



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC NO. 202 OF 2012

CORNELIUS KIPLANGAT A SIGEI.....PLAINTIFF

VERSUS

SIMON CHERUIYOT KITOR.....DEFENDANT

RULING

1.The Plaintiff moved this court by way of Notice of Motion amended on **5th December, 2012** seeking the following substantive order:-

That a temporary injunction be issued to restrain the defendant by himself or his servants, employees, agents from entering, occupying, taking possession, fencing and/or in any manner dealing with land title number Olenguruone/Chepakundi/1057 (“the suit property”) pending the hearing and determination of this suit.

2.The application is supported by the plaintiff’s affidavit and is based on the grounds stated on the face thereof; that the plaintiff is the lawful and registered owner of the suit property having been issued with a title deed in 1997 (**CKAS1**); that the defendant is his neighbour who on **19th November, 2012** invaded the suit property and chased away the plaintiff’s worker who was grazing animals thereon; that the matter was reported to the police and recorded as **OB/9/16/11/2012** but this notwithstanding, the defendant continued with his actions and even erected a fence on the suit property (photographs marked as **CKAS2**);that unless the application is allowed, the defendant will continue suffering irreparable loss.

3. The application was opposed vide the defendant's replying affidavit dated **6th February, 2013**. It is his contention that he purchased the suit property on **9th November, 2012** from one **Wanjiku Wainaina Njoroge** vide a sale agreement (**SK1**);That the said Wanjiku is the registered owner as evidenced by the green card (**SK2b**); That the plaintiff is not his neighbour and is actually the one interfering with his quiet possession; that they have had a long standing dispute which has involved correspondence with Advocates and trips to the police and village elders.

4. In support of the defendant’s case, **Wanjiku Wainaina Njoroge** swore a further replying affidavit on **6th February, 2013**. She deponed that she was the registered owner of the suit property from where she had fled following the tribal clashes in 1992 and moved to Thika; that on **9th November, 2012** she sold the suit property to the defendant but had been unable to process a title deed for the him as the conveyance process was still going; that as far as she was aware, the plaintiff was a stranger and an impostor and had acquired the title fraudulently through people who had illegally moved into her land after she fled due to the tribal clashes.

5. On **10th December, 2013** parties agreed that the application would be disposed off by way of written

submissions. The plaintiff filed their written submissions on **19th February, 2014** while the defendant did likewise on **4th March, 2014**.

6. In his submissions, the plaintiff stated that he had been in actual possession of the suit property for the last 16 years and that the defendant had not exhibited a title deed as prove of ownership and neither had he filed a counterclaim.

7. On his part, the defendant submitted that the plaintiff's application was bad in law, misconceived and an abuse of the court process for the reason that the defendant was a third party purchaser for value without notice to any defect in the title. He relied on the cases of **Giella v Cassman Brown (1973) EA 358** and **Yego v Tuiya (1986) KLR 726** and submitted that the plaintiff had not met the conditions for a grant of injunctive order. Furthermore, granting the injunction would result in more hardship than what the relief was meant to cure.

8. Injunctions are equitable remedies that are granted at the discretion of the court. The principles of granting such injunctions were laid down in the celebrated case of **Giella vs Cassman Brown and Company Limited** (supra) where the Court held at page 360 as follows:-

“First, an applicant must show a *prima facie* case with 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 (E.A. Industries vs Trufoods, 1972) EA 420.”

These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the applicant has a *prima facie* case. It must also be noted that the purpose of an injunction is to maintain the status quo pending the hearing and determination of the matter before it.

9. I am alive to the fact that the court is not required to make final findings of contested facts but to weigh the relative strength of the parties' cases. The principle was considered and **Lord Diplock** made the following observation in **American Cyanamid Co. V Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL** at 510.

“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

10. With the facts and evidence placed before me, I am of the view that a *prima facie* case with a probability of success has not been established. This is because doubt has been cast on the plaintiff's case as to the history of how he came into possession of the suit property. Other than the title deed registered in his name and photographs showing the fence erected by the defendant, the defendant has not exhibited any other document to support his case.

11. On the other hand, the defendant has annexed a sale agreement between him and Wanjiku Wainaina Njoroge, a copy of title deed in the vendor's name issued in 1978 and a bank pay in slip of **Kshs.415,000**. He has also annexed an extract of a green card certified on **24th January, 2013** showing that Wanjiku Wainaina Njoroge is still the registered owner of the suit property. The said Wanjiku, has also sworn an affidavit in support of the defendant's case, giving a back ground of the suit property and explaining why the defendant does not have a title deed to the suit property.

12. This suit relates to ownership of land. Two title deeds have been issued for the suit property. The issue of ownership can only be canvassed at the main hearing where witnesses will be called to testify and documentary evidence adduced.

13. Will the applicant suffer irreparable damage if the injunction is not granted?

The plaintiff has not demonstrated what injury he will suffer which cannot adequately be compensated by an award of damages. It is common ground that the defendant is now in possession of the suit property. Since the purpose of an injunction is to maintain status quo, granting the orders sought will in effect be evicting the defendant from the suit property which is never the intention of the court.

14. For the above reasons, I decline to grant prayer (3) in the amended notice of motion dated 5th **December, 2012**. Costs for the application will be in the cause.

Dated and Signed at Nakuru this 10th day of October 2014

L N WAITHAKA

JUDGE

PRESENT

Mr Simiyu for the plaintiff/Applicant

Mr Ntabo for the Defendant/Respondent

Emmanuel Maelo: Court Assistant

L N WAITHAKA

JUDGE