



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 28 OF 2019

LENNY M. KIVUTI.....PLAINTIFF

VERSUS

ABDULLAHI MAALIM AHMED.....DEFENDANT

RULING

1. This Ruling is in respect to the Plaintiff's Application dated 18th March, 2019 and the Defendant's Application dated 26th May, 2020. In the Plaintiff's Application dated 18th March, 2019, the Plaintiff has sought for the following orders:

a) Spent.

b) Spent.

c) That pending the hearing and determination of this suit this Honourable Court be pleased to grant an order of temporary injunction restraining the Defendant, whether by himself, his servants, agents or anybody else claiming under him or any of them or otherwise from purporting to sub-divide, entering into, trespassing on or in any manner at all interfering with the Plaintiff's piece of land known as L.R. NO. 12715/95 (Grant NO. IR. 44513) situate in Syokimau Area of Machakos County.

d) That the Court do be pleased to issue an order directed to the Director of Criminal Investigations (DCI)- Land Fraud Unit- to carry out investigations to establish the persons involved in the forgery of the title documents to the suit and institute criminal proceedings as appropriate.

e) That the cost of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the registered owner of the property known as L.R No. 12715/95 comprising about 5 acres situate in Syokimau area, Machakos County (*the suit property*) and that he acquired and had the suit property registered in his name on 19th May, 1988.

3. According to the Plaintiff, when he went to Survey of Kenya to get a copy of the area survey plan for the area, he found that his land had been sub-divided into two portions by the firm of Boma Surveys that belonged to Surveyor B.M. Okumu and that the land had been given two new land reference numbers, namely 12715/95/2 and 12715/95/3 under FR 614/93.

4. The Plaintiff deponed that when he contacted Mr. Okumu, the Surveyor, he confirmed that he is the one who had sub-divided the suit property into two portions on the instructions of the Defendant; and that when he showed Mr. B.M. Okumu his original title and after Mr. Okumu compared it with the title that he had been given by the Defendant, he confirmed that the Defendant's title was a forgery.

5. The Plaintiff deponed that he cross-checked the records held in the Deed file at the Ministry of Lands and obtained a purported transfer dated 6th December, 1988 and registered against the title on 19th December, 1988 as IR 44513/3; that the purported transfer was not signed by him and was a forgery; that he was never a resident of Athi River as indicated in the Transfer document and that he never executed a transfer in favour of the Defendant.

6. According to the deponent, upon further scrutiny of the documentation held in the Deed file, he found that his name was indicated as Lenny Maxwell Kivuti Lodislaus whereas his name as appears in the National identity card is Lenny Maxwell Kivuti; that the date of execution of the registration on the fake *document* (7th May, 1988) differs from that on the original document (17th May, 1988) and that the purported transfer did not comply with the provision of the then registration laws.

7. The Defendant opposed the Application vide a Replying Affidavit sworn on 20th February, 2020. The Defendant deponed that he was the

registered owner of land known as L.R. No. 12417/95; that the Ministry of Lands, through an Allotment Letter Ref. No. 39711/XXX11 offered him the opportunity to buy L.R. No. 12417/95 subject to payment of the prescribed fees and acceptance of the offer and that he wrote to the Ministry of Lands accepting the said offer.

8. According to the Defendant, he is an innocent Purchaser of the said land having paid the required land rates to the County Government of Machakos; that as the legal owner of the land, he was desirous of sub-dividing the same into several portions for selling and developing and that he approached the firm of Boma Surveys & Co. Ltd to carry out the sub-divisions of the land.

9. The Defendant deponed that Boma Surveys & Co. Ltd submitted the survey documents to the Director of Survey for approval of the proposed sub-division; that after the approval of the sub-division, he was issued with new titles and that he had transferred the sub-divisions to buyers.

10. The Defendant deponed that the original title was surrendered back to the government after the sub-division; that new titles were issued to third parties and that he is no longer the registered owner of the land.

11. The Defendant lastly deponed that the Plaintiff has not tabled any evidence to show that he is the legal owner of the land and that he has been paying rates and/or land rent to the County Government of Machakos.

12. In his Application dated 20th May, 2020, the Defendant has sought for the following orders:

a) That a temporary injunction do issue restraining the Plaintiff either by themselves, his servants, agents and otherwise be and are hereby restrained from developing and/or interfering with the suit property pending hearing and determination of this suit.

b) That this Honourable Court be pleased to vacate and/or set aside orders issued by the court on 4th November, 2019 pending the hearing and determination of the suit.

c) That no development is to occur in the suit property until the final determination of the entire suit and/or dispute.

13. The Defendant's Application is premised on the grounds that the Plaintiff has constantly been interfering with the peaceful enjoyment of the property; that the Plaintiff moved to court and acquired orders barring the Defendant from his land and that the Plaintiff is currently using the ex parte orders to develop the suit property.

