



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 242 OF 2012

PETER MUIRURI MBUGUA.....PLAINTIFF/APPLICANT

VERSUS

SAMUEL KABIRU MWANGI.....DEFENDANT /RESPONDENT

RULING

1.The plaintiff/Applicant **Peter Muiruri Mwangi** , filed a Notice of Motion dated **29th June, 2012** seeking the following orders *inter-alia*: **that the Defendant /Respondent by himself, servants, employee and/or agents be restrained from entering, wasting, cultivating, selling, alienating, damaging or in any way interfering with all that parcel of land known as Molo/ South/ Ikumbi/block 5/275 (Tergat) (hereafter referred to as the suit land) until this suit is heard and determined and the usual order on costs.**

2. The Application is premised on the grounds set out therein and is supported by an affidavit sworn by the Applicant dated 4th June, 2012 and a further affidavit dated 18th October 2012. He depones that his late father Mbugua Njoroge was a shareholder of Tergat Farmers Co-op Society Limited and was allocated and settled on plot number 275 in 1984. He left as a result of the 1992 clashes but came back once peace had prevailed and has been in possession ever since.

3.That while the applicant was pursuing letters of administration of his father's estate the defendant misled the Nakuru Land Registrar that he was the owner of the suit parcel and was issued with a title deed for the said parcel. After the applicant obtained letters of administration, he visited the Land Registrar Nakuru and after perusal of the register of members of Tergat Farmers Co-op Society Limited, he discovered that the title held by the defendant was issued to him erroneously. He wrote a letter to the respondent asking him to surrender the title issued to which the respondent has not heeded.

4.In a rejoinder the defendant opposes this application. The defendant **Samuel Kabiru Mwangi** swore a replying affidavit on 17th September , 2012. He avers that he is a member of Tergat Farmers Co-op Society Limited and after balloting was allocated plot number 275. However,during a site visit he was shown a wrong plot (45) which belonged to another person.

5. In1984 he and others were summoned by the Divisional Co-operative officer for arbitration. It emerged that he was the rightful owner of the suit property and the Divisional Co-operative officer wrote to the Land Registrar to issue him with a title deed and the Land Registrar complied.

6. He visited the suit land after the post election violence with the intention to construct therein but found that two brothers had occupied his land and constructed therein. Despite complaining to the area chief and District Commissioner, Kuresoi, the brothers have not been evicted from the suit land or vacated the same.

7.The plaintiff/applicant filed written submissions reiterating his stated position which I have read and considered but the respondent did not file any despite being given an opportunity to do so .

8. The issue that stands out for determination is whether on the facts and circumstances of this case, the Applicant is entitled to the orders of injunction sought at this interlocutory stage.

9. The principles upon which the court will grant an injunction are well settled and articulated in the decision of **Giella vs Cassman Brown & Co. Ltd (1973)** EA 358. The Applicant needs to show that he has a *prima facie* case with probability of success; that he stands to suffer irreparable damage that cannot be compensated by an award in damages and if the court is in doubt, it will determine the application on a balance of convenience.

10. On the first limb, the applicant must show that he has a *prima facie* case with probability of success. In so doing, he annexed a copy of a share certificate in the name of Mbugua Njoroge issued by Tergat Farmers Co-op Society Limited, a copy of death certificate of Mbugua Njoroge, copy of area list of Tergat Farmers Co-op Society Limited, copy of official search showing that the respondent is the registered owner of the suit land and a copy of confirmation of grant appointing him as administrator to the estate of Mbugua Njoroge.

11. I have perused the aforementioned documents and noted that other than the extract of the register, which I shall address in a short while, there is no other document supporting the applicants claim to plot No.275.

12.The respondent has cast doubt on whether the applicant's late father was allocated plot No. 275. On his part he has annexed the following documents as proof of owner ship of the suit land; a copy of receipt showing some payment described as share capital issued by Tergat Farmers Co-op Society Limited, extract of a list of members of Tergat Farmers Co-op Society Limited, correspondence, copy of a title deed in his name and copy of an official search showing he was issued with a title deed in 2007.

12.The extract of members registers exhibited by both the applicant and the respondent show that both respondent and the applicant's deceased father's are listed as having been allotted plot number 275. This in my view cannot be treated as conclusive evidence that any or both of them was allocated plot number 275.

13.The respondent has gone further and exhibited an undated letter from the Divisional Co-operative officer Molo addressed to the District Land Registrar Nakuru in reference to Samuel Kabiru Mwangi, Plot No. 275. The letter states in part " **The above named is the bonafide member of Tergat Farmers Co-op Society Limited. He's the owner of plot No. 275 as per members register in this office and also as per attached copy of the register. Please issue him with title deed as this office has no objection.**"

14. The respondent is also the registered owner of the suit land. Such registration provides the respondent a prima facie absolute and indefeasible claim to the suit Land. **Section 26(1)** of the Land registration Act 2012 provides:

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

15. In my humble view, this is a matter that would require further interrogation of the parties' evidence by way of oral submissions by the parties at the trial so that the parties are subjected to cross examination to test the credibility of the evidence tendered. However, at this stage all the applicant is required to demonstrate is not a case which must succeed but one which may succeed. With the facts and evidence placed before me, I am of the view that the applicant has failed to establish a prima facie case with a probability of success.

16. Will the applicant stand to suffer irreparable damage if the injunction is not granted? From the material before me, it is not in dispute that the applicant and his family are in possession of the suit property. However this being land, if found during trial that the applicant is entitled to the land then the land can be valued and damages awarded

17. Thirdly if one looks at the balance of convenience, surely the scales tilt heavily in favor of the respondent who holds title to the suit land.

18. For the above reason, I find no merit in the Notice of Motion dated 29th June, 2012 and hereby dismiss it with costs to the respondent.

Dated, signed and delivered on this 9th day of May 2014.

L N WAITHAKA

JUDGE.

PRESENT

Ms Ndeda holding brief for Mr Gekonga for plaintiff/Applicant

N/A for defendant

Emmanuel Juma: Court Assistant

L N WAITHAKA

JUDGE