



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 144 OF 2018

LILIAN AKINYI ABUTO.....1ST PLAINTIFF

WILLY STUCKI.....2ND PLAINTIFF

-VERSUS-

PETER KINYANJUI GITAU alias PETER KAMBO GITAU...1ST DEFENDANT

FREDRICK OTIENO OYUGI.....2ND DEFENDANT

THE LAND REGISTRAR MSA.....3RD DEFENDANT

RULING

1. For determination is the plaintiffs' application dated 14th June 2018 brought under the provisions of Order 40 of the Civil Procedure Rules and article 159 of the Constitution. The plaintiffs hereinafter referred to as the applicants are seeking grant of orders:

1. Spent

2. Spent

3. That this honourable Court be pleased to issue an order restraining the defendants, their servants, agents employees or advocates from further dealing, construction and or development of the

5. That the costs of this application be provided for.

2. In support of the prayer for granting of the orders, the 1st applicant swore an affidavit dated 14th June 2018 where she deposes that;

“1. That I am the proprietor of the suit property herein situated at Nyali within Mombasa County being SUBDIVISION NUMBER 13078/3 Original Number 13030/50 as delineated on land Survey Plan Number 252039 being CR No. 37340 jointly with the 2nd Plaintiff/Applicant WILLY STUCKI.

2. That suit property was legally purchased by I and the 2nd Defendant/Respondent vide Agreement for sale dated 23rd January 2004. Annexed hereto are copies of agreement of Sale dated 23rd day of January 2004 and Transfer marked as L.A.A.1 & 2 respectively.

3. That the Defendant/Respondent in collaboration with his agents, servants, employees and conies invaded the suit property herein and have commenced construction as at now the same is at a very advanced state without the Plaintiffs/Applicants knowledge, consent or approval. Annexed hereto are copies of photographs showing the developments/construction on the suit property marked as L.A.A.3.

4. That the certificate of Title indicates various transactions including transfer instruments lodged at the Ministry of Lands Mombasa purporting to vest ownership and/or proprietorship of the suit property to various persons that I do not know. Annexed hereto is a copy of CERTIFICATE OF TITLE CR NO 37340 marked as L.A.A.7.

5. That at no given point have I harboured the intentions of selling this piece of land and that the Defendant/Respondent cannot justify how he ended up becoming the proprietor of the suit property herein.”

3. The application is opposed by the 1st Respondent via his replying affidavit sworn on 16th August 2018. Mr Gitau deposes to purchasing property no subdivision 13079 (Original No 13030) Section 1 MN from Mr Hassan Abdullahi Hassan on 20th April 2016 Mr Gitau admitted paragraph 2 of the supporting affidavit but added that the applicants conveyed their interest over the suit property to a Mr Fredrick Otieno Oyugi on 27th May 2009 as shown in entry No 7 of the instrument of title.

4. The Respondent denied that he has illegally entered the suit property since the proprietorship was legally vested on him being the 5th purchaser of the property from the plaintiff. The Respondent accused the applicants of abusing the Court process in bringing the present application. He attached documents to prove his ownership of the suit property which included a sale agreement; certificate of title; payment slips for stamp duty and approvals for his developments. The Respondent urged the Court to dismiss the application.

5. The 1st applicant filed a further affidavit on 3rd October to deny the 1st Respondent’s averments as contained in the replying affidavit. She deposed that Mr Hassan did not have a good title to pass to the 1st defendant. That there is nothing to show for the transfer from the applicants to the 2nd defendant. She deposed that on learning of the 1st defendant’s encroachment, she sent her agents to immediately make the 1st defendant aware of their rights over the land. She urged the Court to grant the orders sought in their motion.

6. The 1st defendant filed his submissions on 26th October 2018. The plaintiff filed her submissions on 12th October 2018. The 3rd defendant (the A. G) informed Court that the orders do not affect them and so do not wish to participate in the application. It was not clear whether the 2nd Respondent was served with the pleadings herein after the plaint was amended to introduce him as a party to the proceedings.

