



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 24 OF 2015

ANIELLO STORELLI.....PLAINTIFF

VERSUS

DAMARIS MWONGELI.....1ST DEFENDANT

SNOW CITY LIMITED.....2ND DEFENDANT

RULING

1. For determination is the Notice of Motion dated 19th February 2018 brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 1(a) and 4 and Order 51 Rule 1 of the Civil Procedure Rules and Paragraph 20 of the Practice Directions on proceedings in the Environment and Land Court in which the plaintiff is seeking an order that pending hearing and determination of the suit the court issues a temporary injunction against the defendant, her agents, representatives, assignees or anybody claiming through or under her from interfering with the Plaintiff's peaceful possession, enjoyment and cultivation of properties **TITLE NUMBERS KWALE/WAA/932 and KWALE/WAA/1206**. The Plaintiff/Applicant also filed the Notice of Motion dated 18th April 2018 brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rule and Article 159 (2) (d) of the Constitution seeking a temporary injunction restraining the defendants from constructing and/or carrying out further construction and/or developing new houses, buildings/villas on properties **TITLE NUMBER KWALE/WAA/932, AND 1206 and KWALE/GALU KINONDO/1103, 1105, 1106, 1107, 1111,1112,1113, 1114, 1119, 1120, 1121 and 1122**.

2. The applications are premised on the grounds on the face of the motions and supported by the affidavits of Aniello Storelli, the applicant sworn on 19th February, 2018, and on 18th April 2018 and a supplementary affidavit sworn on 28th May, 2018. Briefly, it is the applicant's case that he purchased the suit properties and had them registered in the defendants names, having met and lived with the 1st Defendant as a couple. That they have been collecting rent, jointly with the 1st defendant until 2014 when the defendants directed tenants to pay rent to the 1st defendant's personal account, leaving the applicant with minimal or without income. The applicant avers that since 2017 he has been doing small scale farming on **TITLE NUMBERS KWALE/WAA/932 and KWALE/WAA/1206** but the 1st defendant, with a view to further frustrate the applicant, has interfered with the applicant's possession and cultivation by threatening to evict the applicant's workers and threatening to uproot the plants thereon. The applicant avers that unless restrained by the order of court, the defendants will continue with the interference, putting the applicant to hardship and irreparable loss.

3. The applicant states that this court has so far issued three interim injunctive orders. That on 12th June, 2015, the court (Omollo, J) issued on interim injunction restraining the defendants from selling, disposing of, sub dividing and/or charging the suit properties pending hearing and determination of the main suit, and on 30th October, 2017 this court issued on interim injunction restraining the applicant from constructing on the suit properties pending the hearing of the application on 30th November, 2017; and on 20th February 2018 this court issued another injunctive order restraining the defendants from interfering with peaceful possession and cultivation of **TITLE NUMBER KWALE/WAA/932 and 1206**. The applicant avers that the above orders are to the effect that both parties are in effect barred and restrained by the court from engaging in any sort of activity that may interfere with the *status quo ante* while the suit continues.

4. The applicant states that he has since the issuance of the orders aforesaid abstained from interference with the suit properties in expectation that the defendants will also obey this court's orders. The applicant further states that he has learnt that the defendants are constructing three big villas on the suit properties and is apprehensive that the defendants may have already disposed part of the suit properties to third parties who have no knowledge of the court orders and who are now developing the suit properties. The applicant contends that the actions of the defendants of constructing on the suit properties amount to utilizing the land as an owner would and in sense amounts to them taking over the suit properties prior to determination of who the true owner is. The applicant avers that the actions of the defendants are very calculative and are bent on dispossessing the applicant of the suit properties and forcibly occupy them, and thereby put the applicant to great hardship.

5. The applications are opposed by the defendants who filed a replying affidavit dated 6th March 2018, grounds of opposition dated 28th

April 2018 and another replying affidavit dated 28th April 2018 sworn by the 1st defendant. It is the defendant's contention that the application dated 19th February 2018 is in conflict with the courts orders of 18th October 2017. The 1st defendant avers that she constructed the apartments through the 2nd defendant in whose names the relevant properties are registered and that the applicant has no right to incomes therefrom. The 1st defendant states that she has been farming on **PLOT NO. KWALE/WAA/932 and 1206** since 2014 but the applicant entered thereon in 2015 and sold off livestock and trespassed again in 2017 and cut down trees.

6. It is the defendants' contention that the applications are sub judice and res judicata. The defendants aver that the applications are incurably defective, incompetent and should be dismissed in limine, adding that the applicant has not satisfied the conditions for issuance of the orders sought. In particular, that the applicant has failed to establish a prima facie case or any irreparable harm likely to be suffered. The defendants state that the application is made in bad faith and underscored by ulterior motives which include and are not limited to deceiving and misleading the court and that it is an abuse of the court process and should be dismissed.

