



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT

CIVIL SUIT NO. 171 OF 2012

JOSEPH KIHARA GITUI.....PLAINTIFF

VS

CHARLES KINYUA BEN (ALIAS)

CHARLES KINYUA KIHUTO.....DEFENDANT

RULING

The **applicant**, in this application dated 27.8.2013 prays for orders that the **respondent** by himself, his agents servants or anyone claiming through him be restrained from putting up new structures or demolishing the existing ones or in any way putting up any developments in NO.LR 11969/123 IRN NO. 4846 MARSABIT TOWNSHIP pending the hearing and determination of this suit or until any further orders of this court and *that the honourable court be pleased to order the respondent to surrender the leasehold title for LR NO. 11969/123 IRN MARSABIT TOWNSHIP to the Chief Land Registrar to enable him/her open and/or reconstruct a new file.*

The application is based on grounds that the file for the aforesaid parcel of land has been missing at the Land office Nairobi and efforts to trace the same have borne no fruits and that the applicant who is the bonafide registered owner of the land does not have the original leasehold title. Moreover that there are no records at the lands office for the aforesaid parcel of land and the chief land registrar has been unable to open and/or construct a new file for the same unless the original leasehold title is surrendered to him. Furthermore that even the order issued by this court and served upon the Chief Land Registrar is incapable of being implemented owing to the missing file. The respondent has without any colour of rite started putting out structures in the applicant's plot without his consent. Lastly that the respondent will not be prejudiced in any way if the orders sought are granted.

The application is supported by the affidavit of **Joseph Kihara Gitui** who states that he is *the applicant herein and hence competence to swear this affidavit and the absolute registered owner of the leasehold title LR 11969/123 IRN 4846 MARSABIT TOWNSHIP.* He has sued the respondent in this suit seeking for among other prayers surrender of the leasehold title document and claims that after the institution of this suit he went to the lands office Nairobi and applied for an official search to the aforesaid parcel of land but was unable to obtain the search owing to the fact that there are no records at the chief land registrar's office for the aforesaid parcel of land. He was advised to present and surrender the original copy of the leasehold title to the Chief Land Registrar to enable him open or reconstruct a new file. He had applied for the original title document to be deposited by the respondent in court but they agreed with the respondent that the status quo be maintained in the parcel of land. That the aforesaid order was served upon the Chief Land Registrar but it has to date never been implemented owing to the missing file at the

lands office That his advocate on record has requested for the records in vain hence he verily believes that the respondent has been Interfering with the records at the lands office as evidenced by the letter dated 14th February 2002. That the respondent has started construction works in the plot without the applicant's consent. The applicant was not informed of the intended exercise of resurveying of his land yet he is the sole and absolute registered owner. He believes that the respondent will not be prejudiced in anyway if the orders sought are granted. That there is an eminent danger that the status of his land may be altered if the respondent remains with the original title documents to his land when there are no records at the lands office.

The application is opposed by the Respondent who states in the replying affidavit sworn on 5.9.2013 and filed on the same date that it is true that the Applicant has sued him for an Order for surrender of title deed for LR 11969/123IRN 4846 but he contends that the Plaintiff willingly and freely surrendered the title document to him after they reached an agreement for sale and transfer of the same to him sometimes in the year 1999 and after he paid the agreed consideration of Kshs 400,000/= and that he immediately took possession of the said parcel of land which comprised of a temporary structure which he started occupying as his residence whereupon he embarked on renovating the said building and commenced construction of an eatery on the same premises as well as effecting other improvements.

That since May 2000, he has been in open, continuous and uninterrupted occupation of the said property exercising all right as the legal owner though the Plaintiff has to date not effected transfer of ownership to him and hence the counterclaim. That until these court proceedings were commenced, he was never fearful of the Plaintiff as he is his wife's elder brother and in his view the matters referred to by the Plaintiff in paragraphs 4-9 are diversionary as he is neither the custodian of the records at Ardhi house nor has any influence whatsoever with any official at the said offices and therefore the allegations against him are totally baseless as he has no capacity whatsoever to interfere with official records held and maintained by the ministry of lands. It is his contention that the Plaintiff in collusion with certain officers at Ardhi house has created the fiction of the missing records to create a distraction to the court and may be pro long this litigation as the various documents attached to the Plaintiff's application appear suspect as they are contradictory and ought to be rejected as having no evidential value. That it is equally false that he has been constructing new structures on the suit property. That since 4th June 2013, when this honourable court ordered hat the status quo be maintained on the suit property, he has not undertaken any new developments on the property effected any urges this Honourable court to strike out the Applicants application dated 14th May 2010.

