit is when the party's presence is necessary for complete and effectual determination of the dispute in issue or when the party to be enjoined has sufficient legal interest in the matter or where the court cannot pass an effective decree without the joinder of the person sought to be enjoined.

19. In the instant case, the Applicant has conceded that the person who sought to sell the suit property to him had a fraudulent title. The lawyer who acted for her has since been struck off the Roll of Advocates. The Advocate did not obtain the search from lands Office. It was a forgery. There is therefore no basis upon which the Chief land Registrar can be enjoined as an interested party. There is no issue of cancellation of title and the court can determine the dispute herein without the presence of the Chief Land Registrar.

20. There was no money paid to the firm of Amolo & Gachoka Advocates. The Applicant was not a client of the said firm. The Applicant has conceded that Francis Mugo Mwoya conned him and he has already made a complaint to the Law Society of Kenya. There was no professional undertaking given by the firm. As the Applicant clearly says in his affidavit, he paid the Kshs.200,000/= directly in the name of Francis Mugo Mwoya. There is therefore no basis upon which the Respondent firm can be enjoined in these proceedings. I therefore find no merit in this application which is hereby dismissed with costs to the 1st Intended Interested Party/Respondent.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 30th day of January 2020.

E.O.OBAGA

JUDGE

In the presence of:

Mr. Ochola for plaintiff.

Court Assistant : Waweru

E.O. OBAGA

JUDGE