7. The 1st defendant deposes that she is the registered proprietor of **PLOT NO. KWALE/WAA/932 and PLOT NO. KWALE/WAA/1206** while 2nd defendant is the registered owner of plots **KWALE/WAA/1103, 1105, 1106, 1108, 1111, 1114, 1119 AND 1120**. The defendants deny having disobeyed any court orders and further deny undertaking any constructions on the suit properties. They accuse the applicant of disobeying court orders by continuing to occupy, construct, and trespass upon **PLOT NO. KWALE/WAA/932 and 1206**. It is the defendants' contention that the applicant has come to court with unclean hands for he continues to construct structures on the said properties and even harvesting trees and taking away the defendants animals.

8. The advocates for both parties agreed to dispose of the application by way of written submissions. The applicant's advocate filed their submissions on 8th October 2018 while the defendants' advocates filed theirs on 15th August 2018. The applicant submitted inter alia, that the application is not res judicata because the parties are different, given that the 2nd defendant was not a party to the suit at the time of hearing and determination of the initial application, that there are new facts at play as the defendants are seeking to dispossess the applicant of the suit properties and that the issue of possession was not in issue in the previous application. The applicant relied on the case of **Uhuru Highway Development Limited –v- Central Bank of Kenya & 2 Others (1996) eKLR**. The Applicant further submitted that he has established a prima facie case as he has been in possession of the Waa Properties and relied on the previous ruling and the site visit report filed. The applicant further submitted that if the applications are not allowed he will suffer irreparably as he stands the risk of being evicted from the suit properties that serve as his only source of livelihood, and that the balance of convenience lies in his favour.

9. The defendants submitted that the applications are sub judice and res judicata and therefore an abuse of the court process. The defendants relied on the case of **Heritage Insurance Company Ltd –v- Patrick Kasina Kisitu (2015) eKLR; Joseph Gichuhi and Another –v- Agnes Mwenesi Siteka, Joseph Makarios –v-s Benardicat Escalambo & Another; and John Bosco Ngeta Maundu –v- William Wambua Kiwia & 3 Others**.

10. I have considered the applications and the rival submissions. The applications herein are for injunctive orders which are equitable reliefs granted at the discretion of the court. Further the court will warn itself that at this stage, it is not dealing with the disputed facts to finality but only determining whether the applicant is deserving of injunctive orders. The court will also take into account that injunctive orders are issued whenever the suit property is in danger of disposition or alienation before the issues in dispute have been resolved. See the case of **Noormolhammed Janmohammed –v- Kassam Ali Virji Madhani (1953)20 IRK 8** where the court held that:

“Temporary Injunctions are granted where there is evidence of immediate danger to property by sale or other disposition. The purpose of temporary injunction is to preserve the status quo.”

11. It is further evident that a party seeks for injunctive relief when he/she feels that his/her right has been infringed. The court will be guided by the principles set out in the case of **Giella –v- Cassman Brown Co. Ltd (1973) EA 358**. These principles are:

- a. **The applicant must establish that he has a prima facie case with probability of success.**
- b. **That the applicant will suffer irreparable loss which cannot be adequately compensated by an award of damages.**
- c. **When the court is in doubt, to decide the case on a balance of convenience.**

12. Are the application herein res judicata and or sub judice? It is not in dispute that vide its order dated 12th June, 2015, the court (Omollo, J) granted an order of injunction to preserve the suit properties and restrained the 1st defendant or her representatives from selling, disposing of, sub-dividing and/or charging the suit properties pending the hearing and determination of the suit. On 28th May 2018 the court, with the consent of the parties ordered a site visit which was done by the Deputy Registrar on 20th July 2018. The purpose of the site visit was to confirm the position on the ground in regard to the suit properties which are claimed by both parties. The said report indicated that the properties known as **KWALE/WAA/932 and 1206** were farms with Moringa Plantation and that the plaintiff was interacting with the staff on the ground and seemed to be the one overseeing the cultivation. On the other hand, the 1st defendant was the one pointing out which of the properties known as **KWALE/GALU KINONDO/1103, 1105, 1106, 1107, 1111, 1112, 1113, 1114, 1119, 1120, 1121 and 1122** had been sold or not sold. The court order of 12th June, 2015 was to preserve the suit properties. The court specifically made an order that the said properties should not be sold or disposed of pending the hearing and determinations of the suit. When the court made the order on 12th June, 2015, the 2nd defendant was not yet a party to the suit. The 2nd defendant was joined in the suit on 10th May 2017. Some of the suit properties are in the name of the 2nd defendant. If the suit properties are sold before the suit is heard and determined, the order of the court made on 12th June 2015 will be in vain. The court cannot issue orders in vain.

13. Since the dispute between the parties is over ownership of the suit properties and in view of the order of the court made on 12th June 2015, which is still in force, I find that the order that best commends itself in the circumstances of this case to be an order of status quo as

confirmed by the site visit report dated 23rd July 2018. I proceed to order that status quo be maintained pending the hearing and determination of the suit. Costs of these proceedings shall be in the cause. It is so ordered

DATED, SIGNED and DELIVERED at MOMBASA this 13th day of March 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Bwire for Plaintiff

No appearance for defendants

Yumna Court Assistant

C.K. YANO

JUDGE