



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 444 OF 2017

ANGELA VALENTINE FERNADES.....PLAINTIFF

-VERSUS-

JUMA MUTHU.....DEFENDANT

RULING

1. The plaintiff/applicant has moved this Court vide a notice of motion dated 7th December 2017 which motion is premised on Order 40 of the Civil Procedure Rules. The applicant seeks for orders:

a. Spent

b. Spent

c. That this honourable Court be pleased to issue an injunction restraining the defendant either by himself, his agents, servants and/or employees from trespassing, excavating and/or carrying out construction activities in the plaintiff's parcel of land known as L. R No. 318/II/MAINLAND NORTH pending the hearing and determination of the suit herein.

d. That costs of this application be provided for.

2. The application is supported by the applicant's affidavit and the grounds inter alia; that the plaintiff is the registered owner of the suit land No 318/II/MN. Secondly that the defendant has trespassed on the said parcel and has commenced excavation and construction works. In the supporting affidavit, Ms Angela deposes that she has made several attempts to stop the defendant's activities including formally writing to him but he has failed to heed. That the defendant's actions has denied her right to property and the activities are causing wastage thus the need to issue the orders prayed for.

3. The defendant via a replying affidavit sworn on 3rd February 2018 denied the facts pleaded by the applicant stating the application lacks merit, is frivolous and an abuse of the Court process. The defendant denied that the applicant is the registered owner of the suit land by annexing a copy of the Court ruling made in Mombasa RMC Civil Case No 2695 of 2017 between *Zavion Remedios, Mr Olinda Fernandes and Juma Mdui*. The Respondent avers that he was born on the suit property while his father David Mdui was working as the caretaker of the then registered owner Caraciolo Baotista Gomes. That Baotista left the country in 1965 and never returned and that he later heard the man died in mid 1970s.

4. The Respondent further deposed that since the death of his father he is the one who has been guarding the suit property from squatter invasions. The Respondent pointed out that there was irregular change of plaintiff in RMCC 2695 of 1997 where an ex parte judgement had been obtained and which ex parte judgment was later set aside on 23rd January 2013 by Hon. Kitagwa RM. The Respondent added that when the plaintiffs in the mentioned suit failed to prosecute it, he (the Respondent) applied to the National Land Commission to be allotted the land and annexed copies of correspondences exchanged in respect thereof. It is his case that the plaintiff has no basis for claiming the suit property. He urged the Court to dismiss the application.

5. The Applicant filed a supplementary affidavit on 15th March 2018 to contest the issues raised in the Replying affidavit. She maintained having a good title to the suit land and that the defendant is a mere trespasser. That the defendant has not shown the interest he has over the suit property.

6. The parties filed written submissions on 24.7.2018 and 24.8.2018 which submissions I have duly considered. From the pleadings filed, the defendant has raised two main issues which I find to be of relevance for purposes of determination of this application i.e.

i. Whether the applicant has demonstrated having a good title to the suit land.

ii. Whether the Respondent having alleged extended occupation of the suit land raises the question on whether or not orders of temporary injunction can issue pending hearing and determination of the suit.

7. The Applicant annexed a certificate of the title to the suit land which at entry No 13 showed the same was registered in her name pursuant to a vesting order issued in RMCC No 2695 of 1997 on 21st February 2007. To counter the vesting order, the Respondent annexed a copy of an application dated 20th February 2012 where he prayed for setting aside of the vesting order issued on 4th February 2007 amongst other prayers. The application was heard and the Court rendered itself on 23rd January 2013 allowing the prayer for setting aside of the vesting order.

8. In the supplementary affidavit, the applicant deposed that the annexing of pleadings from the previous suits was of no relevance to the present suit. I find this averment quite interesting for two reasons. First the applicant did not find it necessary to confirm whether or not the ruling rendered on 23rd January 2013 was indeed valid as it was material to her case. This was the crux of the matter as the order which conferred registration of the title in her names having been set aside. Secondly, she did not bother to inform the Court whether the previous suit No 2695 of 1997 suit is still alive or not. Since the order which conferred title to the applicant was set aside and no further orders have been shown to this Court to have been given in that suit, I find that the applicant has not demonstrated a prima facie case.

9. The second issue is when the defendant entered the suit land. The affidavit in support of the motion states that the defendant is trespassing on the land and has not shown any interest if at all. The Respondent in rebutting the allegation deposed that he was born on the land and that on learning that the previous owner may have passed on applied to the National Land Commission to be allocated the suit property. The applicant once again failed to address the Court on when the defendant entered the suit land. If it was before her registration as owner thereof as alleged, then issuing the orders sought would amount to asking the Court to undo that which was already done i.e. evicting the Respondent at an interlocutory stage without a hearing. The effect of the facts presented by the Respondent is that the balance of convenience tilts in his favour.

10. In conclusion therefore, I find the application is below the threshold for granting of temporary injunctions. The same is hereby dismissed with costs to the Respondent.

Dated, signed & delivered at Mombasa this 12th February 2019

A. OMOLLO

JUDGE