REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. 15 OF 2017

(Formerly Machakos ELC Appeal No. 198 of 2012

MUIRURI DAVID MWANGI.....APPELLANT

VERSUS

ROSE NJOKI MWANGI.....1ST RESPONDENT

COUNTY COUNCIL OF OL KEJUADO.....2ND RESPONDENT

JUDGEMENT

(Being an appeal from the ruling and order of the Senior Resident Magistrate at Kajiado Hon. S. O. Temu made on 30th October, 2012 in civil case No. 195 of 2011)

Introduction

By a Memorandum of Appeal dated the 15th November, 2012, the Appellant appeals against the whole of the Ruling and Order issued on the 30th October, 2012 by the Senior Resident Magistrate's Court at Kajiado. The genesis of this appeal is the Ruling and Order of the Senior Resident Magistrate Hon. S O TEMU in the Kajiado SRMC No. 195 of 2011 where he allowed the 1st Respondent's Application dated the 8th November, 2011 in which she had sought for the following orders:

1. That this application be certified as urgent and be heard ex parte in the first instance.

2. That a temporary injunction be granted restraining the Defendants and/or their servants, agents or licensees from trespassing into the Plaintiff's Plot Number 361/ Residential Olekasasi T. Centre and further constructing the illegal structures on the said Plot until the Hearing and Determination of this Application.

3. That an injunction be granted restraining the Defendants and/or their servants, agents or licensees from trespassing into the Plaintiff's Plot Number 361/ Residential Olekasasi T. Centre and further constructing the illegal structures on the said Plot pending the Hearing and Determination of this Suit

4. That the Respondents be ordered to pay the costs of this Application.

The appellant being dissatisfied by the Ruling and Order filed an appeal at the Environment and Land Court of Kenya in Machakos on 16 th November, 2012.

The Memorandum of Appeal contained the following grounds;

1. That the learned trial Magistrate erred in law and in fact that the Respondent was in actual possession and had built on the plot and injunctive reliefs sought were overtaken by events.

2. The learned Magistrate erred in law and in fact in failing to find that the 1 st Respondent had not finalized the dispute resolution mechanism with the 2nd Respondent as there is still a dispute pending before the dispute committee.

3. The learned Magistrate erred in law and in fact in failing to find that the 1st Respondent had failed to provide evidence on the actual physical location of the property No. 361/1 Residential Ole Kasasi Trading Centre.

4. The learned Magistrate erred in law and in fact in failing to find that the 1st Respondent had not established how she bought or acquired the plot 361/ Residential Olekajiado Trading Centre.

5. The learned Magistrate erred in law and in fact in failing to find that the Appellant had the proper documents which were validated by the County Council of Ol Kejuado.

6. The learned Magistrate erred in fact in failing to find that there was a case of double allocation and the same ought to be resolved at full trial.

7. The learned Magistrate erred in law and in fact in failing to find that the balance of convenience tilted in favour of the Appellant being in possession of the premises.

8. The learned Magistrate erred in law and in fact in failing to find the Appellant also owns plot No. 1047 situate at OleKajiado Trading Centre and the dispute could not be resolved by way of affidavits.

9. The learned Magistrate erred in law and in fact in finding that the 1st Respondent had established a prima facie case with a probability of success.

The Appellant prays that the Appeal be allowed and the Order of 30th October, 2012 be set aside with costs and interest to the Appellant.

The Appeal was canvassed by way of written submissions, although it is only the Appellant that filed his. The Respondents failed to file written submissions despite the Court granting them leave to do so.

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and parties' submissions, I have summarized the following issues for determination:

- Whether the Learned Magistrate erred in law and in fact by granting injunctive reliefs as against the Appellant in respect to Plot 361/Residential Olekasasi T. Centre pending the hearing and determination of the lower court suit.
- Whether the Appeal is merited.

As to whether the Learned Magistrate erred in law and in fact by granting injunctive reliefs as against the Appellant in respect to Plot 361/Residential Olekasasi T. Centre pending the hearing and determination of the lower court suit.

