



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 81 OF 2015

RHODA WAMBUI MWANGI.....PLAINTIFF

-VERSUS-

FATUMA MOHAMED.....1ST DEFENDANT

MICHAEL NATO.....2ND DEFENDANT

THE CHIEF BUILDING INSPECTOR

MOMBASA COUNTY GOVERNMENT.....3RD DEFENDANT

RULING

1. The plaintiff has moved the Court under section 18, 19, 20 and 21 of the Land Registration Act, 2012 and Order 40 of the civil Procedure Rules. The application seeks the following orders ;

i) Spent

ii) Spent

iii) That an order of temporary injunction do issue restraining the Defendant/Respondents by themselves, their employees, servants and/or agents or assignees and/or any other person acting under her from trespassing upon and/or in any other manner whatsoever interfering with the plaintiff's use, possession and quiet enjoyment of all those portions of land known as Plots No. 4317/VI/MN pending the hearing and determination of this suit.

iv) Costs of the application be provided for.

2. The applicant states that he is the registered owner of plot No. 4317/VI/MN which the 1st defendant has trespassed on without any colour of right or lawful excuse. In the affidavit in support of the application, the applicant annexed a copy of the title deed and how she acquired the plot. She deposes that she has paid all dues to the county government. It is her averment that the 1st and 2nd defendant has been interfering and or trespassing on the suit plot with the help of the county government officials.

3. The application is opposed by the 1st and 2nd defendants. The 2nd defendant filed grounds of opposition in which he stated that there is no right, interest or impediment shown to accrue either to or against the 2nd Defendant. He urged the Court to dismiss the application and suit against him.

4. In her replying affidavit, the 1st defendant deposed that the applicant's title was irregularly obtained. She also deposed that no building plans were approved by the 3rd defendant and therefore no structures should be erected without such plans. She has denied chasing anyone away and denied a greeting to vacate the suit property. She deposed further that construction cannot take place because of the current and because the construction has not been approved by the 3rd defendant. Lastly she deposed that her late mother constructed a house on the suit property as per the building plan annexed as 'FMI'.

5. Parties filed written submissions which I have read and considered. I will refer to the relevant paragraphs in the body of this ruling. The applicant has deposed that she is the registered owner of the suit land and went ahead to annex copies of documents to show how she acquired the property. From the orders sought in the application, only the 1st defendant has opposed the grant of the same since the 2nd defendant has stated no claim accrues for him. The 3rd defendant did not file any document.

6. The 1st defendant submitted that the applicant has not demonstrated that she has a prima facie case because section 26(1) of the Land Registration Act gives exception where the title is acquired through fraud/misrepresentation or illegally. She also submitted that the title obtained had special conditions that must be complied with for any dealings to be valid i.e not sell, transfer or sublet any part of the land. That her mother owned the property within the meaning of article 40 and 260 of the constitution.

7. It is therefore not in dispute that the applicant holds a title deed to the suit property. The 1st defendant challenges the title that it was fraudulently obtained. Section 26 of the Land Registration Act states that a title deed shall be taken as conclusive proof of ownership until it is successfully challenged. The applicant's title is yet to be challenged therefore the fact that she has demonstrated that she owns the land is a clear proof that she has a prima facie case with probability of succeeding.

8. Whether to grant an injunction or not, a party is required to establish any of the principles laid down in the case of **Giella vs Cassman brown**. A party is not required to prove the existence of all the principles. The 1st defendant alleged that she was in physical occupation of the plot through a house built by her mother – deceased in 1961. In the photos annexed to the applicant's affidavit, the poles are standing on a vacant plot. The 1st defendant did not annex any photograph to show the fence was enclosing their house.

9. In any event an order of injunction does not confer ownership of a plot to any party to a suit. It is merely to preserve the suit property so that parties present their case in Court. The 1st defendant will have her day in Court. In the result, I find merit in the notice of motion dated 30th April 2015. The same is allowed in terms of prayer 3. The costs of the application do await the outcome of this suit.

Ruling dated and delivered at Mombasa this 13th day of July 2016.

A. OMOLLO

JUDGE