



No. 272

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 377 OF 2013

RICHARD OBIERO NYAKUNDI PLAINTIFF

VERSUS

MOHAMUD MOHAMED ALIO

ABDULLAHI ISMAEL MOROW..... DEFENDANTS

RULING

1. The plaintiff/applicant herein brought this suit against the defendants on 11th September 2013 seeking several reliefs including; a declaration that the plaintiff is the lawful owner of all that parcel of land known as **LR. No. Kisii Municipality/Block I/757** (hereinafter referred to as “**the suit property**”), the cancellation of the registration of the defendants as proprietors of the suit property and a permanent injunction to restrain the defendants from entering, trespassing onto and/or otherwise interfering or dealing howsoever with the suit property. The plaintiff’s claim against the defendants is that; the plaintiffs are the registered proprietors of the suit property having been registered as such on 8th July, 2010. Sometimes in the month of September, 2013, the defendants without any right or lawful cause entered the suit property and started putting up a structure thereon.
2. Upon making inquiries, the plaintiff discovered that the defendants had caused themselves to be registered as the joint proprietors of the suit property on 7th September, 2011 in unclear circumstances. It is the plaintiff’s case that the registration of the defendants as the proprietors of the suit property was unlawful and fraudulent and that as a result thereof, the plaintiff has been unlawfully deprived of the suit property. The plaintiff has therefore suffered loss and damage. Simultaneously with the plaint, the plaintiff/applicant filed a Notice of Motion application dated 11th September, 2013. The same was brought under order 40 rule 1, 2A and 9 of the Civil Procedure Act seeking among other prayers:-
 - a. **A temporary injunction to restrain the defendants by themselves, or through their agents and/or servants from transferring, entering, constructing any structure on or in any way interfering with the plaintiff’s quiet enjoyment of all that land known as Kisii Municipality Block I/757 (the suit property) pending the hearing and determination of this suit.**

The plaintiff’s application was supported by the grounds set out on the body thereof and on the affidavit and further affidavit sworn by the plaintiff on 11th September, 2013 and 2nd October, 2013 respectively. In his affidavits aforesaid in support of the application, the plaintiff has stated that he is an attorney of one, **Benard Osiago Obiero** (hereinafter referred to only as “**Obiero**”) who is the registered leasehold

proprietor of the suit property. Obiero purchased the suit property from one, **Paul Mochumbe Mogaka** (hereinafter referred to as “**Mogaka**”) on 7th July 2010. Sometimes in the month of September, 2013, the defendants brought building materials to the suit property claiming that the suit property belongs to them and started constructing a building thereon.

3. On 2nd September 2013, he (the plaintiff) applied for a certificate of official search in respect of the title of the suit property and was surprised to discover that the defendants had been registered as joint proprietors of the suit property on 7th September 2011. His surprise arose from the fact that he had carried out an official search on the title of the suit property earlier on 17th July 2012 which had indicated that the suit property was registered in the name of Obiero as the owner. The plaintiff has contended that in the circumstances, the defendants could not have been registered as the proprietors of the suit property save through acts of fraud. The plaintiff has contended further that if the defendants were registered as the proprietors of the suit property on 7th September, 2011, there is no way in which the particulars of the defendant’s registration could not have been reflected on the certificate of official search that was carried out by the on 17th July, 2012. The plaintiff has contended that the defendants have vowed never to vacate the suit property unless ordered to do so by the court. The plaintiff has stated further that he stands to suffer irreparable loss unless the orders sought are granted. The plaintiff has annexed to his affidavit in support of the application, a copy of a certificate of lease dated 8th July, 2010 in the name of the plaintiff, a copy of a certificate of official search dated 24th June, 2008 on the title of the suit property which shows that the same was registered in the name of Mogaka on 9th March, 2008, a copy of a certificate of lease dated 19th March, 2008 in respect of the suit property in the name of Mogaka, a copy of an agreement for sale of the suit property between Obiero and Mogaka dated 7th July, 2010, a copy of a certificate of official search dated 17th July, 2012 in respect of the title of the suit property which shows that the suit property was registered in the name of Obiero on 8th July, 2010 and a copy of a certificate of official search dated 2nd September, 2013 in respect of the title of the suit property which shows that the same was registered in the names of the defendants on 7th September, 2011.
4. The defendants entered appearance on 24th September 2013 and filed a replying affidavit sworn on 26th September 2013 in opposition to the application. In their replying affidavit that was sworn by the 2nd defendant/respondent, the defendants denied the plaintiffs claim against them in its entirety and contended that they are the lawful proprietors of the suit property. The defendants contended that they purchased the suit property from one, Benson Musa Mogaka (“**Musa**”) on 1st September 2011 and that the suit property measures approximately 0.0261 hectares. The defendants have contended that when purchasing the suit property, they did due diligence and obtained from the seller all requisite documents in proof of the fact that the seller (Musa) was indeed the lawful owner of the suit property. The defendants have contended that Musa carried out all the necessary formalities before the suit property was transferred to the defendants who were subsequently issued with a certificate of lease for the property. The defendants have contended that their development plans for the building they are putting up on the suit property were duly approved by the relevant Government departments upon presentation including the National Environmental Management Authority. The defendants have contended that the plaintiff/applicant has not proved and/or shown the root of his purported title over the suit property and has also failed to demonstrate that he stands to suffer irreparable loss not capable of being compensated by way of damages unless the orders sought are granted. The defendants have termed the plaintiff’s application as lacking in merit and an abuse of the court process.
5. The advocates for the parties agreed to argue the application by way of written submissions. The submissions by both parties have been filed and the same are on record. I have considered the plaintiff’s application and the two affidavits filed in support thereof. I have also considered the defendants’ affidavit in reply in opposition to the application. Finally, I have considered the rival submissions by the advocates for the parties. This being an application for a temporary injunction, it has to be considered in light of the principles that were set out in the case of, **Giella vs. Cassman Brown & Co. Ltd (1973) E. A. 358** which provides that for a temporary injunction to issue:-

