



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MACHAKOS

ELC. CASE NO. 132B OF 2019

KANAN DAIRY LIMITED.....PLAINTIFF/PLAINTIFF

VERSUS

BEATRICE NZAKWA MAKAU.....1ST DEFENDANT

KATELEMBO ATHIANI MUPUTI FARMING AND

RANCHING CO-OPERATIVE SOCIETY.....2ND DEFENDANT

RULING

1. In the Notice of Motion dated 3rd December, 2019 and filed under Order 40 Rules 1 & 4(1) and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the Plaintiff sought for the following orders:

a) Spent.

b) Spent.

c) That pending the hearing and determination of the suit, an order of injunction be and is hereby issued restraining the Defendants whether by themselves, agents, servants, proxies or employees from entering, taking possession, trespassing or otherwise dealing in property L.R Athi River/Athi River Block 1/1139.

d) That the Officer Commanding Station (OCS) Machakos Police Station do enforce compliance with the orders issues herein.

e) Costs be provided for.

2. The Application is supported by the Affidavit of the Plaintiff's Director who has deponed that the Plaintiff is the registered owner of land known as Athi River/Athi River Block 1/1139 (*hereinafter referred to as the "suit property"*), having purchased the same in April 2014 for Kshs. 3,400,000; that after the said purchase, he took vacant possession of the land and developed it into a dairy farm and that prior to the purchase, he carried out due diligence required by conducting an official search over the suit property.

3. The Plaintiff deponed that the Defendants unlawfully and without any colour of right visited the suit property and threatened to evict him from the suit property; that he is not a member of the 2nd Defendant and that the 2nd Defendant cannot purport to derogate his rights over the suit land through a Task Force.

4. The Plaintiff deponed that the Defendants' actions are misguided by a Report issued by a Task Force which was formed to establish the allocation of land within the 2nd Defendant's Society and not properties owned by third parties, including himself and that the purported Report seeks to revoke his Title Deed which was issued under the Land Registration Act.

5. The deponent averred that the Katelembo Task Force had no jurisdiction over the suit property and the said Task Force purported to elevate Allotment Letter held by the 1st Defendant over the Title Deed held by himself, and that as such, it was imperative that the orders sought are granted.

6. The 1st Defendant filed her Replying Affidavit sworn on 28th February, 2020 in opposition to the Application. She deponed that the suit land, also known as Plot 519, was allocated to her late husband, John Makau, who was member number 2384 of the 1st Defendant; that she is

the one who is in possession and occupation of the suit land where she rears cattle and that the Plaintiff admitted that the matter was placed before the 2nd Defendant who found that she was the lawful beneficial owner of the suit land and ordered him to vacate the suit land.

7. The 1st Defendant deponed that the Plaintiff acquired the suit land unlawfully, unprocedurally and fraudulently; that the Plaintiff was not entitled to the orders sought and that the Application dated 3rd December, 2019 should be dismissed with costs.

8. The Application was canvassed vide written submissions. Counsel for the Plaintiff submitted that the issue for determination is whether, on the evidence and material placed before court, the Plaintiff has satisfied the conditions upon which a temporary injunction can be granted. Reliance was placed on the case of *Giella vs. Cassman Brown (1973) EA 358* in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, the Plaintiff must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the Plaintiff might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

9. On the aspect of a *prima facie* case with chances of success, The Plaintiff’s advocate submitted that the Plaintiff is the registered owner of land known as Athi River/Athi River Block 1/1139 (the “suit property”), having purchased the same in April 2014; that the Plaintiff took possession of the suit property and developed it into a dairy farm and that prior to the purchase, the Plaintiff carried out the required due diligence which revealed that one Joseph Muthama was the registered owner of the suit property.

10. The Plaintiff’s counsel submitted that the Plaintiff went further and conducted a historical search over the suit property; that Joseph Muthama, the then owner of the suit property, bought the land from one Agnes Mutinda Makau, the widow of John Makau, and that upon registration and issuance of a Title Deed, the Plaintiff acquired absolute and indispensable title over the suit property.

11. According to counsel, the Report which was issued by a Task Force that was formed to establish the allotment of land within the 2nd Defendant’s Society was not for properties owned by third parties, including the Plaintiff and that the decision of the Task Force over the suit property was an overreach, lacking jurisdiction, illegal, null and void.

12. It was submitted that pursuant to Section 25 of the Land Registration Act, any cancellation and/or revocation of the Title Deed could only be done according to the provisions of the Act and that Sections 79 and 80 of the Land Registration Act, No. 3 of 2012 restricts the rectification of a validly registered title to two bodies, namely, the Registrar and the court respectively.

