



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 232 OF 2014

JOYCE SARANGE KENYATTA PLAINTIFF

VERSUS

LUCAS NYAMBEGERA NYANGWESO DEFENDANT

RULING

1. What I have before me is the plaintiff's application that was brought by way of Notice of Motion dated 17th June 2014 under Order 40 rules 1 and 2 of the Civil Procedure Rules in which the plaintiff has sought the following orders:
 1. **spent**
 2. **That a temporary injunction do issue restraining the defendant, his agents and/or servants from entering, demolishing or removing construction materials or in any way whatsoever trespassing onto the plaintiff's land parcel Kisii Municipality/Block/595 (hereinafter known as "suit property") pending the hearing and determination of this application.**
 3. **That a temporary injunction do issue restraining the defendant by himself, his agents and/or servants from entering, demolishing or removing construction material or in any way whatsoever trespassing onto the plaintiff's land parcel Kisii Municipality/Block 1/595 (hereinafter also known as "suit property") pending the hearing and determination of this suit.**
 4. **That costs of this application and incidentals thereto be provided for.**

The application was supported by the affidavit of the plaintiff herein Joyce Sarange Kenyatta sworn on 17th June, 2014. In the said affidavit, the plaintiff averred that she purchased the suit property from one, Petiro Ongwacho Ongwacho (hereinafter referred to only as "Ongwacho") through assignment of lease agreement dated 11th November 2013. The plaintiff averred further that before she entered into the said agreement for the purchase of the suit property, she applied for an official search that confirmed that Ongwacho was the registered owner of the property. She also obtained a copy of the certificate of lease for the suit property in the names of Ongwacho which reinforced her belief that Ongwacho was the owner of the suit property. The plaintiff averred that Ongwacho did all that was required of him as vendor and caused the suit property to be transferred and registered in the name of the plaintiff.

2. The plaintiff averred that after the suit property had been registered in her name as aforesaid, she applied for and obtained approval from Kisii County Government on 2nd December 2013 to proceed with development of the suit property. She also arranged for the preparation of the environmental impact assessment project report for the purposes of obtaining environmental impact assessment licence for the said development. Thereafter, she had bill of quantities prepared and entered into an agreement with a contractor to commence construction of a commercial

building on the suit property which construction started in the month of March 2014. The plaintiff averred that while the construction works on the suit property was in progress, the defendant together with hired goons in the company of the deputy OCS Kisii Police Station descended on the construction site on 28th May 2014 at around 5.00pm and advised her workers not to continue with construction works the following day.