The Appellant submitted that as at the date of the Order granted by the trial Magistrate he was in actual occupation of Plot 361/Residential Olekasasi T. Centre hereinafter referred to as the 'suit plot'. He avers that he is the allottee of Plot 1047 situated at Olekasasi. He submitted that the 1st Respondent failed to provide evidence on the actual location of her Plot 361/Residential Olekasasi T. Centre. He insisted that the 1st Respondent did not establish a prima facie case to warrant the orders that were granted. He relied on the decisions of **Nguruman Ltd. Vs. Jan Bonde Nielsen (2014) eKLR and Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) IKLR 125** to support his averments. He further submitted that since he was in occupation of the suit plot, the Court issued orders which for all intents and purposes amounted to his eviction therefrom. To support this argument, he relied on the decisions of **Lucy Njoki Waithaka V Industrial & Commercial Development Corporation (2001) eKLR and Joseph Mbugua Gichanga V Cooperative Bank of Kenya Ltd (2005) eKLR.** He insisted that the facts of the dispute in the lower court did not in any way establish a case against him. Further, the same had not been proved on a balance of probabilities. He relied on the decision of **Miller Vs Minister of Pensions (1947) 2 All ER 372 and Dhariwal Hotels Limited V Southern Credit Banking Corporation Limited 1248 of 2002.** He argued that the Court should not have issued orders of injunction since there were proceedings on dispute resolution mechanism in respect to the suit plot pending before the Dispute Committee. He relied on the decisions of **Kenya Pipeline Company Limited V Kenol Kobil Limited (2013) eKLR and Martin Otieno Okwach & Charles Ongondo Were t/a Victoria Clearing Services v Kenya Post Office Savings Bank (2014) eKLR** including Order 46 Rule 20 (1) of the Civil Procedure Rules to buttress his arguments. He further submitted that he holds a good title to the suit plot as the root of his title is traceable. Further, that he has proper documents which were validated by the County Council of Ol Kejuado. To support this argument, he relied on various decisions including **Joseph N. K Arap Ngok V Justice Moijo Ole Keiuwa & 4 Others Civil Appeal No. 60 of 1996; Wreck Motor Enterprises V The Commissioner of Lands & Others (1997) eKLR and Munyu Maina V Hiram Gathiha Maina Civil Appeal No. 239 of 2009.** He reiterated that the issue of who was in actual possession of the suit plot had been confirmed as in 2008 the 1st Respondent had been ordered to return the fence she had removed therefrom by the local chief. Further, the 1st Respondent had once made a report to the Police using the name Lucy Wanjiku vide Cr 735/ 347/2011 and after investigations were conducted, it revealed that the Appellant was in actual possession of the suit plot. He avers that the case before the lower court was on double allocation and not trespass. To buttress his arguments he relied on the decision of **Mwangi & Another V Mwangi (1986) KLR 328.**

In the first instance as to whether the Appellant has demonstrated that the trial magistrate erred in law and in fact by finding that the 1st Respondent was entitled to injunctive reliefs against him, I wish to make reference to the case of **Mrao V First American Bank of Kenya Ltd & 2 others (2003)KLR 125** where the Court defined a prima facie case to mean a case where based on the facts presented a Tribunal can conclude there exists a right that has been infringed.

From the evidence presented in the respective affidavits in the lower court matter, it was not in dispute that both the Appellant and 1st Respondent held Letters of Allotment in respect to the suit plot. The Appellant's Letter of Allotment is for Plot 1047 Olekasasi Trading Centre while the 1st Respondent's Letter of Allotment is in respect to Plot 361/Residential Ole Kasasi Trading Centre. It emerged that the Appellant was in actual occupation of the suit plot and had put up structures thereon. The Appellant further annexed a copy of the map for

the area which indicated where Plot 1047 Ole kasasi Trading Centre is situated. However, I note the 1st Respondent was not in occupation of the suit plot and neither did she furnish a map in court on the location of her plot. It further emerged that in 2008, the 1st Respondent had actually been directed to repair the Appellant's fence on the suit plot which she had destroyed. Be that as it may, the Learned Magistrate proceeded to issue orders of temporary injunction against the Appellant restraining him from occupying the suit plot, which the Appellant contends amounted to orders of eviction. From the averments in the supporting affidavit, I note the 1st Respondent was paying land rates to the 2nd Respondent. The Appellant in his replying affidavit also demonstrated that his plot had been validated, he had put up a structure thereon and had been paying land rates to the 2nd Respondent. Further, that the matter was being dealt with by the dispute resolution Committee yet the 1st Respondent proceeded to court. From the correspondence from the 2nd Respondent that were annexed to the respective affidavits, it is evident they created the confusion culminating in the dispute herein. To my mind it seems this was a case of double allocation where two different parties held different Letters of Allotment in respect to one plot.

In the case of **Mwangi & Another Vs Mwangi (1986) KLR 328** the Court held that the rights of a person in possession or occupation of land are equitable rights which are binding. Further, in the case of **Nguruman Ltd. Vs. Jan Bonde Nielsen (2014) eKLR** the Court of Appeal held that :' **On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.'**

Based on the facts as presented, my analysis above as well as associating myself with the cited decisions, I find that the Appellant having held validated Letters of Allotment in respect to the suit plot; being in actual occupation thereon and producing a map which indicates the location of his plot, he had indeed established a prima facie case and stood to suffer irreparable harm which could not be compensated by way of damages, unlike the 1st Respondent who had not taken occupation of the suit land and did not provide a map in respect to the location of her plot. I opine that the balance of convenience indeed tilted in his favour. I hence find that the Learned Magistrate indeed erred in law and in fact by granting injunctive reliefs as against the Appellant in respect to the suit plot pending the hearing and determination of the lower court suit.

It is against the foregoing that I find the Appeal merited and will proceed to allow it. I will further proceed to set aside the Order of the lower court dated the 30th October, 2012 and direct that the matter therein be heard on its merits.

The Appellant is awarded the costs of the Appeal.

Dated signed and delivered via email this 29th day of May, 2020

CHRISTINE OCHIENG

JUDGE