



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO.347 OF 2017

TITUS MUTUNGA MAWEU.....PLAINTIFF/APPLICANT

-VERSUS

ERASTUS MUALUKO SIVALU.....1ST DEFENDANT/RESPONDENT

ANN NZULA SIVALU.....2ND DEFENDANT/RESPONDENT

GIDEON NZIOKI.....3RD DEFENDANT/RESPONDENT

R U L I N G

1. By his Notice of Motion application expressed to be brought under Section 3, 13(7) (a) & 19(2) of the Environment and Land Court Act, Section 63(e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Article 159 of the Constitution of Kenya, 2010 and all other enabling provisions of the law, the Plaintiff/Applicant prays for orders: -

1) Spent

2) Spent

3) That an order of injunction do issue restraining the defendants/respondents, their servants and/or agents and/or anybody working under them or claiming through them from trespassing into, constructing or carrying out any kind of development, leasing or selling isolated plot at Ikuyuni Market also known as Barazani Trading Centre situated between plots belonging to Joseph M. Ndunda and Harrison M. Kalei until the hearing and determination of this suit.

4) The costs of this application be borne by the Defendants/Respondents.

2. The Notice of Motion application is dated 04th October, 2017 and was filed in court on 05th October, 2017. It is predicated on the six (6) grounds on its face and is supported by the supporting and supplementary affidavits of Titus Mutunga Maweu, the Plaintiff/Applicant herein, sworn at Machakos on 04th October, 2017 and 27th December, 2017 respectively.

3. The 1st Defendant/Respondent did not oppose the application.

4. The application is opposed by the 2nd and the 3rd Defendants/Respondents vide their replying affidavits sworn at Makueni on 07th May, 2018, 22nd October, 2019 and filed in court on 07th May, 2018 and 19th November, 2019. For the record, the 3rd Defendant/Respondent filed two replying affidavits namely the one sworn at Machakos on 07th May, 2018 and filed in court on even date and the one sworn at Machakos on 22nd October, 2019 and filed in court on 19th November, 2019. The latter affidavit ought to have been headed "supplementary affidavit" in light of the leave that the Plaintiff/Applicant was granted on 14th October, 2019.

5. In grounds 1 to 6 the Plaintiff/Applicant has stated that he is the purchaser for value of the suit property having bought the same from the 1st Defendant/Respondent, that the 3rd Defendant/Respondent has trespassed into the property and is in the process of dispossessing the Plaintiff/Applicant, that the 3rd Defendant/Respondent is already committing acts of wanton waste on the suit property, that unless the suit property is preserved by way of an injunction, the Plaintiff/Applicant stands to suffer irreparable loss, that the balance of convenience is also in favour of the Plaintiff/Applicant, that it is fair and just in the interests of justice and fairness the court do issue an order of injunction stopping the Respondents from continuing with their acts of wanton waste.

6. In paragraphs 2, 3, 5 and 6 of his supporting affidavit the Plaintiff/Applicant has deposed that he bought the suit property described as isolated plot at Barazani Market, situated between the plots belonging to Mr. Josphat M. Ndunda and Harrison M. Kalei on 8/12/2009 from

the 1st Defendant at a purchase price of Kshs.215,000/=, that before he purchased the suit premises, he confirmed the 1st Defendant had purchased the same from George Mutuku Mulandi through an agreement dated 13/02/2001, that the 1st Defendant granted him (Plaintiff) vacant possession and he started developing the plot by repairing a structure that was already there and fixing doors to the main entrance at the front side, aside entrance and one widow, that he enjoyed quiet possession of the suit premises since 2009 when he bought the same until March, 2017 when he 3rd Defendant came to the suit premises claiming that the same had been sold to him and he (3rd Defendant) removed the three doors he had fixed and carted them away without consulting him.

7. The 2nd Defendant/Respondent has deposed in paragraphs 5, 6, 7, 8 and 9 of her replying affidavit that she developed the suit property by putting up a semi-permanent structure with no roof, that in the year 2017 she decided to sell the suit property in order to raise school fees for her children, that she approached the area chief for purposes of advertising to the public of her intention to sell the suit property, that after publication by the Chief, she sold the property to the 3rd Defendant/Respondent herein for the sum of Kshs.300,000/=, that on or about 25/9/2017 she found out that a stranger had fitted the suit property with doors and she went ahead to remove the said doors and took them to the D.O's office.

8. On his part, the 3rd Defendant/Respondent has deposed in paragraphs 3, 4 and 5 of his affidavit that sometimes in the year 2017 he purchased the suit property from the 2nd Defendant/Respondent for the sum of Ksh.300,000/=, that before purchasing the suit property, he confirmed that the 2nd Defendant/Respondent had in the year 2004 purchased the same from the 1st Defendant/Respondent only for the latter to refuse to hand over the sale agreement that he also confirmed that the 2nd Defendant/Respondent had actually informed the area Chief to inform the locals of her intention to sell the suit property to him.

9. His second replying affidavit sworn at Machakos on 22nd October, 2019 is exact replica of his earlier affidavit sworn on 07th May, 2018.

10. Parties filed their submissions pursuant to directions to dispose off the application by way of written submissions.

11. Both parties are agreed that the conditions for the grant of the prayers sought are as set out in the celebrated case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**. I need not repeat the three principles herein.

12. On the principle of the Applicant must show that he has a prima facie case with probability of success, the Plaintiff's/Applicant's Counsel submitted that the Plaintiff/Applicant has demonstrated through his affidavit and annexures TMM1, TMM2, TMM3A and TMM3B that he is a purchaser for value that he has shown he bought the suit property from the 1st Defendant/Respondent who in turn bought it from one George Mutuku Mulandi. The Counsel added that the 1st Defendant/Respondent conceded to the application.

