



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO 20. OF 2020

YUCABETH MONDA.....PLAINTIFF

VERSUS

PAUL MICHIRA NYAKWEBA.....1ST DEFENDANT

ABEL MOSETI OGARO.....2ND DEFENDANT

COUNTY LAND REGISTRAR, KISII.....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff/Applicant filed a Notice of Motion dated 1st July 2020 seeking an order of temporary injunction restraining the 1st and 2nd Respondents from evicting, constructing, developing selling, disposing of or in any other manner interfering with the Applicant's possession of land parcel number NYARIBARI MASABA/BOKIMOTWE/1/1657 pending the hearing and determination of the suit herein. The said application is based on the grounds specified on the face of the Notice of Motion and the Applicant's supporting affidavit sworn on the 1st of July 2020.

2. It is the Applicant's contention that she bought a parcel of land measuring 25 feet by 100 feet comprised in land title number NYARIBARI MASABA/BOKIMOTWE/1/1630 from Joseph Keya Otworu-deceased. The said land was registered in the name of Samwel Mose Otworu who held the same in trust for himself and his brother Joseph Keya Otworu. The said Samwel Mose Otworu later sub-divided the land and transferred a portion known as NYARIBARI MASABA/BOKIMOTWE/1/1657 to the applicant and she was issued with title deed in the year 2008. She adds that she has been in possession of the suit property since she bought it.

3. The Applicant further avers that sometime in June 2020 the 2nd Respondent brought some building materials to the suit property with the intention of commencing construction thereon. She stopped him and reported the matter to the Assistant Chief. She then conducted an official search at the Lands Office where she discovered that her name had been crossed out in the land register after. She avers that the Land Registrar has never recalled her title for cancellation as she still holds the title issued to her. The Land Registrar was unable to furnish her with any complaint by the original owner of the suit property, which led to the purported cancellation of her title. She therefore depones that the Land Registrar colluded with the 1st and 2nd Respondents to defraud her of her interest in the said title. It is her deposition that she is an old lady who depends on the suit property with her family and if an injunction is not issued she will suffer irreparable loss. She has annexed a copy of the title deed, mutation forms, green card and transfer forms as well as a letter addressed to the Land Registrar.

4. In addition to the Applicant's affidavit, one Samwel Mose Otworu has sworn an affidavit corroborating the Applicant's averments that the Applicant bought land from his late brother Joseph Keya Otworu in 1994. He confirms that he transferred the Applicant's portion to her after which she was issued with a title deed in 2008. He avers that he has never made any complaint against the Applicant to the Land Registrar that she obtained the title without his knowledge. He further depones that he has never sold the suit property to the 1st Respondent and affirms that the land belongs to the Applicant.

5. The 2nd Defendant opposed the application through his Replying Affidavit sworn on the 15th July 2020. He depones that he is the registered owner of the suit property which he purchased from one Paul Michira Nyakweba (1st Defendant). He denies having had any transaction with the Applicant. He avers that the 1st Defendant bought the suit property from the Applicant's husband, one Evans Mondo Ombworo who is in a position to shed light on the Applicant's allegations.

6. In response to the Replying Affidavit, the Applicant filed a Further Affidavit denying the allegations in the 2nd Defendant's affidavit and

stating that the 2nd Defendant has not annexed any documents to prove his averments.

7. The application was canvassed by way of written submissions and counsel for the Applicant filed his submission on 8th October 2020, while counsel for the 2nd Respondent filed his on 18th September 2020. I note that counsel for the 2nd Respondent has annexed some documents and photographs to his submissions in support of his client's case contrary to the established rules of procedure.

ISSUES FOR DETERMINATION

8. The only issue for determination is whether the Applicant has met the conditions for the grant of a temporary injunction.

ANALYSIS AND DETERMINATION.

9. In order to qualify for an order of injunction an Applicant must meet the conditions set out in the case of **Giella v Cassman Brown & Company Limited 1973 E.A358** which are as follows:

“First, the Applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

10. The first hurdle that the Applicant must surmount is to demonstrate that he has a prima facie case with a probability of success.

In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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”

11. The Applicant has explained how she acquired the suit property through purchase from one Joseph Keya Otworu and was later issued with a title deed after the transfer was effected by Samwel Mose Otworu, who was holding the mother title in trust for himself and his brother Joseph Keya Otworu. She later learnt that the Land Registrar had purported to cancel her title without any recourse to her. Samwel Mose Otworu has sworn an affidavit confirming the sale and transfer of the suit property to the Applicant. He denies that he made any complaint to the Land Registrar to warrant cancellation of the Applicant's title. Prima facie, the Applicant has demonstrated that her land is in danger of being alienated without any proper explanation. It is therefore my finding that she has established a prima facie case with a likelihood of success.

12. Moving on to the second condition, the Applicant has deposed that she is an elderly woman who together with her family depends on the suit property and if the order of injunction is not granted, she will suffer irreparable loss. She states that she has been in possession and occupation of the suit property since 1994 when she bought it. The Respondents have not refuted this allegation and I have no reason to disbelieve her. On his part the 2nd Respondent claims to have acquired title to the suit property in May 2020. In the premises, I find and hold that the Applicant has demonstrated that she stands to suffer irreparable loss which cannot be compensated by damages.

13. Since the court is not in any doubt as to whether or not the Applicant should be granted injunctive orders, I need not consider the balance of convenience.

14. The upshot is that the application has merit and I grant it and make the following orders:

a) A temporary injunction be and is hereby issued restraining the 1st and 2nd Respondents by themselves their agents, servants, or persons acting under their instructions from evicting, constructing, developing, selling, disposing of or in any other manner interfering with the applicant's possession of land parcel number NYARIBARI MASABA/BOKIMOTWE/1/1657 pending the hearing and determination of this suit.

b) The costs of the application shall be in the cause.

Dated, signed and delivered at Kisii this 3rd day of December, 2020.

J.M. ONYANGO

JUDGE