



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC DIVISION CASE NO. 677 OF 2012

KEFA NYAKUNDI ORWENYO & ANOTHERPLAINTIFFS

VERSUS

DAVID GACHERU NGOVU.....DEFENDANT

RULING:

The Plaintiffs/Applicants herein have brought this Notice of Motion dated 8th October, 2012 and have sought for various orders.

The orders sought are:-

- a. Spent
- b. Spent
- c. That the Court do issue an Order of injunction restraining the Defendants/Respondents whether by himself, his employees, servants and all agents or any person claiming under him whatsoever from developing and/ or trespassing on Plot No. 40 within **LR No. 6845/67/40 Urutagwo Mwiruti Women Group** from carrying any construction or works on the said plot or in any manner whatsoever interfering with the Plaintiff/applicant ownership, occupation and possession of the same pending the hearing and determination of this suit.
- d. The Court do issue any such further or other orders as it may deem fit and in the interest of justice.
- e. Cost of this application be paid by the Defendant /Respondent.

The application was supported by the grounds on the face of the application notably that 1st plaintiff is legal and lawful owner of **Plot No. 40** within **LR No. 6845/67/40 Urutagwo Mwiruti Women Group** and which the 1st Plaintiff has commenced construction, that 2nd Plaintiff is his brother who holds Power of Attorney as regards to the said parcel of Land. That Defendant has commenced construction on the said parcel of land and thus this suit.

The application was supported by the annexed affidavit of **Philip Osiemo Orwenyo**, the 2nd Plaintiff herein.

The application is opposed by the Defendant who filed his Replying Affidavit and averred that he is the lawful owner of **Plot No. 40** within **LR No. 6845/67/40 Urutagwo Mwiruti Women Group** having acquired the same in 1998. He annexed a copy of his ownership certificate marked **DGN1**.

That Plaintiffs invaded his plot (parcel of land) and started construction on the same. The Defendants

prayed for dismissal of the Plaintiff's suit and notice of Motion.

The Defendant filed a counter-claim dated 19/11/2012 and averred that the Plaintiff annexed document marked POO-1 supporting the Affidavit of **Philip Osiemo Orwenyo** sworn on 9/10/2012 is inadmissible in evidence, the same being in breach of the Stamp Duty Act chapter 480 Laws of Kenya and it ought to be struck out.

The parties consented to canvass the Notice of Motion and the preliminary objection together through Written Submissions which I have now considered.

I will first deal with the Preliminary Objection. Annexure **P 001** "**Power of Attorney to litigate**" is indeed one of the key documents for the Plaintiffs. The said document under eleventh Schedule of the Stamp Duty Act Chapter 480 Laws of Kenya is chargeable with Stamp Duty being a Power of attorney. Indeed Section 19 of the Stamp Duty states as follows:-

" No Instrument chargeable with Stamp Duty shall be received in evidence in any proceedings whatsoever unless it is duly stamped. No instrument chargeable with Stamp Duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped".

Having considered the entries under 'Eleventh Schedules', the court finds that the Power of Attorney is such an instrument that required to be stamped under the Stamp Duty Act. The said annexure P001 is not stamped as provided by section 19 of Cap 480 and therefore the said document is not admissible.

The Plaintiffs however stated that the Preliminary Objection is vague and not specific. 2nd Respondent e further submitted that failure to pay the stamp duty does not render the suit defective. Applicant relied on the case of **DT Dobie & Co.ltd Vs Joseph Muchina & Anothers (1980) eKLR**, where the Court held that:-

" No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment".

On his part, the Defendant relied on various cases; **Caltex oil (Kenya) ltd Vs Too (2001) LLR 2555, and Weetabix Limited Vs Healthy u Two Thousand Limited (2006)-eKLR** where the court held that:-

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Having considered the rival arguments herein, I am persuaded that annexure P 001 of the supporting affidavit of the 2nd Plaintiff sworn on 9/10/2012 offends the provisions of the Stamp Duty Act and I will not hesitate to strike it out. The Court upholds the Preliminary Objection raised by the Defendant and proceeds to strike out and expunge from the Court record **annexture P001**.

Having struck out the said annexure 'P001' which was the Power of Attorney donating power to the 2nd Plaintiff to bring this suit, can the Notice of Motion stand?.

It is very clear that the applicant has also based his Notice of Motion on annexure P002 a certificate of ownership to **Kefa Nyakundi Orwenyo**. The said certificate of ownership is not in the names of the 2nd Plaintiff Philip Osiemo Orwenyo. The document that the 2nd Defendant relied on to support the Notice of motion has been struck out. In essence it means that the Notice of Motion has been brought by a person who has no capacity to bring it.

Even if the expunged document was admissible and the Notice of Motion is found to have been properly brought before the Court, has the applicant herein established the threshold principles for grant of injunctive relief as was held in the case of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358?**. These Principles are:-

Applicant has to establish that he has a prima facie case with probability of success; that he will suffer irreparable damage and if the court is in doubt to decide the case on a balance of convenience.

It is evident that there are two Certificates of Ownership for Plot No. 40. One is issued to the Defendant and is dated **23rd July 1998** and the second one is dated 28th day of July 2005. They are both signed by Mrs A W Ngungi , the Chairlady.

The Plaintiffs alleged that the Defendant Certificate of Ownership is a forgery. However, such a determination can only be arrived at after evidence is called and tested in court. Such evidence can only be availed by officials of the **Urutagwo Mwiruti Women Group** who would shed light on which of the two Certificates of Ownership is genuine.

The court cannot rely on annexures P004 at this juncture to confirm that indeed **Kefa Nyakundi Orweyo** is the rightful owner of this Plot 40. The person who signed the said **annexture P 004** needs to avail himself in court to give evidence and his evidence be tested through cross-examination.

The court has also noted that Certificate of Ownership issued to the Defendant was issued on 23rd July, 1998 and Plaintiffs on 28th July, 2005. The issue of these Certificates of Ownership needs to be resolved by the trial Court. The court will therefore hesitate to find that the applicants herein have a **prima facie case** with high probability of success.

On the issue of whether the applicants would suffer irreparable loss that is not capable of being compensated by an award of damages , there is no evidence that applicants have developed the Plot and put any investment on it. Applicant has therefore failed to show that he would suffer irreparable loss. I rely on the case of **Mureithi Vs City Council of Nairobi (1976- 1985) EA 331** as quoted by the Defendant herein. Eventually, the court herein is not in doubt the balance of convenience do not tilt in favour of the Plaintiff /Applicants.

The upshot of the foregoing is that, the Plaintiffs' Notice of Motion dated 8th October, 2012 is dismissed with costs to the Defendant/Respondent.

It is so ordered.

Dated, signed and delivered this 4th day of October, 2013

L.N. GACHERU

In the Presence of:-

.....For the Plaintiffs'

.....For the Defendant

Simiyu: Court Clerk

L.N. GACHERU

JUDGE