



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ENVIRONMENTAL & LAND DIVISION

CIVIL SUIT NO. 407 OF 2016

JEREMIAH MUUTI WACUGI.....PLAINTIFF

VERSUS

KINUTHIA KANYONYONYO NJUGUNA.....1ST DEFENDANT

ESTHER WAMBUI MWAURA.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR, NYANDARUA.....3RD DEFENDANT

THE HONOURABLE ATTONEY GENERAL.....4TH DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff alleging to own certain land having been allotted by the SFT; defendants also claiming to have purchased the same land; best that status quo be maintained pending hearing of the suit)

1. This suit was commenced by way of plaint which was filed on 3 October 2016. The plaintiff has pleaded that he is the registered proprietor of the land parcel Nyandarua/Ndemi/1137 (the suit property) and that he did become registered on 19 March 2015. He has pleaded that in the month of February 2016, he got information that some people have encroached into the property and have erected a semi permanent structure. He made a report to the Assistant Chief who summoned the parties. It is pleaded that the encroachers, the 1st and 2nd defendants, produced documents which were for another property and they were advised to get proper documents. They however went to the suit land on 28 February 2016 and started ploughing using a tractor. The matter was again reported to the Assistant Chief who again summoned the parties. At the meeting which was held the following day, the 1st and 2nd defendants produced ownership documents for the land parcel Nyandarua/Ndemi/1228. The Assistant Chief then directed the District Surveyor to visit the ground which was done on 22 March 2016. At the site visit, it is said that it was affirmed that indeed the 1st and 2nd defendants have encroached into the land. On 24 March 2016, the 1st and 2nd defendants filed a caution claiming licensee interest. The plaintiff avers that he wrote a letter for the removal of this caution but he has not received a response. In this suit, the plaintiff has asked for orders that the 1st and 2nd defendants be evicted; a permanent injunction against them; an order that the caution be removed; mesne profits; general damages; and costs of the suit.

2. Together with the plaint, the plaintiff filed an application for injunction against the 1st and 2nd defendants seeking to have them restrained from the suit property pending hearing and determination of this case. It is that application which is the subject of this ruling.

3. The supporting affidavit has more or less reiterated the averments in the plaint, which I have already set out above. The plaintiff has inter alia annexed a copy of his title deed and search certificate to the suit land and a survey report.

4. The 1st and 2nd defendants/respondents, entered appearance, filed defence and counterclaim and a replying affidavit to the application. In their statement of defence and counterclaim, it is inter alia contended that the registration of the plaintiff as owner of the suit land was done fraudulently and that he is not the lawful owner of the land. They have stated that they are the legal owners of the property having been in occupation since the year 1982. They have averred that they purchased the property in the year 1982 from one Mwangi Kimani, the original allottee of the Settlement Fund Trustees (SFT). It is contended that the SFT ought not to have transferred the land to the plaintiff. In the counterclaim, the respondents wish to have a declaration that they are the joint legal owners of the suit land subject only to the charge in favour of the SFT; an order cancelling the title of the plaintiff; costs and interest.

5. In their replying affidavit, the respondents have deposed that they own the land parcel Nyandarua/Ndemi/1137 which was previously known as Plot No. 1544 Ndemi Settlement Scheme, having purchased it from one Mwangi Kimani, the original allottee of the SFT on 31 May 1982. They depose that they took possession and have been in continuous peaceful occupation of the same. In February 2016, they were summoned by the Assistant County Commissioner regarding a land dispute referred to him by the plaintiff. It is then that they discovered that the plaintiff has been issued with a title deed which prompted them to lodge a caution. They visited the offices of the SFT and obtained documents which seem to suggest that their land was re-allocated to the plaintiff in the year 2014. It is their view that this was done fraudulently. It is said that the Director of Land Adjudication and Settlement has after conducting investigations, discovered that the re-allocation of the land to the plaintiff was improper. A letter from the Director is annexed. They have stated that it is them who have been in possession and it is them who stand to suffer irreparable harm if the injunction is granted. Also annexed to the affidavit is a letter dated 29 July 2016 showing the ground status of the land parcels No. 1137 (Plot No. 1544) and the parcel No. 1228.

6. The plaintiff filed a reply to defence and defence to counterclaim. In it, he has pleaded inter alia that he applied to be allocated the suit property in the year 2014 and that the same was approved. He paid for the land and the same was registered in his name. He has pointed at discrepancies between what the defendants allege to have purchased from Mwangi Kimani and what he owns. He has pleaded that on 7 April 2016, Mwangi Kimani wrote to the SFT complaining that he was allocated the land parcel No. 1228 which he has been in possession of but which was illegally given to one Mbithi Murunzu who was later issued with a title deed. It is said that the Director of Land Adjudication and Settlement replied stating that Mwangi Kimani was allocated the land parcel No.1137 (Plot No. 1544) while Mbithi Murunzu was allocated the land parcel No. 1228 in the year 1993.

7. A supplementary affidavit (titled further affidavit) was filed by the plaintiff. He has inter alia deposed that the land parcels No. 1544 and 1228 are different; that the sale agreement between the respondents and Mwangi Kimani, is over the land parcel No. 1228 which is 6 acres while the suit land (parcel No. 1137) is 10 acres. He has denied that the respondents were in possession of the land as claimed and has averred that they came to encroach into the land when he took possession in the year 2016. He has sworn that the respondents are not man and wife as they have claimed and that the respondents have different land elsewhere and live separately.

8. I have considered the application alongside the submissions of Mr. Wainaina, learned counsel for the applicant.

9. It does indeed appear that the plaintiff applied for and was allotted the suit property by the SFT in the year 2014. He did get a title deed on 19 March 2015. He has averred that he took possession of the land and that the respondents encroached into it in the year 2016. On the other hand, the respondents claim to have purchased the suit property, believing it to be the land parcel No. 1228 and they have annexed a sale agreement. They aver that they have been in possession and occupation of the land since the year 1982.

10. There is a lot of conflicting evidence that the parties have tendered and it is clearly not possible at this stage of the proceedings to tell who is stating the truth. What has panned out in the affidavits and pleadings filed, to me, appears to be a complex case and I do not think that it is possible, indeed it will be unwise, for this court to delve too much into who appears to have established a better title at this stage of the proceedings.

11. In my view, this application is best decided on a balance of convenience and to me, the balance of convenience, tilts towards maintaining the status quo as it was before the dispute emerged. There is a ground status report prepared for the Director of Land Adjudication and Settlement which is dated 29 July 2016. I deem this to be a fairly independent report. It does state that on the suit property (land parcel No. 1137) the plot is fenced and on the lower side, there has been constructed a temporary house about 3 months old and there is also a pit latrine. There was a man by name of Kimani on the site but it is not clear who placed him here. It is best that the land be maintained in this fashion until the case is heard and determined and I so order. I in fact really doubt if the plaintiff ever took up meaningful occupation of the land prior to this case being filed and I do not think that it would be fair, given the counterclaim of the defendants, for me to disturb whatever possession which has been prevailing. It is necessary also that the title in issue be 0000protected and I issue an order of inhibition, inhibiting the registration of any disposition in the register of the land parcel Nyandarua/Ndemi/1137 until this case is heard and finalized.

12. In essence I do order that status quo be maintained until this case is heard and determined. The costs of this application shall be costs in the cause.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th day of March 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr. Ooga holding brief for Mr. Wainaina for the plaintiff/applicant

Mr. Macharia for the 1st and 2nd respondents

N/A for the 3rd and 4th respondents

Court assistant : Nelima

MUNYAO SILA

JUDGE

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