



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 197 OF 2018

MOVE ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

BENARD MUTHUKA MUTUA.....DEFENDANT

RULING

1. In the Application dated 8th October, 2018, the Plaintiff is seeking for the following orders:

a. That a temporary injunction restraining the Respondent/Defendant, their employee's servants and or agents or anyone claiming from them from either trespassing, evicting, demolishing, excavating, constructing, building, developing, disposing or in any other manner whatsoever interfering with all that parcel of land known as L.R. No. 7590/3 (I.R. No.19157) situated in Mavoko within Machakos County pending hearing and determination of this suit.

b. That the O.C.S Kyumvi Police Station to ensure enforcement of the orders.

c. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff's Director who has deponed that he is the registered proprietor of land known as L.R No. 7590/3 situated in Mavoko within Machakos County (*the suit land*); that the Plaintiff has been in peaceful occupation of the suit land until 4th October, 2018 when the Defendant, together with a group of 30 goons invaded the land and that the Defendant destroyed the fence, the office and forcefully trespassed on the land.

3. In reply, the Defendant deponed that he is the lawful proprietor of the suit land; that he bought the land from the original owner and that he has been pursuing the transfer of the title in his name. According to the Defendant, the title in possession of the Plaintiff is a forgery.

4. The Plaintiff's advocate submitted that his client has a valid title to the suit land; that the Sale Agreement that the Defendant is relying on has not been witnessed and that there is no evidence that the purchase price was ever paid.

5. On the other hand, the Defendant's advocate submitted that the Plaintiff has not demonstrated how it acquired the title document; that the copy of the title document exhibited by the Plaintiff is a forgery and that the Application should be dismissed.

6. The Plaintiff's Application is seeking for an order of injunction. According to the Plaintiff, it has a title in its favour in respect of L.R. No. 7590/3. The Grant attached on the Plaintiff's Director's Affidavit

shows that the land was allocated to Daniel Moses Mwambu and a Grant was registered in his favour on 4th August, 1962.

7. The Grant for L.R. No. 7590/3 further shows that the land was transferred to Andrew Savi Syengo on 16th January, 2007, who transferred the land to the Plaintiff on 27th September, 2011. That is the same year that the Plaintiff was incorporated.

8. Although the Grant shows that the land was transferred to the Plaintiff on 27th September, 2011, the Plaintiff did not produce a copy of the Sale Agreement to prove that indeed he purchased the suit land from the said Andrew Savi. Indeed, the process that was followed to either issue the Grant to Daniel Moses Mwambu or to transfer the suit land to Andrew Savi Kyengo has not been shown. The Defendant's allegation that the annexed Grant is a forgery is therefore not far-fetched.

9. The Defendant's claim is hinged on a Sale Agreement dated 5th February, 2007 between himself and Daniel Moses Mwambu. The signatures on the said Sale Agreement are not witnessed, contrary to the provisions of Section 3(3) of the Law of Contract Act which provides as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

10. The Sale Agreement exhibited on the Defendant's Affidavit cannot therefore confer an interest on land. In any event, there is no evidence from the Defendant to show that the purchase price of Kshs. 197,000,000 was ever paid.

11. Considering that the initial grantee, Daniel Moses Mwambu, has not filed any Affidavit stating that he sold the suit land, and in view of my observation above in respect to the documents produced by the Plaintiff and the Defendant, I find that neither the Plaintiff nor the Defendant have established a prima facie case with chances of success.

12. Indeed, there is no evidence to show that the Plaintiff or the Defendant are in actual possession of the suit land. In the circumstances, the issue of any of the two parties suffering irreparable injury that cannot be compensated by an award of damages does not arise.

13. In the circumstances, the most appropriate order to make in the interim is to restrain both the Plaintiff and the Defendant from interfering with the suit land pending the hearing and determination of the suit.

14. For those reasons, I make the following orders:

a. The Notice of Motion dated 8th October, 2018 is dismissed with no order as to costs.

b. Neither the Plaintiff nor the Defendant or their agents, servants and/or employees should trespass, evict, demolish, excavate, construct, develop, alienate or deal in any manner whatsoever with land known as L.R. No. 7590/3 (I.R. No. 19157) situated in Mavoko within

Machakos pending the hearing and determination of the suit.

c. The OCS Kyumvi Police Station to ensure compliance of the order above.

d. Each party to bear his/its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF APRIL, 2019.

O.A. ANGOTE

JUDGE