13. Counsel placed reliance on the case of *Njuwangu Holdings Ltd vs. Langata Kpa Nairobi & 5 others [2014] eKLR* where the court held as follows:

“As matters now stand, the Plaintiff who has a registered title over the suit property has a superior title to the 1st Defendant who only holds a letter of allotment...it is my view that a letter of allotment cannot override a duly registered title and a letter of allotment over the same property barring any fraud on the part of the party holding the registered title, a letter of allotment must of necessity give way. The rights of the party who holds the registered title have crystallized as opposed to that of the party holding a letter of allotment which is yet to crystallize.”

14. Counsel discounted the 1st Defendant’s claim that she owned the suit property or that she was married to the owner of the suit property; that the 2nd Defendant only produced the Chief’s letter identifying her as a wife of the previous owner of the suit property, a copy of the membership card, a plot allocation slip and an extract of Katelembo Society Register and that none of the documents are proof of ownership of the suit property.

15. The 1st Defendant’s advocate submitted that the decision of the 1st Defendant has not been set aside; that the Plaintiff is holding the Title Deed to the suit property illegally and that no evidence was tendered to show how the Plaintiff acquired the suit property from the registered member of the 2nd Defendant. Reliance was placed on the case of *Esther Ndegi Njiru & Another vs. Leonard Gateti (2014) eKLR*.

16. Having acquired the Title Deed to the suit property illegally, it was submitted that the Plaintiff’s title to the suit property is not protected by Section 26(1) (b) of the Land Registration Act and that the Plaintiff had not demonstrated that he has a *prima facie* case with chances of success.

17. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction are now settled: the Applicant must show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by award of damages unless the order of injunction is given and where in doubt in respect of the two considerations, then the Application should be decided on a balance of convenience (See *Giella vs. Cassman Brown (1973) EA 358* and *Fellowes and Son vs. Fisher [1976] 1 QB 122*).

18. What amounts to a *prima facie* case was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* as follows:

“... In civil cases, it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

19. It has been established by the law and decided cases that the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties pending the disposal of the main suit.

20. The Plaintiff's Director deponed that he purchased land known as Athi River/Athi River Block 1/1139 (*the suit property*) for Kshs. 3,400,000 and took possession. According to the Plaintiff's Director, he entered into a written agreement with the former owner of the suit property, and that the suit property was then transferred in his favour. The Plaintiff produced in evidence the Sale Agreement dated 15th April, 2014 between its Directors and one Joseph Muthama.

21. The Plaintiff also produced in evidence the copy of the Title Deed in respect of the suit property. The said Title Deed shows that the land was registered in favour of the Plaintiff on 4th July, 2014. The Plaintiff also produced in evidence a copy of the Title Deed that was issued to one Joseph Muthama on 11th December, 2013.

22. The 1st Defendant's case is that the suit property, which was also known as plot number 519 was allocated to her former husband, John Makau, who was a member of the 2nd Defendant. The 1st Defendant produced in evidence a copy of the membership card issued to the late John Makau. Although the 1st Defendant has claimed that she is the wife of the late John Makau, she did not annex on her Affidavit a copy of the Letters of Administration to show that she is the one who has been authorized by the court to deal with the Estate of the late John Makau.

23. It will appear that the only evidence the Defendants are relying on to claim the suit property is the report of an entity known as "*Katelembo Task Force*" which in its findings dated 22nd August, 2019, found that the suit property belonged to the 1st Defendant.

24. Indeed, there is no evidence that was placed before the court to show that the said "*Katelembo Task Force*" had jurisdiction to determine the issue of ownership of the suit property. It is trite that under Article 162 (2) (b) of the Constitution, the Environment and Land Court Act and the Magistrates Act, it is only this court and the Magistrate's Court that have jurisdiction to determine the issue of occupation, ownership, and title to land, and not "*Katelembo Task Force*."

25. The Plaintiff has a Title Deed which can only be defeated on the basis of fraud or mistake (*See Section 26 of the Land Registration Act*). The Defendants have not placed before the court any evidence to show that the Title Deed that was held by Joseph Muthama, who transferred the land to the Plaintiff, was obtained fraudulently or by mistake.

26. Considering that under Section 26 of the Land Registration Act, a Title Deed is *prima facie* evidence of ownership of land, I find that the Plaintiff has established a *prima facie* case with chances of success. Indeed, the Plaintiff having developed the suit property, he will suffer irreparable damages that cannot be compensated by damages unless the injunctive orders are granted.

27. For those reasons, I allow the Plaintiff's Application dated 3rd December, 2019 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JULY, 2020.

O.A. ANGOTE

JUDGE