



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC 167 OF 2015

PETER GITHINJI KAMAU.....PLAINTIFF

VERSUS

WILLIAM GITHINJI ROTICHDEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff claiming to have purchased land from a seller who had also purchased it from the previous registered proprietor; property now registered in name of plaintiff; plaintiff seeking to have defendant restrained from the land; defendant also claiming to have purchased the land from the previous registered proprietor; defendant having registered a restriction before transfer of the property to the plaintiff; best to determine the application on a balance of convenience; balance of convenience in favour of the defendant who had the earlier sale agreement and had been in possession)

1. This suit was commenced by way of a plaint filed on 11 June 2015. Together with the plaint, the plaintiff filed an application for injunction seeking to restrain the defendant from the suit property, which is the land parcel Miti Mingi/Mbaruk Block 3/53 (Barut). It is that application which is the subject of this ruling.

2. The case of the plaintiff, as pleaded and as averred in the affidavits in support of the application, is that through an agreement dated 11 October 2013, he purchased the suit property from one Shem Osiago Morumbwa who was then the beneficial owner of the suit property at a consideration of Kshs. 650,000/=. At the time of purchase, the suit property was registered in the name of one Evans Ondieki. On 6 January 2014, Evans Ondieki transferred the suit property to Kebeya Autoworks, which is said to be a business enterprise of Shem Osiago, and the new proprietor thereafter transferred the property to the plaintiff. The plaintiff is therefore the current registered proprietor of the suit property and he has a title deed in his name issued on 19 September 2014. In his supporting affidavit, the plaintiff has averred that he took possession of the land on 11 November 2013 and farmed on the land peacefully. On 3 April 2015, he sent a tractor to plough the land, and it was while the tractor was halfway, that the defendant emerged with a panga and threatened to kill the plaintiff if he proceeded to plough the land. Through this application, the plaintiff wants the defendant restrained from the suit property pending hearing of the suit.

3. The defendant entered appearance and filed a replying affidavit to oppose the application. His position is that he is the beneficial owner of the suit property having purchased it from Evans Ondieki, who is his immediate neighbor, through an agreement dated 21 April 2009. It was agreed that he was to take immediate possession of the property and completion to be done upon transfer of the property in the name of the defendant. The defendant states that he waited for quite a while for the transfer of the suit property,

and being apprehensive, he registered a restriction on 22 August 2013. In the month of September (year not declared), the defendant noted some strangers on the land who alleged to be prospective buyers. The defendant then visited the lands office only to find the restriction removed and title issued in the name of Kebeya Autoworks. On 9 September 2014, he wrote to Kebeya Autoworks to find out how the property was transferred to them but the letter was not replied to. He has averred that by the time the property was sold to Shem Osiago Morumbwa, he (the defendant) was in occupation. He has averred that the plaintiff has never been in occupation and that he is the one who has been carrying out farming activities on the land.

4. Shem Osiago Morumbwa swore an affidavit in support of the plaintiff's application. He stated that he trades as Kebeya Autoworks and that he sold the suit property to the plaintiff.

5. I have considered the matter alongside the submissions of Mr. Nyamwange for the applicant and Mr. Mukira for the respondent.

6. In an application of this nature, before allowing the same, the court needs to be satisfied that the applicant has established a prima facie case with a probability of success and that he stands to suffer irreparable loss if the injunction is not granted. If in doubt, the court will decide the application on a balance of convenience. These principles were laid down in the case of *Giella v Cassman Brown (1973) EA 358*.

7. In this matter, both plaintiff and defendant have demonstrated that they had sale agreements flowing from the previous registered owner, Evans Ondieki. The sale agreement of the defendant was earlier in time, and the defendant had registered a restriction before the transfer of the suit property to Kebeya Autoworks and later to the plaintiff. It is not clear how the restriction was removed, for the defendant states that he was never informed of its removal. Both parties claim the said land and I hesitate at this point in time, to go into depth on who between the two has a better case than the other. That will have to await the trial. Essentially, what I am saying is that this application is best determined on a balance of convenience. In my view, the balance of convenience favours the defendant who had settled on the land earlier than the plaintiff.

8. Therefore, in so far as possession of the land is concerned, I direct that the defendant do remain in possession pending hearing of this suit. So as to preserve the title, I bar the parties from selling, charging, or in any other way dealing with the suit property. I also issue an order of inhibition, restricting the registration of any disposition in the register of the suit property until the final determination of the suit. Costs shall be in the cause.

8. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 5th day of November 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of

Mr Nyamwange for plaintiff/applicant

N/A for Mr Mukira for defendant/respondent

Court Assistant: Janet

MUNYAO SILA

JUDGE

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AT NAKURU