3. The plaintiff averred that on 29th May 2014 at around 9.30am, the defendant in the company of the said goons and police officers from Kisii police station stormed the construction site once again and this time round chased away workers there from, confiscated their working tools and handed over to the defendant the construction materials including sand, ballast and cement that were on the site. In addition, the defendant and those who had accompanied him demolished the pillars that had been put up by the plaintiff's contractor and carried away the bricks thereby in effect evicting the plaintiff from the suit property. As a result of the said invasion, the construction work on the suit property stalled. The plaintiff averred that the defendant carried out the eviction of the plaintiff from the suit property without a court order and that deputy officer in charge of station (OCS), Kisii Police Station released to her foreman the items that they had detained unconditionally. The plaintiff averred that the defendant is committing waste on the suit property which is bound to change the nature and character of the suit land and unless the orders sought are granted the plaintiff is likely to suffer irreparable damage arising from the said acts of trespass on the suit property by the defendant.
4. The plaintiff's application was opposed by the defendant. The defendant swore a replying affidavit on 25th June 2014 in response to the application. In his affidavit, the defendant averred that on or about 8th May, 2014 he was called by his relative one Mr. Erick Mokaya who informed him that a Mr. Fred Kenyatta Nyamokeri was digging a foundation for construction of a permanent building on the suit property. He tried to get in touch with the said Fred Kenyatta Nyamokeri through telephone to find out why he was interfering with his (the defendant's) property but he did not succeed. However on 14th and 15th May 2014 the said Fred Nyamokeri deposited construction materials at the site and commenced construction work. On 28th May 2014, he reported the matter at Kisii Police Station under O/B No. 73/28/5/2014 and was given police officers who accompanied him to the site. When the people who were working at construction site saw the police, they fled and the police officers confiscated the tools that they were using for construction.
5. On the following day, namely, 29th May 2014, he fenced off the suit property and left Kisii for Nairobi thereafter. The defendant averred that the documents annexed to the plaintiff's affidavit in support of the present application are fake more particularly the copy of a certificate of lease in the name of Ongwacho. The defendant averred that the plaintiff has not tendered any evidence to show that Ongwacho was granted a lease over the suit property by the County Council of Gusii. The defendant averred further that there is no evidence that the commissioner of lands was involved in the issuance and/or approval of the said certificate of lease. The defendant averred that the suit property was originally known as Plot No. 48G and that he purchased the same from one, Nelson Gichana Mabeya at a consideration of KShs. 200,000/=. The defendant averred that he enjoyed quiet and peaceful possession of the suit property until sometimes in early 2006 when he discovered that some unknown people had fraudulently purported to subdivide the property into five (5) portions namely Y, U, V, W and X.
6. The defendant averred that he took up the issue of the said fraud with the commissioner of lands and the Municipal Council of Kisii and through a letter dated 23rd March 2006, the land officer then in charge of among others, Kisii District confirmed to him (defendant) that he is the owner of the original Plot No. 48 'G'. A similar confirmation was made by the Municipal Council of Kisii through a letter dated 29th March 2007. The defendant averred that although the original Plot No. 48 'G' was subdivided into several portions namely U, V, W and Y, the defendant nevertheless continued occupying and owning the entire parcel except V, W and X which were found to be on a road reserve. The defendant averred that on 11th June 1998, he was issued by the commissioner of lands with a letter of allotment in respect plot number 'U' which is situated in the present location of the suit property.
7. The defendant averred that the process of issuing him with a lease and other title documents relating to the said plot number 'U' is at an advanced stage and in that regard, plot number 'U' has been given a new parcel number namely, Kisii/Municipality/Block I/1022 ("Plot No. 1022").

- The defendant averred that a deed plan has also been prepared and what is remaining now is the issuance of the title document in his favour. The defendant averred that the plaintiff seems to have been coned into buying the suit property by fraudsters. The defendant denied that he was responsible for the alleged destruction and theft of the plaintiff's properties which were on the suit property as he left Kisii immediately after fencing the suit property and he did not leave any guard on site. The defendant averred that the orders sought if granted would occasion him injustice.
8. When the application came up for hearing before me on 26th June 2014, Mr. Bosire, advocate appeared for the plaintiff while Mr. Marigi, advocate appeared for the defendant. In his submission, Mr. Bosire reiterated the contents of the plaintiff affidavit sworn in support of the application herein which I have highlighted hereinabove and submitted that the plaintiff has satisfied the conditions for granting the orders sought. Counsel submitted that the plaintiff has demonstrated that she purchased the suit property lawfully from the previous registered owner and that she has a valid title to the property.
 9. Counsel submitted further the plaintiff has annexed to her affidavit survey maps which show ground location of the suit property and Plot No. 1022 which is claimed by the defendant which maps leave no doubt that the suit property and Plot No. 1022 claimed by the defendant are separate and distinct and that the same are not at the same location on the ground. Counsel submitted that the defendant seems not to know where his property is situated on the ground and has as a result of that trespassed on the suit property claiming it to be Plot No. 1022. Counsel submitted that the defendant had no right to forcefully evict the plaintiff from the suit property using the police without a court order.
 10. In response to Mr. Bosire's submissions, Mr. Marigi learned counsel for the defendant also reiterated the contents of the defendant's affidavit filed herein on opposition to the plaintiff's application. Mr. Marigi maintained that the defendant did not evict the defendant from the suit property. Counsel submitted that the people who were carrying out construction on the suit property took off and vacated the site when the defendant arrived with the police. The defendant thereafter took possession of the suit property and fenced the same. Counsel submitted further that the plaintiff's title to the suit property which has been relied upon as the basis of this suit is fraudulent which fraud has been laid bare by the various correspondence annexed to the defendant's replying affidavit. Counsel submitted that now that the defendant is in occupation of the suit property, the order sought if granted would have the effect of evicting the defendant and reinstating the plaintiff on the suit property. In reference to survey maps annexed to the plaintiff's affidavit, counsel submitted that the same are not genuine. Counsel submitted further that the plaintiff's application was brought after unreasonable delay. He submitted that if the plaintiff was evicted forcefully as she claims, she should have moved to court immediately.
 11. I have carefully considered the plaintiff's application, the affidavit filed in support thereof, the affidavit filed in opposition thereto and the rival submissions by the respective advocates for the parties. This being an application for a temporary injunction, it has to be considered in light of the following principles that were set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] E. A 358** namely;
 - i. The applicant must satisfy the court that he has a prima facie case with a probability of success.
 - ii. The applicant must demonstrate that he will otherwise suffer irreparable injury which cannot be compensated in damages and;
 - iii. If in doubt, the court will determine the application on a balance of convenience.
 12. In the case of, **Mrao vs. First American Bank of Kenya and 2 Others [2003] KLR 125**, a prima facie case was defined as follows:

“a prima facie case in a civil application includes but is not confirmed to a genuine and arguable case. It is a case 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.”

I am satisfied on the material before me that the plaintiff has established a prima facie case against

the defendant. The plaintiff has proved that she is the registered owner of the suit property. The plaintiff has placed evidence before the court that the suit property was initially registered in the name of Ongwacho and that she purchased the same from Ongwacho on a willing buyer willing seller basis. The plaintiff has also placed evidence before the court that Ongwacho transferred the suit property to her and that she was in possession thereof when the defendant entered thereon without a court order and displaced her. There is no doubt that the suit property and Plot No.1022 which the defendant claims to own are at the same location on the ground. However whereas the plaintiff has a title to the suit property and was in possession thereof at all material times, the defendant's title to Plot No.1022 is said to be in the process of being acquired. A title which is in the process of being acquired cannot defeat an existing title.

13. Section 25 (1) of the Land Registration Act, 2012 provides as follows:

“25(1) The rights of a proprietor whether acquired on first registration or subsequent for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject:-

- i. To leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**
- ii. To such liabilities, rights and interests as affect the same and are declared by section 28 not to noting on the register unless the controversy is expressed in the register.”**

The plaintiff's rights over the suit property conferred by the said provisions of the Land Registration Act, 2012 must be accorded due protection of law. I have no evidence on the material before me that the plaintiff's title to the suit property was acquired fraudulently as claimed by the defendant. Whether or not the said title is fraudulent is an issue that can only be determined at the trial. In any event, the fact that the plaintiff's title to the suit property is fraudulent could not justify the defendant's forceful entry and eviction of the plaintiff there from. I am satisfied that this is an appropriate case to issue the orders sought. The defendant has argued that if the orders sought by the plaintiff are granted, it will amount to eviction of the defendant who is now in possession of the suit property. I see no merit at all in this argument. From the evidence on record, I am convinced that the defendant did not obtain possession of the suit property lawfully. In the case of **Aikman -vs- Muchoki [1984]KLR 353**, it was held that a wrong doer cannot be allowed to keep what he has unlawfully taken. The court must take the parties back to the position in which they were before the defendant's forceful entry into the suit property with the assistance of the police officers from Kisii Central Police Station. In the case of **Kamau Mucuha -vs- The Ripples Ltd. (Civil Application No. Nai. 186 of 1992) (unreported)**, Justice Cockar, JA as he then was stated that,

“A party , as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.....” .

14. In the case of **Jaj Superpower Cash and Carry Ltd. –vs- Nairobi City Council & 2 others, Court of Appeal at Nairobi, Civil Appeal No.111 of 2002(unreported)**, the Court of Appeal said this at page 10,

“this court has recognized and held in the past that it is a trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

I am satisfied that the plaintiff stands to suffer irreparable loss if the orders sought are not granted. The plaintiff was in the process of developing the suit property when the defendant invaded the suit property, confiscated the construction equipments and pulled down the foundation structures that she had put up thereby forcefully evicting her from the site. If the orders sought are not granted, the plaintiff would stand

dispossessed of the suit property and as such she would be unable to continue with whatever activities she was carrying out therein. The plaintiff's loss in such event would be irreparable.

15. The upshot of the foregoing is that the Notice of Motion application dated 17th June 2014 is for granting. The same is allowed in terms of prayer (C) thereof. The plaintiff shall have the costs of the application.

Delivered, signed and dated at KISII this 14th of November, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Abobo for the plaintiff

Mr. Begi h/b for Oyugi for the defendant

.....Court Clerk

S. OKONG'O

JUDGE