- a. **An applicant must satisfy the court that he has a prima facie case with a probability of success.**
 - b. **That he will otherwise suffer irreparable injury which is un-compensable in damages if the order is not granted and**
 - c. **If in doubt, the court will determine the application on a balance of convenience.**
6. In the instant case, both the plaintiff and the defendants have leasehold titles to the suit property. The titles were however issued at different times and although the subject matter of the two titles are the same, namely, **LR. No. Kisii Municipality/Block I/757**, the plaintiff's title gives the measurement of the suit property as 0.05 hectares while the defendants' title gives the measurement of the same property as 0.0261 hectares. The plaintiff has produced a certificate of official search dated 17th July, 2012 indicating that the plaintiff is the registered proprietor of the suit property having been so registered on 8th July, 2010. On the other hand the defendants have also produced a certificate of official search dated 16th July, 2013 indicating that the defendants are the registered proprietors of the suit property having been so registered as such on 7th September, 2011. The plaintiff has given in detail the history of his title. The defendants have done the same. It is not possible at this stage to determine on affidavit evidence before me even on a prima facie basis as to which of the two titles, one held by the plaintiff and the other by the defendants is genuine and valid. The determination of this issue would require evidence and as such the same can only be made at the trial.
7. Due to the foregoing, I am unable to say without any doubt that Plaintiff has established a prima facie case against the defendants with a probability of success. Having expressed my doubts as to the Plaintiff's case against the defendants, the plaintiff's application falls for consideration on a balance of convenience. From the evidence on record, it is clear that until the defendants started assembling building materials on the suit property in the month of September, 2013 with a view to start construction works thereon, the suit property had remained undeveloped. The said attempt by the defendants to commence construction on the suit property was stopped by this court. There is no evidence before me that either party had developed the suit property or tried to do so prior to that date. In the circumstances, the balance of convenience would not tilt in favour of either party. In the circumstances, the order that commends itself to me to make in this matter is one that will preserve the suit property so that neither party develops, transfers or alienates the same while this case is pending. This will ensure that the status quo that was prevailing before the defendants' attempt to develop the suit property is maintained pending the determination of the lawful owner of the suit property. In the **Court of Appeal Case of Ougo & Another-vs- Otieno (1987) KLR 364**, it was held that,

“The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”

8. Due to the foregoing, I decline to grant the prayers sought in the Plaintiffs' application dated 11th September, 2013. Instead, I hereby order that, pending the hearing and determination of this suit or until further orders by the court, neither party shall, enter into, develop, sell, transfer, lease, charge or in any other manner alienate the suit property namely, **LR. No. Kisii Municipality/Block I/757** or any part thereof. Either party shall be at liberty to apply on the issue of the preservation and protection of the suit property. The cost of the application shall be in the cause.

Delivered, signed and dated at KISII this 6th day of June 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Gichana h/b for Ochoki for plaintiff

Mr. Okenye h/b for Bosire for defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE