



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 33 OF 2019

ASHOK LABSHANKER DOSHI.....1ST PLAINTIFF

PRATIBHA ASHOK DOSHI.....2ND PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....1ST DEFENDANT

BERNARD OCHIENG OGUTU.....2ND DEFENDANT

RULING

(Application for injunction; plaintiff displaying title to the suit property; defendants claiming that the land in issue bears a different title and was set aside for a school; no separate title demonstrated by defendants that contradicts that of the plaintiff; prima facie case established; application for injunction allowed.)

1. This ruling is in respect of an application for injunction which was filed by the plaintiffs together with the plaintiff. The case of the plaintiffs as elaborated in the plaint is that they are the owners of the leasehold title comprised in the land parcel LR No. MN/VI/3458 situated in Changamwe, Mombasa County. It is averred that on 25 February 2019, the 2nd defendant accompanied by some officers and employees of the 1st defendant, invaded the suit property and vandalised the gate and part of the perimeter wall on the allegation that the suit property is part of Changamwe Secondary School. On 26 February 2019, they were served with an enforcement notice by the 1st defendant's officers. It is the case of the plaintiffs that the defendants have no right to invade their property. It is their case that the title of the person from whom they purchased the property, Turf Developers Limited, has been affirmed in numerous cases including the cases Mombasa Civil Suit No. 162 of 2007, Mombasa Civil Case No. 485 of 2000 and Mombasa Judicial Review Miscellaneous Application No. 37 of 2014. In the suit, they wish to have orders of a declaration that they are the rightful owners of the suit property and an order of permanent injunction to restrain the defendants from the land.

2. The supporting affidavit to the application is sworn by Ashok Labshanker Doshi, the 1st plaintiff. He has annexed a copy of the Certificate of Lease and annexed photographs of the damage caused when the 2nd defendant visited the suit property on 25 February 2019. He deposed that the officers of the 1st defendant marked the boundary wall and the gate with a big "X" mark inscribed "CGM Demolish". He further annexed copies of ruling and judgment in the cases alluded to in the plaint affirming that Turf Developers Limited held good title to the land.

3. The 1st defendant has opposed the application for injunction through the replying affidavit of Jaffer Suleiman Mosheh the Chief Officer in the Department of Lands, Planning and Housing. He has deposed that it was found out that the plaintiffs have erected a wall on the plot VIMN/GL which he avers is Government land without their permission as required by the Physical Planning Act, Cap 286, Laws of Kenya. He deposed that the County officers proceeded to the land to serve an enforcement notice and they were informed by the guards that the suit property is owned by the plaintiffs. He has deposed that they have no dispute over the ownership of the plot MN/VI/3458 owned by the plaintiffs which he has stated is along Airport Road and has no relation with the plot VIMN/GL where the enforcement notice was served and which plot he has described to be along Refinery Road. He has contended that the erected wall is on land owned by Changamwe Secondary School. He attached what he referred to as a cadastral map showing the suit land.

4. The 2nd defendant on his part swore a replying affidavit where he inter alia deposed that he is only a Member of County Assembly (MCA) of Changamwe Ward and has no control over the employees of the 1st defendant. He accepted having been on the suit property though he stated that he was showing County officials the status of projects in the area. He believes that he is not involved in the dispute between the plaintiffs and the 1st defendant.

5. The interested party filed a replying affidavit sworn by Brian Ikol, its Acting Director, Legal Affairs and Enforcement. He has stated that

he is aware that the interested party reviewed the legality of the grant over the suit land and directed its revocation through Gazette Notice No. 5022 of 18 July 2014 on the basis that the land was reserved for Changamwe Secondary School. Following this notice, Turf Developers Limited who were the then registered proprietors moved to court vide JR No. 37 of 2014 seeking inter alia orders of certiorari to quash the Gazette Notice and orders of mandamus to reinstate the title. The said orders were granted by Emukule J on 8 June 2016. He has deposed that the title was reinstated following the judgment and the interested party has not interfered with the plaintiffs' title or possession since.

6. The applicants filed further affidavits one sworn by Mr. Doshi and the other sworn by Kennedy Kassim Mwambeyu the property clerk of the applicants. Mr. Doshi averred that the enforcement notice was not served upon the Plot No. VIMN/GL but on the suit property. He has asserted that the suit land is on Refinery Road and not Airport Road. He has doubted whether there is any property with the description VIMN/GL without any numerals. He annexed the map for the area and pointed out that what Mr. Jaffer annexed was not a cadastral map but a google map with plot numbers later typed in. Mr. Mwambeyu on his part deposed how the enforcement notice was served upon him.

7. I invited counsel to file written submissions which they did and I have taken these into account.

8. The case of the plaintiffs is that they own the suit property and the defendants therefore ought to be kept off the same. There are claims from the 1st defendant that the suit property belongs to Changamwe Secondary School. The 1st defendant also seems to claim that the enforcement notice was served on a different plot.

9. I have looked at the material before me. I have seen the copy of title held by the applicants which bears their name. Section 26 of the Land Registration Act directs courts to take title as prima facie evidence of ownership. The whole of Section 26 is drawn as follows :-

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

10. It will be seen from the above that title can be impeached where it has been procured by fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme. However, until such vitiating factors are proved, the court is to assume that the title is a good title and that is why there is the direction that the court needs to take title as prima facie evidence of ownership. I further note that the defendants have not displayed any title to the suit land whether described as MN/VI/3458 or VIMN/GL that is contrary to the title that the plaintiffs have displayed. Given that position, and given that the applicants do have title to the suit property and the defendants have displayed none, it follows that the plaintiffs have established a prima facie case with a probability of success. The plaintiffs certainly stand to suffer irreparable loss if the defendants proceed with their intention of demolishing the perimeter wall and gate or other developments on the land. That intention is manifested in the enforcement notice served on the suit land. To me, it is irrelevant at the moment that the 1st defendant has described the plot as VIMN/GL and not MN/VI/3458. What is not in doubt is that the enforcement notice has been served on the land that the plaintiffs take to be MN/VI/3458. The 1st defendant will have a chance at the hearing of the suit to show that the developments undertaken by the plaintiffs are not on the plot MN/VI/3458 but on the plot VIMN/GL, and until that is determined, the 1st defendant ought not to interfere with the developments in issue.

11. Even if I was to consider the balance of convenience, the same tilts towards maintaining the status quo ante until this suit is heard and determined.

12. I am aware that the 2nd defendant and the interested party feel that they have been wrongfully enjoined. That is an issue to be determined at a later stage of the proceedings because what I am dealing with now is an application for injunction.

13. Given the above discourse, I do allow the application for injunction as prayed. I do specifically order as follows :-

(i) That pending the hearing and determination of this suit, there is hereby issued an order of injunction restraining the defendants, their officers, agents, employees, assigns or any person acting at their behest or direction, from visiting, invading, trespassing into, or threatening to demolish, or demolishing, or interfering, with the perimeter wall and gate or other developments on the land parcel MN/VI/3458, irrespective of whether the defendants believe that these developments are on plot VIMN/GL, and generally not to interfere with the plaintiffs' use, occupation and possession of the said property.

(ii) That the Officer Commanding Station (OCS) Changamwe Police Station to ensure compliance with the above order.

(iii) That the plaintiffs shall have the costs of this application.

14. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of February, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr.Oluga for the plaintiffs.

Mr Tajbai for the 1st defendant.

Mr Chebukaka for the 2nd defendant.

No appearance for the Interested Party.

Court Assistant; David Koitamet.