



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MALINDI ELC CASE NO.47 OF 2019

ERICA ANN THOMAS.....PLAINTIFF

VERSUS

JOEL NGALA JILANI.....DEFENDANT

RULING

1. By this Notice of Motion application dated 21st June 2019, Erica Ann Thomas (the Plaintiff/Applicant) prays for an order of injunction restraining Joel Ngala Jilani (the Defendant/Respondent) from charging, leasing, selling, transferring or in any manner whatsoever interfering with her quiet possession, enjoyment and ownership of all that parcel of land known as Kilifi/Madeteni/450.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds:

i) That the Plaintiff is the owner of the said parcel of land;

ii) That the Plaintiff purchased the said parcel of land from one Kelvin Mwamuye Jilani in 2007 and paid the full purchase price from which time he has been in possession and undertaken major developments thereon;

iii) That the Defendant has fraudulently obtained another title to the land in the name of Kelvin Mwamuye Jilani, now deceased; and

iv) That the Defendant has commenced interference with the Plaintiff's quiet enjoyment and threatens to bring down the developments on the land and to drive out the Plaintiff therefrom.

3. The application is opposed by the Defendant. In a Replying Affidavit sworn on 31st July 2019 and filed herein on 16th July 2019, the Defendant terms the Plaintiffs application as misconceived, vexatious, mischievous and a gross abuse of the Court process. The Defendant avers that contrary to the Plaintiff's claim, he is the bona fide owner of the said property and is in possession thereof.

4. The Defendant denies that the Plaintiff's husband bought the suit property from the Defendant's brother the late Kelvin Mwamuye as alleged or at all. It is his case that the Plaintiff is a fraudster out to obtain his land illegally through forgeries and other misrepresentations.

5. The Defendant asserts that together with his sister Josephine Munyazi Jilani, they are the Administrators of the Estate of his brother Kelvin Mwamuye Jilani. He avers that immediately following the death of his brother who was shot dead by unknown persons, they came to realise that so many of his documents were missing. It was then he was informed that their property in Matsongoni had been sold by his brother to the Plaintiff's husband. The Defendant asserts that his efforts to get any meaningful information on the alleged sale from the Plaintiff and her husband have not borne fruit.

6. The Defendant further avers that he then followed up the matter with the Kilifi Land Registry and he was satisfied that there was no proper sale and or transfer of the property by his brother to the Plaintiff. It was then that he followed up and was issued with another title after he swore an affidavit indicating that the family had lost the previous title. The new title issued on 11th March 2019 is in the joint names of the Defendant and his sister Josephine.

7. I have perused and considered the application together with the response thereto. As was stated by Spry, V.P, in the celebrated case of ***Giella –vs- Cassman Brown (1973) EA 353:***

“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 normally be 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.”

8. Explaining what would amount to a prima facie case in *Mrao Ltd –vs- First American Bank of Kenya Ltd (2003) eKLR*, the Court of Appeal observed as follows:

“.....In civil cases, it is a case in 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.”

9. In the instant matter before me, the Plaintiff was registered as the proprietor of the suit property on 8th May 2002. She told the Court that her registration was consequent upon a transfer of the property to her name by one Kelvin Mwamuye Jilani from whom her husband one Captain Andy Thomas had bought the property.

10. As fate would have it, the said Kelvin Mwamuye Jilani passed away on 23rd September 2010. The Defendant herein who is his brother avers that shortly after his death, they realized that a number of documents that were in Kelvin’s possession could not be traced. Having heard “rumours” that his brother had sold the suit property to the Plaintiff, the Defendant confronted the Plaintiff who confirmed that indeed the property had been transferred to her name during Kelvin’s lifetime.

11. Despite such knowledge, it is apparent that the Defendant swore an affidavit alleging that the title documents for the suit property were lost. On that account, on 13th September 2017, some seven years after his brother passed away, a new title was issued in his brother’s name. On 11th March 2019, the said title was transferred and another fresh title deed was issued for the suit property in the name of the Defendant and his sister Josephine Munyazi Jilani.

12. It was further apparent that on account of these titles issued in September 2017 and March 2019, the Defendant feels entitled to the suit property and that he no longer recognizes the Plaintiff’s title thereto.

13. As the Court of Appeal stated in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others (2014) eKLR*:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

14. Applying those principles to the matter before me, it is clear to me that the Plaintiff has a title to the suit property and that the Defendant and her sister acquired a fresh title to the same property more than 15 years after the Plaintiff was first registered as the owner thereof and despite the Defendant’s knowledge of the Plaintiff’s title.

15. The Plaintiff has told this Court that the Defendant is using his newly acquired title to interfere with her quiet possession and threatening to demolish her developments thereon. This Court is thus satisfied that the Plaintiff has demonstrated a clear and unmistakable right which is being threatened by the actions of the Defendant. The Plaintiff certainly deserves the protection of this Court pending a proper inquiry as to whom between herself and the Defendant is the rightful owner of the suit property.

16. In the premises I am satisfied that there is merit in the Motion dated 21st June 2019. The same is allowed in terms of Prayer Nos. 3 and 4 thereof with costs.

Dated, signed and delivered at Malindi this 18th day of September, 2020.

J.O. OLOLA

JUDGE