13. It was also submitted that even though the 2nd Defendant/Respondent claims to have bought the suit property from the 1st Defendant/Respondent, in her affidavit sworn on 15th November, 2017, she did not exhibit any sale agreement. She added that the 1st Defendant/Respondent who was in court on 18th December, 2017 did not allude to any agreement and that according to the Plaintiff's/Applicant's supplementary affidavit sworn on 27th December 2017, he has made it clear in paragraph 7 that he took vacant possession on 15th February, 2010. The Counsel went on to submit that the interference by the 2nd and 3rd Defendants/Respondents only started in March, 2017 as averred in paragraph 8 of the Supplementary affidavit.

14. It was further submitted that since the suit property does not have title documents that can be used to prove ownership it is the sale agreements by the parties that will come into play in line with Section 3 of the Law of Contract Act which requires agreements on conveyancing of interest in land to be in writing and witnessed by at least two witnesses. The Counsel pointed out that there is no such agreement between the 1st and the 2nd Defendant/Respondent and therefore the 2nd Defendant/Respondent is lying to court when she says that she bought the suit property from her brother, the 1st Defendant/Respondent. The Counsel went on to submit that as per the agreement dated 05th January, 2017 the 1st Defendant/Respondent did not have anything to sell as the suit land already belonged to the Plaintiff/Applicant.

15. From the above, the Counsel was of the view that the Plaintiff/Applicant has a prima facie case with probability of success.

16. The Counsel for the Defendants/Respondent was of the view that the Plaintiff/Applicant has failed to prove that he has a prima facie case with probability of success (emphasis are mine).

17. Regarding the principle of an injunction will not normally be granted unless the Applicant will suffer irreparable harm, the Plaintiff's/Applicants Counsel submitted that the loss that the two defendants/Respondents caused when they entered into the suit property and removed doors cannot be quantified in damages thus the Plaintiff/Applicant will suffer irreparable harm.

18. On the other hand, the Counsel for the 2nd and 3rd Defendant's/Respondents submitted that there is no evidence to show that the Plaintiff/Applicant has always been in occupation of the suit property and that the pictures produced by the Applicant as evidence of act of wanton destruction of the subject property is in fact an incomplete structure that had been put up by the 2nd Respondent after she purchased the property from the 1st Respondent. The Counsel added that there is no evidence that the Plaintiff/Applicant stands to suffer irreparable harm.

19. Regarding the principle of if the court is in doubt, it will decide the application on balance of convenience, the Counsel pointed that same tilts in favour of the Plaintiff/Applicant who has shown the history of how he acquired the suit property.

20. On his part, the Counsel for the 2nd and 3rd Defendants'/Respondents was of the view that the balance of convenience tilts in their favour.

21. Arising from the above, my finding is as follows: -

22. On whether or not the Plaintiff/Applicant has shown that he has a prima facie case with probability of success, in paragraphs 2 and 4 of his supporting affidavit, the Plaintiff/Applicant has deposed that he purchased the suit property from the 1st Defendant/Respondent on 08th December, 2009 and proceeded to take vacant possession on 15th February, 2010. The 1st Defendant/Respondent conceded to the application on the 06th February, 2018 thus admitting to the facts and evidence as presented by the Plaintiff/Applicant. If the 2nd Defendant/Respondent purchased the suit premises from the 1st Defendant/Respondent in the year 2004 as the former has deposed in paragraphs 3 of his affidavit, sworn on 07th May, 2017, it is clear that there is no agreement that was annexed in support. The 2nd Defendant/Respondent cannot be heard to say that the 1st Defendant/Respondent refused to hand him a copy of duly executed agreement since he has not even shown documentary evidence of acknowledgement of the purchase price by the 1st Defendant/Respondent. Thus the 2nd Defendant/Respondent could not purport to sell the suit property to the 3rd Defendant/Respondent in 2017 since as the affidavit evidence shows, the same was in possession and occupation of the Plaintiff/Applicant. I would therefore agree with the Counsel for the Plaintiff/Applicant that the latter has satisfied the first principle in Giella's case.

23. As for the second principle, I do note that even though the Plaintiff/Applicant has deposed that the wanton destruction by the two Defendants/Respondents is irreparable, in my view this is not true. The damage, if any, is quantifiable. However, it is in the sentimentality aspect of the land (since land is an emotive issue in Kenya) that if the orders sought are not granted, the harm that the Plaintiff/Applicant is likely to suffer is irreparable and thus in my view, the second principle is also satisfied.

24. Arising from the first two principles, it is clear to me that this Court is not in doubt as to where the balance of convenience lies and even if it were, it would in any case tilt in favour of the Plaintiff/Applicant.

25. The upshot of the foregoing is that the application has merit and in the circumstances, I hereby proceed to allow it as hereunder: -

3) That an order of injunction is hereby issued restraining the Defendants/Respondents, their servants and/or agents and/or anybody working under them or claiming through them from trespassing into, constructing or carrying out any kind of development, leasing or selling isolated plot at Ikuyuni Market also known as Barazani Trading Centre situated between plots belonging to Joseph M. Ndunda and Harrison M. Kalei until the hearing and determination of this suit.

4) The costs of this application be borne by the Defendants/Respondents.

Signed, Dated and Delivered at Makeni via email this 21st day of May, 2020.

MBOGO C. G.,

JUDGE.

Mr. G. Kwemboi – Court Assistant