



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 233 OF 2009

THOMAS OMAGWA KEMUMA PLAINTIFF

VERSUS

BENSON ONGABI 1ST DEFENDANT

PATRICK MAERA MAKORI 2ND DEFENDANT

RULING

1. The plaintiff brought this suit on 10th November 2009 claiming that her deceased mother one, **Babeta Nyagei Kemuma** (hereinafter referred to only as “**the deceased**”) was at all material times the registered proprietor of all that parcel of land known as **LR No. Wanjare/Bomerenda/1289** (hereinafter referred to only as “**Plot No. 1289**”). The plaintiff claimed that on or about the year 1986, the 1st defendant illegally and fraudulently caused a portion of Plot No. 1289 to be curved out and given plot reference number 55A/Suneka (hereinafter referred to as “**the suit property**”) which he thereafter transferred to the 2nd defendant. The plaintiff claimed that in view of the circumstances under which the 2nd defendant acquired title to the suit property, the 2nd defendant’s title to the same is tainted with fraud and should be cancelled. In his prayer to the court, the plaintiff sought an order for the cancellation of the 2nd defendant’s title over the suit property and the registration of the plaintiff as the proprietor of the same.
2. The defendants filed a joint statement of defence and counter-claim on 18th June 2010. In their defence, the defendants denied the plaintiff’s claim in its entirety. The defendants denied that Plot No. 55A/Suneka (“the suit property”) was curved out of Plot No. 1289. In his counter-claim, the 2nd defendant contended that he is the lawful proprietor of the suit property and sought a declaration to that effect together with an order for the eviction of the plaintiff therefrom.
3. What is now before me is the defendants’ application that was brought by way of Notice of Motion dated 10th June 2013 seeking; a temporary prohibitory injunction to restrain the plaintiff from trespassing on, disposing off or erecting structures on Plot No. 55A/Suneka (“the suit property”) and, a mandatory injunction to compel the plaintiff to remove the temporary structures and construction materials that he has put on the suit property. The defendants’ application was brought on the grounds among others that, the 2nd defendant is the proprietor of the suit property and that while this suit is pending, the plaintiff has entered into an agreement with a third party for the sale of the suit property. The defendants have also contended that the plaintiff has put up temporary structures and assembled construction materialson the suit property which is hindering their access to the property.
4. The defendants’ application was opposed by the plaintiff through a replying affidavit sworn on 15th July 2013. The plaintiff maintained that the suit property is owned by the deceased. The