In the Supplementary affidavit filed on 20.9.2013 the Plaintiff/Applicant states that the Respondent's replying affidavit is full of falsehoods as he has never at any time sold his plot to the respondent as the respondent has been occupying his plot and the premises therein by virtue of being his brother in law as a licensee and not as a trespasser and his claim that he acquired the title by adverse possession is misconceived.

In the further affidavit filed on 30.9.2013 the defendant states that reiterates that the contents of his affidavit sworn on 5th September 2013 in reply to the Plaintiff's application dated 27th August 2013 that since the commencement of the instant suit he has not undertaken any developments on the suit property contrary to the allegations made by the Plaintiff/Applicant. That the pictures attached, to the Applicant's Supplementary affidavit only depict building material on site which he had deposited thereon for purposes of making building blocks before the commencement of this suit. That it is his firm belief that the allegation by the Plaintiff/Applicant that the original records of the property are missing at Ardhi House are no more than a ploy by the Applicant in collusion with one E. Wafula of Ardhi House and other functionaries to crate the impression that the respondent or other persons acting at my behest are interfering with the records of the suit property at the said offices. He has learnt from reliable family sources that the Plaintiff intends to sell the suit property to a third party and that the only reason why he cannot effect the sale is that he does not have custody of the lease certificate which was handed over to him by the plaintiff upon completion of the payment of the purchase price and undertakes that in the event that the plaintiff shall be successful in this suit, he will surrender the said lease certificate.

The Plaintiff's/Applicant's submission reiterate the facts in the affidavits. Mr. Muthingani

for the respondent did not file submissions. I have considered the evidence on record and do find that there is no dispute that the original title document in respect of LR NO. 11969/123 IRN 4846 which indicates that the land is registered in the plaintiff's name, is in the defendants possession. The defendant claims that the same was surrendered to him by the Plaintiff when he paid the Plaintiff Kshs 400,000 as consideration for the purchase of the land. He claims to be renovating the buildings on the land but has never been constructing any structure since the court ordered status quo on 4.6.2013.

The Plaintiff in response to the defendant's allegation states that he has never sold the land to the applicant and that the said applicant has been occupying the land as a licensee and not a trespasser hence a claim of adverse possession cannot be sustained.

I have considered the evidence so far on record by way of affidavits and do find that both the Plaintiff and Defendant are not candid in their statements. There is a lot of doubt in the Plaintiff's statement that the defendant is a licensee as there is no explanation as to how the defendant was given the original title by the Plaintiff voluntarily.

Likewise, there is no evidence on record other than the defendant's claim, that the defendant bought the land from the Plaintiff as no agreement has been annexed on the Replying Affidavit.

In Giella – vs- Cassman Brown , it was held that where the court is in doubt, then the application can be decided on the balance of convenience.

Since this court is in doubt as to the truth of the matter, I do find that the said truth will only be ascertained after hearing ***viva voce*** evidence and order that in the balance of convenience, the respondent by himself, his agents servants or anyone claiming through him, be restrained from putting up new structures or demolishing the existing ones or in any way putting up any developments in NO.LR 11969/123 IRN NO. 4846 MARSABIT TOWNSHIP pending the hearing and determination of this suit.

Secondly that the original leasehold title for LR NO. 11969/123 IRN 4846 MARSABIT TOWNSHIP be surrendered to court and be kept in the strong room with the file.

DATED AND SIGNED AT EDORET THISDAY OF..... 2015

OMBWAYO ANTONY

JUDGE

DELIVERED AND SIGNED AT NYERI THIS 5TH DAY OF FEBRUARY,2015

LUCY WAITHAKA

JUDGE