



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIROMENT & LAND COURT CASE NO. 29 OF 2012

GRACE KERUBO OMANGA..... PLAINTIFF

VERSUS

ERICK MOMANYI ONGAU.....1ST DEFENDANT

HASSAN ONDICHO SIMBA..... 2ND DEFENDANT

RULING

1. The Plaintiff brought this suit against the defendants on 1st February, 2012 seeking among other reliefs, a declaration that the Plaintiff is the registered and/or lawful owner of all that parcel of land known as LR. No. KISII MUNICIPALITY/ BLOCK 1/ 588 (hereinafter referred to as “**the suit property**”), an order of eviction/ demolition to issue against the defendants in relation to the suit property, a permanent injunction restraining the defendants from entering into, trespassing onto, building onto, interfering with and/or in any other manner dealing with the suit property and general damages for trespass. Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 9th February, 2012 under certificate of urgency seeking interlocutory mandatory injunction directed at the defendants to vacate, be evicted and/or to grant vacant possession of the suit property and/or any portion thereof pending the hearing and determination of this suit and an interlocutory prohibitory injunction to restrain the defendants from entering into, re-entering, trespassing onto, building structures, cultivating, digging, interfering with and/or in any other manner whatsoever dealing with the suit property or any portion thereof pending the hearing and determination of this suit. The application was supported by the affidavit and further affidavit of the Plaintiff sworn on 9th February, 2012 and 18th June, 2012 respectively. The Plaintiffs application was brought on the grounds that; at all material times, the Plaintiff was and still is the registered leasehold proprietor of the suit property. The suit property was allocated to the Plaintiff by the Commissioner of Lands through a letter of allotment dated 6th June, 1986. When the suit property was allocated to the Plaintiff, it was un-surveyed residential plot then known as Plot No. 32, Kisii Municipality. On or about 6th June, 2009, the said Plot No. 32 was surveyed and given its current land reference number, namely, Kisii Municipality/ Block 1/588. The Plaintiff was duly issued with a beacon certificate by the surveyor who carried out the survey. Thereafter, the Plaintiff was issued with a lease dated 16th August, 2011 which was registered on 15th November, 2011 at Kisii District Land Registry. On the same day, the Plaintiff was issued with a certificate of lease. The Plaintiff carried out an official search on 30th January, 2012 which confirmed that the suit property is still registered in her name. The Plaintiff annexed to his affidavit sworn on 9th February, 2012, copies of letter of allotment dated 6th June, 1986, payment receipts for stand premium and annual rent, beacon certificate, Lease dated 16th August, 2011, certificate of lease dated 15th November, 2011 and certificate of official search dated 30th

January, 2012. The Plaintiff claimed that on or about the month of December, 2011, the defendants without any lawful cause or basis for doing so entered the suit property and started depositing building materials thereon. In furtherance of the said acts of trespass, the defendants on or about the 1st day of February, 2012 commenced the construction of a permanent structure on the suit property. The Plaintiff was apprehensive that the defendants said acts of trespass would deprive her of the suit property. It is on account of the foregoing that the Plaintiff approached the court for the reliefs sought in this application.

2. The Plaintiff's application was opposed by the defendants. The 2nd defendant swore an affidavit on 29th May, 2012 in reply to the Plaintiff's application while the 1st defendant swore affidavit on 22nd June, 2012 for the same purpose. In their response to the application, the defendants contended that the 1st defendant is the lawful owner of the suit property. They contended that the suit property was allocated to one, Samuel Matayo Moseti (hereinafter referred to as "**Moseti**") by the Commissioner of Lands through allotment letter dated 5th January, 1995. Pursuant to the said allotment, Moseti was issued with a lease for the suit property dated 14th May, 1999 which lease was registered at Kisii District Land Registry on 20th July, 1999. Upon registration of the said lease as a foresaid, Kisii District Land Registrar issued Moseti with a certificate of lease dated 20th July, 1999 for the suit property. Through an agreement for sale dated 22nd September, 2009, Moseti sold his interest in the suit property to the 1st defendant at a consideration of Ksh. 650,000.00. The suit property was transferred by Moseti to the 1st defendant, who became registered as the proprietor of thereof on 12th February, 2010.

