



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 1(A) OF 2020

WILSON MORRIS WAMBUAPLAINTIFF/APPLICANT

VERSUS

WASWA INVESTMENT CO. LTD.....DEFENDANT/RESPONDENT

RULING

1. In the Notice of Motion dated 17th January, 2020, the Plaintiff has sought for the following orders:

a. That this Honourable Court be pleased to grant a temporary injunction restraining the Defendant/Respondent, its agents or any person acting under it from entering, interfering and/or dealing in any manner whatsoever with the land known as Mavoko Town Block 3/60346 pending the hearing and determination of this suit.

b. That costs of the Application be borne by the Defendant/Respondent.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the registered proprietor of land known as Mavoko Town Block 3/60346 (*the suit property*); that the Defendant has illegally entered the suit property and that an order of injunction should issue.

3. In reply, the Defendant's Director deponed that on 15th November, 1994, the Defendant purchased land known as Lukenya Ranch Pot number 505 situate in Machakos County; that initially, the Defendant was registered as a Society and was known as Waswa Development Society and that the land that the Defendant purchased was sub-divided and allocated to individual members of the Defendant.

4. The Defendant's Director deponed that as per the Defendant's Records, it never allocated the Plaintiff the suit property and that the suit property was originally allocated and registered in the name of Mwalimu Town Properties.

5. According to the Defendant's Director, on 15th November, 1994, the Defendant's predecessor, Water and Sewerage Welfare Association, purchased the suit property from Mwalimu Town Properties Limited; that the suit property has never been registered in the name of the Plaintiff and that the Application should be dismissed. Both the Plaintiff and the Defendant's advocate filed brief submissions which I have considered.

6. Having considered the pleadings and the submissions of counsel, the only issue that arises for determination is whether the Applicant ought to be granted the order sought. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (*See Giella vs. Cassman Brown & Co Ltd (1973) EA 358 and Fellowes and Son v. Fisher [1976] 1 QB 122*).

7. What amounts to a *prima facie* case, was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* case as follows:

"...in Civil cases, it is a case in 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."

8. The Plaintiff has pleaded in his Affidavit that he is the registered proprietor of land known as Mavoko Town Block 3/60346 (*the suit property*), and that as such, he is entitled to an order of injunction.

9. To show that he is the registered proprietor of the suit property, the Plaintiff annexed on his Affidavit the Title Deed that was purportedly

issued in his favour on 15th June, 2017. In addition to the copy of the Title Deed, the Plaintiff also exhibited a photograph showing the developments he has made on the suit property.

10. On the other hand, the Defendant's case is that its predecessor, Water and Sewerage Welfare Association, purchased the suit property from Mwalimu Town Properties Limited who was the registered proprietor of the suit property.

11. The Defendant produced in evidence two Agreements, one dated 15th March, 1994 and the other one dated 14th November, 2006.

12. In the Agreement of 15th November, 1994, Mwalimu Town Properties Limited sold to Water and Sewerage Welfare Association a portion of land known as Plot No. 505 "in land owned by Lukenya Ranching and Farming Co-operative Society Limited", being 360 plots measuring approximately 50ft x 100ft each.

13. Although the Defendant's Director deponed that Water and Sewerage Welfare Association is the Defendant's predecessor, there is no evidence to prove that fact. Indeed, the Defendant did not exhibit any document to show the nexus between the Defendant and the said Water and Sewerage Association.

14. Furthermore, the Defendant did not exhibit any evidence to show that the suit property falls within the 360 plots that the said Water and Sewerage Welfare Association purportedly bought from Mwalimu Town Properties Limited, or that the said Mwalimu Town Properties Limited ever owned the suit property.

15. The Plaintiff has exhibited the copy of the Title Deed which was issued in his name on 15th June, 2017. That being the case, and in view of the provision of Section 26(1) of the Land Registration Act which provides that a Certificate of Title issued by the Registrar shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, it is my finding that the Plaintiff has shown that he has a *prima facie* case with chances of success.

16. Furthermore, the Plaintiff is in possession of the suit property, and the denial of an injunctive order is likely to cause him irreparable injury that cannot be compensated by way of damages. The balance of convenience also tilts in favour of the Plaintiff.

17. For those reasons, I allow the Plaintiff's Application dated 17th January, 2020 as follows:

a. A temporary injunction be and is hereby issued restraining the Defendant/Respondent, its agents or any person acting under it from entering, interfering and/or dealing in any manner whatsoever with the land known as Mavoko Town Block 3/60346 pending the hearing and determination of this suit.

b. The Defendant to pay the costs of the Application.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 13TH DAY OF NOVEMBER, 2020.

O. A. ANGOTE

JUDGE