



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 81 OF 2013

RAPHAEL THUKU GAKERE.....PLAINTIFF

-VERSUS-

STEPHEN MBUGUA KURIA.....1ST DEFENDANT

JARED WAINAINA WAWERU.....2ND DEFENDANT

JOHANESS S. SIAGO.....3RD DEFENDANT

SAMUEL KURIA.....4TH DEFENDANT

PHAROAH OMOKE.....5TH DEFENDANT

CHARLES MUNALA.....6TH DEFENDANT

RULING

The Plaintiff has filed a Notice of Motion dated 16th January 2013 seeking orders for an interlocutory temporary injunction against the Defendants whom he alleges have trespassed on his property by digging a foundation thereon. The Plaintiff claims he is the registered proprietor of the said property known as L.R. Nairobi/Block 144/1121 (hereinafter referred to as the suit property). He swore a supporting affidavit on 16th January 2013 to which he attached as evidence a certificate of lease with respect to the suit property issued to him on 26th February 2002, and a certificate of official search of the said property dated 3rd January 2013 showing him to be the registered proprietor.

The Defendants opposed the Plaintiff's Notice of Motion in a replying affidavit sworn by the 2nd Defendant on 31st January 2013. They claim that the Plaintiff's parcel of land is part of a larger parcel of land namely L.R No. 8479 which they have been occupation of with other persons, and which is the subject of ELC Suit No 409 of 2006. Further, that the Defendants title was issued in contempt of the orders given in ELC Suit No 409 of 2006 which they attached. The Defendants also attached pleadings from the said suit and a copy of title of the said land LR 8479.

The Plaintiff in a further affidavit sworn on 20th February 2013 stated that the title the Defendants are relying on was issued on grant No. IR 23575 which grant was surrendered to the Government of Kenya by its then registered owners, Mutiirithia Wa Andu Company Ltd, upon sub-division and issuance of leases under the Registered Land Act. He attached a copy of the Deed of Surrender dated 15th December 1999 registered as IR No. 23575/9. Further, that ELC Suit No 409 of 2006 was filed in court on 20th April

2006, and the orders the Defendants were relying upon were given on 27th September 2007, long after and he had been issued with his title on 26th February 2002. The Plaintiff also denied that the Defendants are in occupation of the suit property which is therefore not the subject matter of the said suit.

Parties were directed to file submissions which are the basis for this ruling. The Plaintiff's counsel in submissions dated 11th June 2013 argued that proof has been provided to show that the Plaintiff is the registered proprietor of the suit property, and his title is indefeasible and *prima facie* evidence of such proprietorship under section 32 of the Registered Land Act and section 26(1) of the Land Registration Act. Counsel relied on the decision in **Okere vs Kiiyuka & Others (2007) 1 E.A 304** in this respect. Further, that the allegations by the Defendants that the Plaintiff's title is not genuine are not supported by any evidence and are based on orders given after issue of the title and to which he was not a party. The counsel relied on the ruling by this court in **Moses Mthenge Ndivo vs Maria Kivinga Ndivo ELC Suit 527 of 2011** to argue that such allegations can only be established after full trial.

The counsel further argued that HCCC No 409 of 2001 did not relate to the suit property but to a different portion of L.R No 8479 occupied by the Defendants, and that in any case the title the Defendants were relying upon was surrendered to the Government on 15th December 1999. Consequently, that under section 44 of the Registration of Titles Act the interests of Mutiriithia Wa Andu Company Ltd as the registered owner vested in the Government. Lastly, it was submitted that the Plaintiff will suffer irreparable loss if the injunction is not issued as he will be denied access to his property and his right to property.

The counsel for the Defendants argued in submissions dated 4th July 2013 that the suit property is one of the titles comprised in L.R Number 8479 which they occupy and which has been the subject of litigation in HCCC 409 of 2006 and in which they have injunctive orders. Further, that the Plaintiff has not shown how he acquired the suit property, and granting the eviction orders will amount to their eviction.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The main issue before the court for determination is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. The requirements for the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

I am of the view that the Plaintiff has established a *prima facie* case as he has brought evidence of his title to the suit property. What I need to determine is whether there is a possibility that his title is vitiated as alleged by the Defendants. On the allegation made about the existence of the suit in HCCC 409 of 2006 and the orders given therein, I make the following observations. Firstly, the Plaintiff has brought evidence to show that the title the Defendants rely upon in HCCC 409 of 2006 was surrendered to the government on 15th December 1999.

Secondly, the Plaintiff was not a party in the said suit, which suit was instituted in 2006 and the orders therein relied upon by the Defendants granted in 2007 after issue of the title to the Plaintiff in 2002. The orders granted in the said suit cannot therefore form the basis of any irregularity in the issue of the said title. Lastly, I also note that the Defendants did not provide any evidence of actual possession of the suit property, and in their originating Summons in HCCC 409 of 2006 dated 20th April 2006 which they produced as evidence, they claim to occupy portions of L.R Number 8479 which are not specified. I am therefore of the opinion that the evidence provided by the Defendants at this stage is not sufficient to show a likelihood of irregularity in the Plaintiff's title nor of their possession of the suit property.

I accordingly allow the Plaintiff's Notice of Motion and hereby order that the Defendants by themselves, their servant, agents, assignees or any persons claiming title through them be and are hereby restrained from alienating, transferring, selling, disposing, using, charging, mortgaging, developing on or constructing on, entering upon, or in any manner whatsoever dealing with the suit property known L.R.

NAIROBI/BLOCK 144/1121 pending the hearing and determination of this suit, or until further orders of this Court.

The costs of the Plaintiff's Notice of Motion dated 16th January 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____3rd____ day of ____October____, 2013.

P. NYAMWEYA

JUDGE