14. The two Applications were canvassed vide written submissions. The Plaintiff's counsel submitted that the Plaintiff is the registered owner of the suit property and that the Government had no right and/or capacity to alienate private property unless through compulsory acquisition for public use and only upon payment of a suitable/appropriate compensation to the owner.

15. The Plaintiff's advocate submitted that the Plaintiff had fulfilled the conditions for the grant of an injunction as set out in the case of *Giella vs. Cassman Brown 1973 E.A 358*.

16. The learned counsel for the Defendant submitted that the main issues arising for determination are three-fold. Firstly, whether this court has jurisdiction to issue the orders sought by the Plaintiff; secondly, whether there is any legal justification to issue a temporary injunction against the Defendant restraining him or anyone else claiming under him from trespassing into his land, and finally who should bear the costs of the Application.

17. The Defendant's counsel submitted that the Plaintiff has not produced any legal and/or justifiable title documents recognized under any written law showing that the land belongs to him. Counsel submitted that the only documents that the Plaintiff produced were an Allotment Letter and a Share Certificate from Syokimau Farm Limited.

18. Both the Plaintiff and the Defendant are seeking for injunctive orders as against each other. The law relating to the grant of a temporary injunction was settled in the case of *Giella vs. Cassman Brown & Co. Ltd [1973] E.A. 358* in which the court rendered itself as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant 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 conveniences”

19. What amounts to a *prima facie* case was explained by the Court of Appeal 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.”

20. The Plaintiff has deponed that he is the owner of land known as L.R. No. 12715/95 situate in Syokimau, Machakos. The said land measures 2.024 Ha. The Plaintiff annexed on his Affidavit the grant that was issued to Syokimau Farm Limited for LR No. 12715/95, IR 44513 on 17th May, 1988. The said Grant shows the suit property was transferred in favour of the Plaintiff on 14th September, 1988 by Syokimau Farm Limited.

21. The Plaintiff's case is that sometimes in February, 2019, he discovered from the Survey of Kenya records that the suit property had been sub-divided into two portions, and on further inquiry, he was informed that the Defendant was claiming that he is the owner of the land. The Plaintiff annexed on the Affidavit survey plan F/R No. 614/93 showing the sub-division of the suit property into two portions.

22. The sub-division of the suit property into two portions was done by Boma Surveys Co. Ltd, on the instructions of the Defendant. In his letter to the Director of Surveys, Mr. B. M. Okumu, the Surveyor, has stated as follows:

“It has come to my attention that the documents that were issued by my client (the Defendant herein) as mentioned above and which I did rely on to carry out the subdivision survey were actually a forgery as the original land registration documents of the subject property were shown to me by the said Mr. Lenny Kivuti. The object of this letter is to request you to cancel the survey plan FR No. 614/93 and all documentation...”

23. The Plaintiff has produced in evidence the copy of the Grant for the suit property purportedly in the name of the Defendant. The said copy of the Grant shows that the Plaintiff transferred the land to the Defendant on 19th December, 1988, which, according to the Plaintiff, is a forgery.

24. In his Replying Affidavit, the Defendant stated that on 1st October, 1999, the Ministry of Lands, vide a Letter of Allotment, offered him an opportunity to buy L.R. No. 12715/95, which offer he accepted. The Defendant annexed the copy of the Letter of Allotment dated 1st October, 1999 showing the allocation of the suit land.

25. According to the Defendant, he was later on issued with a Lease for L.R. No. 12715/95. The Defendant annexed a copy of the said Lease on his Affidavit. The said Lease was purportedly signed by the Chief Land Registrar on 23rd November, 2016. However, there is no indication that the Lease that the Defendant is relying on was ever registered as required by the Land Registration Act.

26. Considering that by the time the Defendant was offered by the government land reference number 12715/95, if at all, the said parcel of land had already been registered in favour of the Plaintiff in 1988, and in view of the fact that the Lease that the Defendant is relying on has never been registered as required by the law, it is my finding that the Plaintiff has shown that he has a *prima facie* case with chances of success.

27. Indeed, the letter by the Surveyor who was retained by the Defendant to the effect that the title he relied on to sub-divide the suit property is a forgery points to the fact that the Defendant does not have a *prima facie* case with chances of success. Furthermore, having not filed a Defence and Counter-claim in this matter, the Defendant cannot succeed in his claim for an order of injunction as against the Plaintiff.

28. For those reasons, I allow the Plaintiff's Application dated 18th May, 2019 as prayed and dismiss the Defendant's Application dated 20th May, 2020 with costs.

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

O.A. ANGOTE

JUDGE