



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 986 OF 2014

MUNGAI NGARUIYA.....PLAINTIFF

VERSUS

JEFFERSON MUCHIRI NJUGUNA1ST DEFENDANT

SYOKIMAU BRIGHT HOMES LTD..... 2ND DEFENDANT

ISAAC GITATA MAINA.....3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 23rd July 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants from entering, remaining upon, constructing, developing, using, selling, advertising or dealing with or otherwise transacting upon the parcel of land known as Land Reference Number 12610/17 (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit.

The Application is premised upon the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff, Mungai Ngaruiya, sworn on 23rd July 2014 in which he averred that he is the registered proprietor of the suit property having bought it from the National Bank of Kenya by decree of charge and he was issued a title deed. He annexed a copy of this title deed as well as a copy of the current search in support of that assertion. He further averred that the transfer in his favour was registered on 2nd June 2005 and he has been in possession of the suit property since then. He confirmed that he has never sold the suit property or any portion thereof to any person. He further stated that after acquiring the suit property, he has been paying land rates dutifully. He further averred that on or about 19th November 2013, he was informed by his agent who resides on the suit property that some people had invaded the suit property and were putting up structures on it without his knowledge. He averred that he proceeded to the suit property and upon realizing that he invaders were turning violent, he reported the matter to the Athi River Police station. He added that the police investigating the matter arrested the invaders and charged them with trespass in **Mavoko Criminal Case No. 1293 of 2013**. He further averred that later on 5th April 2014, another group of persons were where not known to him also invaded the suit property and sought to construct a perimeter fence around the suit property. He added that the matter was reported to the Athi River Police Station who preferred charges against three persons in **Mavoko Criminal Case No. 435 of 2014**. He further averred that the persons charged in the two criminal cases informed him that they

were informed by the 1st Defendant that the suit property was owned by the 2nd Defendant and that the 1st Defendant had been authorized to sell the suit property by the 2nd Defendant. He added that he found the 3rd Defendant on the suit property claiming that he had purchased a portion of the suit property from the 2nd Defendant acting through the 1st Defendant subsequent to which he was issued with a share certificate. He further stated that he has examined the share certificate as well as a copy of the purported sale agreement and noted that the share certificate from the 2nd Defendant indicated to Land Reference No. 12610. He added that his efforts to search L.R. No. 12610 were fruitless. He further stated that he has met several people inspecting the suit property and every time he enquires from them the purpose of visiting his property, they always stated that they have informed from the 1st and 2nd Defendant that the suit property belongs to the 2nd Defendant and that he same is up for sale. He concluded by stating that he has not sold the suit property to the 2nd Defendant neither is the 1st Defendant his agent and that the actions of the 1st and 2nd Defendants are in violation to his right to property and constitute fraud and are thus illegal.

The Application is not contested. The 3rd Defendant's Replying Affidavit sworn on 8th October 2014 and filed on 9th October 2014 was expunged from the court record for having been filed without leave.

The issue which I must determine is whether the Plaintiff is entitled to the temporary injunction that he prays for. In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus 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, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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 convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”

Does the Plaintiff/Applicant have a genuine and arguable case? The Plaintiff/Applicant's case is that he is the registered proprietor of the suit property. In support of that assertion, he produced a copy of his title deed and search results indicating that he indeed is the registered proprietor of the suit property. The validity of that title deed has not been challenged by the Defendants in any way whatsoever. In that case, the law is very clear as regards the position of a title holder of land. **Section 26(1) of the Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

There has been no allegation of fraud or misrepresentation on the part of the Plaintiff to which he has

been proved to be a party and further it has not been demonstrated by the Defendants that the certificate of title exhibited by the Plaintiff was acquired illegally, unprocedurally or through a corrupt scheme. In light of, I find no difficulty in finding that the Plaintiff has succeeded in demonstrating to this court that he has a valid title over the suit property and is entitled to exercise all ownership rights in respect thereof. In short, the Plaintiff has shown that he has a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

Further, land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's rights over the suit property.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 4TH DAY OF MARCH 2016.

MARY M. GITUMBI

JUDGE