By agreement for sale dated 18th February, 2011, the 1st defendant sold to the 2nd defendant the suit property at a consideration of Ksh. 700,000.00. The 2nd defendant paid to the 1st defendant the purchase price in full and the 1st defendant executed an instrument of transfer of the suit property in his favour. The suit property had however not been transferred to the name of the 2nd defendant as at the time this suit was filed. The 1st defendant carried out a search on the title of the suit property on 19th June, 2012 which revealed that the suit property is still registered in the name of the 1st defendant. The defendants annexed to their two affidavits, copies of a letter of allotment dated 5th January, 1995 in favour of Moseti, a lease dated 14th May, 1999 in favour of Moseti, a certificate of lease dated 20th July, 1999 in favour of Moseti, sale agreement dated 22nd September, 2009 between Moseti and the 1st defendant, a certificate of lease dated 18th February, 2010 in favour of the 1st defendant, a certificate of official search dated 19th June, 2012 with respect to the suit property indicating that the same is registered in the name of the 1st defendant, agreement for sale dated 18th February, 2011 between the 1st and 2nd defendants, a deposit slip for Ksh.600,000.00 deposited into the account of the 1st defendant by the 2nd defendant and a rates demand notice dated 21st February, 2011 for the suit property addressed to Moseti. The defendants contended that the Plaintiff has never been in possession of the suit property and that after purchasing the suit property from Moseti the 1st defendant operated a motor vehicle garage therefrom before selling it to the 2nd defendant who has now put up a storey building thereon. The defendants contended that in the circumstances, the injunction orders sought by the Plaintiff are unwarranted.

3. On 28th June, 2012, the advocates for the parties agreed to argue the application by way of written submissions. The defendants filed their submissions on 6th August, 2012 while the Plaintiff filed her submissions on 6th March, 2013. I have considered the Plaintiff's application together with the two affidavits filed in support thereof. I have also considered the submissions filed herein by the advocates of the Plaintiff. Equally, I have considered the affidavits filed by the defendants in opposition to the application and the submissions filed by the defendants' advocates. This is the view I take of the matter. The Plaintiff has sought both prohibitory and mandatory injunctions at this interlocutory stage. The principles applicable to applications for these type of injunctions are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd.**

[1973] E.A. 358, an applicant for a temporary injunction must prove that he has a prima facie case against the respondent with a probability of success and that unless the order sought is granted, he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. For a temporary mandatory injunction, an applicant must establish more than a prima facie case. The granting of a temporary mandatory injunction effectively determines a case without the benefit of a trial. An applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success here must be higher than that which is required for a prohibitory injunction. Such an applicant must also fulfill the usual conditions for granting the normal interlocutory injunction such as showing that he will suffer irreparable harm unless the orders sought are granted. In the case of **Shepherd Homes Ltd. –vs.- Shadahu [1971] 1 ch.34, Meggary J.** had this to say on interlocutory mandatory injunction;

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

4. In the case of **Redland Bricks Ltd vs. Morris [1970] AC 652**, it was stated that jurisdiction to issue a mandatory injunction“ **is a jurisdiction to be exercised sparingly and with caution but in a proper case, unhesitatingly**”. In the Court of Appeal case of, **Jaj Super Power Cash and Carry Limited vs. Nairobi City Council & 2 others, Nairobi, Civil Appeal No. 11 of 2002 (unreported)**, the court observed that a mandatory injunction at an interlocutory stage.....**“merely serves to redress the status quo ante in deserving cases until the main dispute is determined.”** Applying the foregoing principles to this case, the question that I need to answer is whether the plaintiff has satisfied this court that she has unusually strong and clear case against the defendants that warrants the issuance of the prohibitory and mandatory interlocutory injunctions sought. In my view, what has been brought out in this case is the ugly face of our land management and registration systems together with their attendant pitfalls. What has come out very clearly from the affidavits filed by both parties herein is that both the Plaintiff and the 1st defendant have titles to the suit property. Interestingly, both have letters of allotment, leases, certificates of title and are registered as proprietors of the suit property. What this means is that the suit property has two titles. What is a bit unique in this case is that the Kisii Land Registry and Kisii Municipal Council both seem also to have two files for this one parcel of land, one for the Plaintiff and another one for the 1st defendant. It takes a lot of bravery for a land registrar who is charged with the responsibility of keeping land records to issue two official searches for one parcel of land each showing a different proprietor. That is the state of our land registries in Kenya. What I can say in this case is that I am unable at this stage to determine even on a prima facie basis which of the two titles, one held by the Plaintiff and the other by the 1st defendant is genuine. This is an issue that will have to be determined at the trial upon taking evidence. The Plaintiff has therefore not convinced me that she has a prima facie case leave a lone a strong case against the defendants to warrant the granting of the orders of injunction sought. In the interest of justice, the order that commends itself to me to make in this matter is that which will preserve the suit property so that neither party transfers or alienates the suit property while this case is pending.
5. Due to the foregoing, the prayers sought in the Plaintiff’s application dated 9th February, 2012 are declined. In place thereof it is hereby ordered that, pending the hearing and determination of this suit or until further orders by the court, neither party shall sell, transfer, lease, charge or in any other manner alienate the suit property namely, L.R. No. Kisii Municipality/ Block I/ 588. Due to the peculiar nature of this case, the costs of the application shall be in the cause.

Dated, signed and delivered at KISII this 7th day of October, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Otieno holding brief for Oguttu for plaintiff

Mr. Minda for defendants

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

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