7. At paragraph 5 of the plaintiffs’ submission they listed the issues for determination to include:

“a) Whether legal & proper title could be transferred to and by the defendants without knowledge of the plaintiffs.”

“b) Who is the legal owner of all the property known as Subdivision Number 1309 (Original Number 13030/50) Section 1 Mainland North C.R. 37340?”

They proceeded to make submissions on the same. In my view and I so hold, these are issues for determination in the main suit and it is premature to delve into them before the matter goes for full trial. The plaintiffs thus have not addressed the Court on whether their application satisfies the principles for granting of an injunctive relief.

8. The 1st defendant on his part submitted that the applicants have in the pleadings referred to their land as subdivision No 13078/3 and not the 1st defendant’s land No 13079. The 1st Respondent submits that he is in physical possession of the land and also has a valid title. That the applicant has not produced any evidence if alleged fraudulent transfer of the suit property thus they have failed to demonstrate a prima facie case with a probability of succeeding.

9. The 1st Respondent submitted on the rights of a proprietor as provided for in section 24 & 25 of the Land Registration Act and Section 23 of the Registration of Titles Act which submissions are premature in light of the fact that this suit is challenging the authenticity of his title.

10. On whether the applicants stand to suffer irreparable loss, the 1st defendant submits that the applicants have failed to satisfy this principle. It is his case that the balance of convenience tilts in his favour. To support this, he cited the holding in the case of **Jan Bolden Nielson vs Herman Phillipis & 2 others (2012) eKLR** and urged the Court to disallow the motion.

11. I have taken into account the pleadings as filed and the submissions rendered. The annexure marked **PKG 3** in the replying affidavit shows the plaintiff was registered as owner of the suit property No 13079 on 22nd December 2006. Subsequently there are eight entries on the suit title before the registration of the 1st defendant on 27th April 2016. The plaintiffs have pleaded that they have never sold their interest in the suit land to anyone.

12. The 1st entry was a Caveat by Joab Juma Pambo claiming purchasers’ interest that was removed by a Court order on 5th June 2008 under entry Nos 4, 5 & 6. After the lifting of the Caveat, a transfer was registered in favour of the 2nd Respondent on 25th September 2008 before another transfer to Milton Developers Ltd (on 27.5.2009) and Hans Peter & Belinda Omondi on 6.4.2010. Later Hassan Abdullahi Hassan acquired the interest vide a transfer registered on 5.5.2011. Hassan later sold his interest to the 1st defendant.

13. It is evident there are many transactions that took place before the 1st defendant acquired his interest over the suit land and which transactions the plaintiffs are not challenging in this suit including the transfer to Fredrick Otieno Oyugi. I note that entry No 6 refers to a raising order in High Court Civil Suit No 260 of 2008 (O.S) which the applicants have not said anything about. It is therefore difficult to make a finding at this stage that the plaintiffs have made a prima facie case against the 1st defendant who is a 5th purchaser to warrant the granting of an injunction.

14. On irreparable loss, the applicants annexed a sale agreement made on 23rd January 2004. Similarly, the 1st defendant also annexed a sale agreement dated 20th April 2016. Both agreements have attached a monetary value to the suit land meaning the loss if any can be quantified. In the plaint, there is a prayer for general damages. Consequently if the plaintiffs’ suit succeeds they can be compensated by an

award of damages. Hence the loss if any does not meet the threshold of “*irreparable loss*” principle as was settled in the case of Giella vs Cassman Brown.

15. On balance of convenience, it is not in dispute that the 1st defendant is in possession and is currently undertaking developments on the land. Given the circumstances of this case, the balance of convenience tilts in his favour until a determination is made whether he has a good title or not. However if the 1st defendant chooses to continue with his development, then he shall be doing so on condition that the plaintiffs will be under no obligation to compensate him should the plaintiffs case succeed. In summary, the plaintiffs’ motion is found to be without merit. The same is dismissed with an order for each to bear their costs of the application.

Dated, signed & delivered at Mombasa this 9th April 2019

A. OMOLLO

JUDGE