- plaintiff admitted that he had entered into an agreement with a third party for the sale of the suit property but contended that the said agreement has since been rescinded. The plaintiff denied that he has put up any structures on the suit property and contended that the orders sought would result in his eviction from the suit property before the hearing of this suit.
5. I have considered the defendants' application together with the affidavit filed in support thereof. I have also considered the plaintiff's replying affidavit in opposition to the application. Finally, I have considered the written submissions that were filed herein by the respective advocates for the parties. For a temporary injunction to issue, the applicant must establish a prima facie case with a probability of success against the respondent. The applicant must also demonstrate that he/she will suffer irreparable harm that cannot be compensated in damages if the order is not granted. If the court is in doubt as to the above, the application will be determined on a balance of convenience. See, the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358**. For a mandatory injunction, the same shall not issue in the absence of special circumstances. The applicant must also demonstrate that the case is a clear one which the court can determine at once on the material before it. See, **Kenya Breweries Ltd –vs- Washington Okeyo [2002] 1 E. A 109** and **Locabail International Finance Ltd –vs- Agro Export & Another [1986] 1 ALLER 901**.
 6. On the material before me, I am satisfied that the defendants have established a prima facie case against the plaintiff. I am also satisfied that the defendants will suffer irreparable injury if the injunction sought is granted. The 2nd defendant has claimed that he acquired the suit property from the 1st defendant. He has placed before the court evidence that shows that he acquired the suit property in the year 1986. He has provided copies of the plot cards that were issued to him on 17th November 1986 and 21st August 2007 by Gusii County Council and Suneka Town Council respectively in respect of the suit property. He has also produced a letter from Gusii County Council confirming that the suit property was transferred to him by the 1st defendant through minute 17/86 (E) (3) of 5th June, and 18th July, 1986. On the other hand, the plaintiff who has claimed that the suit property was curved out of Plot No. 1289 that is owned by the deceased has not placed any evidence before the court in proof of that contention. There is no evidence before me that Plot No. 1289 belonged to the deceased and that a portion thereof was curved out and registered with Gusii County Council as Plot No. 55A/Suneka ("suit property").
 7. I am unable to reconcile the plaintiff's contention that the suit property was curved out of Plot No. 1289 by the 1st defendant in the year 1986 with the minutes of Gusii County Council of 29th June 1971 and 16th August 1971 upon which the plaintiff has put reliance in proof of the deceased's alleged ownership of the suit property. According to the said minutes, the suit property was initially known as Plot No. 55 and it was owned by the deceased. Following an application by the deceased to Gusii County Council, Plot No. 55 was sub-divided into two (2) portions namely, Plot No. 55A that was registered in the name of the deceased and Plot No. 55B that was registered in the name of one, Henry Matundura. This being the case, I am unable to comprehend how the suit property that came into existence in the year 1971 through the aforesaid subdivision of Plot No. 55 could have been curved out of Plot No. 1289 in the year 1986. The plaintiff has not placed any evidence before the court that the deceased is the current owner of the suit property or that the same is a portion of Plot No. 1289 that is said to be owned by the deceased. I am persuaded on the evidence on record that the defendants, more particularly, the 2nd defendant has demonstrated that he has sufficient interest in the suit property that deserves protection by the law. The defendants have also shown that the plaintiff had attempted to sell the suit property while this suit is pending. This fact was admitted by the plaintiff through the documents that he submitted to court. There is no doubt that the 2nd defendant who claims to be the owner of the suit property would suffer irreparable injury if the plaintiff proceeds to dispose of the suit property while this suit is pending. Due to the foregoing, I am persuaded that the defendants have made out a case for a temporary prohibitory injunction.
 8. I am however not convinced that the defendants have made out a case for a mandatory injunction. The defendants have not shown that special circumstances exist in this case that would justify the granting of a mandatory injunction. I am also not persuaded that the issues raised in this case are simple and clear and as such can be determined in a summary manner. There are several issues in this case which can only be determined at the trial of the suit such as; how and when the 1st defendant acquired the suit property that seems to have been owned by the deceased as at the year

1971. In fact, no evidence has been placed before me to prove that the 1st defendant owned the suit property at any one time. As I have stated above, the plot cards that have been placed before the court relate only to the 2nd defendant's ownership of the suit property. The court would need to interrogate the issue as to whether the 1st defendant owned the suit property before the same was transferred by him to the 2nd defendant. No minutes have been exhibited to show how the 1st defendant acquired the suit property. The minutes through which the transfer of the suit property by the 1st defendant to the 2nd defendant is said to have been approved by Gusii County Council have also not been placed before the court. What are before me are not the minutes but the plot cards referring to some minutes through which the holder is said to have been issued with the card. These cards are not conclusive proof that the meetings referred to therein were held and that the resolutions were made for the transfer of the suit property to the 2nd defendant. The defendants' application has therefore failed to meet the threshold for a mandatory injunction.

9. Due to the foregoing, the defendants' application dated 10th June, 2013 succeeds in part. The same is allowed in terms of prayer 3 thereof on the following terms; pending the hearing and determination of this suit, the plaintiff by himself or through his agents, servants or employees is restrained from selling, disposing off or erecting structures on Plot No. 55A/Suneka market (the suit property). The defendants shall have the cost of the application.

Delivered, signed and dated at KISII this 6th day of March 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Kaburi h/b for Nyagwencha for the plaintiff

Miss Muguche for the 1st and 2nd defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE