



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 457 of 2011

DAVID KENNETH AWORI.....PLAINTIFF/APPLICANT

VERSUS

PHILIP GITONGA.....1ST DEFENDANT/RESPONDENT

MARGARET WANGARI GITONGA.....2ND DEFENDANT/RESPONDENT

REGISTRAR OF LAND – KAJIADO DISTRICT...3RD DEFENDANT/RESPONDENT

RULING

The application before the Court for determination is a Notice of Motion by the Plaintiff dated 29th August 2011. The application is brought under the provisions of Articles 40, 64 and 159 of the Constitution of Kenya, sections 27 and 29 of the Registered Land Act, sections 1A, 1B, 3A and 100 of the Civil Procedure Act, and Order 51 of the Civil Procedure Rules. The Plaintiff is seeking the following substantive orders:

1. The 1st and 2nd Defendants herein, their servants/employees or agents be restrained from accessing, trespassing, cultivating, digging, selling, transferring, charging, managing, constructing on, erecting illegal structures on and/or in any way other interfering with the Land Title Number Kajiado/Ongata-Rongai Township/62 pending the hearing and determination of this suit.
2. The Registrar of Land Kajiado District be restrained from effecting any transfer, charge or any other transaction relating to the Plaintiff's Land title Number Kajiado/Ongata-Rongai Township/62 pending the hearing and determination of this suit.
3. The 1st and 2nd Defendants herein be ordered to pull down all the illegal structures erected on Land number Kajiado/Ongata-Rongai Township/62 (hereinafter referred to as the suit property).

The grounds for the application are that the Plaintiff is the lawful and registered owner of the suit property, having acquired it free of any encumbrances or overriding interests, and has neither sold, gifted, leased, charged or in any way disposed of his land Title Number Kajiado/Ongata-Rongai Township/62. Further, that the 1st and 2nd Defendants have encroached on the suit property and have erected illegal structures thereon. The detailed facts giving rise to the application are detailed out in the Plaintiff's supporting affidavit sworn on 29th August 2011, to which is attached as evidence a copy of a certificate of lease and certificate of official search showing the Plaintiff to be the registered proprietor of the suit property, and photographs of the alleged construction thereon.

The 1st and 2nd Defendant filed replying affidavits, both sworn on 26th October 2011. The 1st Defendant stated that he was not aware of any construction in the suit property and he denied erecting any structures thereon or authorising any person to encroach on the Plaintiff's parcel of land. The 2nd Defendant averred that she is the owner of Plot No. 883/Residential at Ongata Rongai Trading Centre in Olkejuado County Council, having purchased the same from the original allottee on the 2nd March 1984, and has been occupying the plot since and paying rates to the council.

Further that she has fenced her plot with iron sheets and no construction has been started at the said plot. The 2nd Defendant stated that the photographs annexed by the applicant did not relate to her plot, and that the Plaintiff's claim is with respect to L.R. Number Kajiado/Ongata-Rongai Township 62 which is different from her plot.

The parties at the hearing of the application on 26th July 2012 wholly adopted their written submissions and requested for a ruling based on the same. The Plaintiff's learned Counsel in written submissions dated 28th February 2012 argued that a *prima facie* case of ownership under section 32(2) of the Registered Land Act (now repealed) had been established, since evidence of a certificate of lease relating to the suit property had been adduced. Further, that the 2nd Defendant had not adduced any conclusive evidence of ownership of her plot, particularly evidence of an allotment letter with respect to the plot nor of a sale agreement entered into between herself and the original allottee. The Plaintiff also submitted that the 2nd Defendant had not adduced any evidence of her registration as owner of the plot.

The 1st and 2nd Defendants' learned Counsel filed submissions dated 4th April 2012. The learned Counsel argued that the 2nd Defendant had annexed documents to show that she had been in possession of the plot since 1984, and that the Plaintiff had not proved that he had a *prima facie* case in that the photographs produced in evidence contradict those of the 2nd Defendant's which relate to a different plot, and that he had also not stated how he acquired the suit property. Further, that the Plaintiff had not demonstrated that he would suffer damage that cannot be compensated by an award of damages.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. At this stage what I am required to do is determine the application before me on the basis of the requirements stated in ***Giella vs Cassman Brown & Co Ltd, (1973) EA 358*** as to the grant of a temporary injunction, and in ***Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109*** as to the grant of a mandatory injunction.

In the case of a temporary injunction, the requirements 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. For a mandatory injunction to issue that there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of title to the suit property, and the Defendants deny that they have encroached on the said property which they allege is different from their property. The photographs and title documents produced in evidence by the parties are therefore of little assistance to the court, in the absence of a surveyor's report on the location and structures on the two properties alleged to be owned by the parties. I therefore do find that although the Plaintiff has established a *prima facie* case with respect to the suit property, this Court cannot proceed with a determination of the prayers in his application without a confirmation of the location of the suit property, and its relationship with the Defendants.

In order to facilitate the expeditious and just disposal of the application and suit filed herein, I hereby order as follows pursuant to section 1A, 1B, 3A and 63(e) of the Civil Procedure Act:

1. The *status quo* to be maintained as follows: both the Plaintiff and Defendants shall not construct on,

sell, transfer or otherwise dispose of the properties known as Land Reference Number Kajiado/Ongata-Rongai Township/62 and Plot No. 883/Residential at Ongata Rongai Trading Centre, and shall not demolish or in any way interfere with the structures built thereon, pending the hearing and determination of this suit or until further orders.

2. The Provincial Surveyor for Kajiado to prepare and file a report in Court within 30 days of service of this ruling on the location and coordinates of the beacons, and structures on the land parcels Numbers Kajiado/Ongata-Rongai Township/62 and Plot No. 883/Residential at Ongata Rongai Trading Centre, and on the structures that are presently constructed or situated on each of the two parcels of land.

3. The Plaintiff and Defendants shall provide the Provincial Surveyor with the necessary title and/or ownership documents to the said parcels of land and shall jointly bear the costs of the said Surveyor's report.

4. The Plaintiff shall serve a copy of this order on the Provincial Surveyor, Kajiado, and follow-up on the preparation of the said Surveyor's report.

The costs of the application dated 29th August 2011 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____9th____ day of ____October____, 2012.

P. NYAMWEYA

JUDGE