



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CIVIL CASE NO. 8 OF 2019

CHERUIYOT EDWIN MUTAI.....PLAINTIFF

VERSUS

CYRUS NGARUIYA.....DEFENDANT

RULING

Introduction

1. What is before me is the Plaintiff/Applicant's Notice of Motion dated 14th February, 2019 seeking the following orders;

a) *THAT a temporary injunction be issued restraining the Defendants/Respondents either by themselves or their agents/servants from trespassing into, constructing, offering for sale, alienating and to specifically cease all and/or any interference with the suit property or otherwise in any manner interfering with land parcel no. KERICHO MUNICIPALITY BLOCK 4/368, pending the hearing and determination of this suit.*

b) *THAT the costs of this application be provided for.*

2. The Application is based on the grounds stated on the face of the Notice of motion and the Plaintiff's supporting affidavit sworn on the 14th February 2019. In the said affidavit he depones that he is the registered owner of land parcel no. KERICHO MUNICIPALITY BLOCK 4/368 vide a certificate of lease issued on the 8th April, 2013. He has annexed a copy of the said certificate of lease as annexure CEM 1. He avers that sometimes in the month of December he discovered that the Defendant was carrying on some construction on the suit property without his consent. Upon making inquiries, the Respondent claimed that he had purchased the property from some undisclosed third parties. His search at the Lands office revealed that the suit property was still registered in the Applicant's name. It is the Applicant's contention that the Respondent's acts are an affront to the rule of law as they are aimed at depriving the Applicant of his property. The Applicant therefore avers that he is likely to suffer irreparable loss unless the orders sought are granted.

3. The application is opposed by the Respondent through his Replying Affidavit sworn on the 23rd February 2019 in which he depones that he purchased the suit property from one Michael Onyura on 2nd July 2018. He has annexed various documents dating back to 1984 detailing how the said Michael Onyura acquired the suit property. It is the Respondent's contention that the Plaintiff's purported title over the suit property was obtained illegally in a bid to defeat the interest of Michael Onyura who was the bonafide allottee.

4. The application was canvassed by way of written submissions and counsel for both parties filed their submissions which I have considered.

Issues for determination

5. The following issues arise for determination:

a) Whether the Plaintiff has met the set down criteria to warrant the grant of the interim orders of injunction.

b) Who shall bear costs of this application?

Analysis and Determination

6. In order for the court to exercise its discretion in granting injunctive relief the Applicant must meet the conditions set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** 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.”

Has the Applicant established a prima facie case with a probability of success?

7. A prima facie case has been defined by the court in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR as follows:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

8. The Applicant’s case is that he is the registered proprietor of that parcel of land known KERICHO MUNICIPALITY BLOCK 4/368 pursuant to a Certificate of Lease issued on 8th April, 2013 in his favour. He denies that the Respondent has any lawful claim to the suit property and sees his acts as an affront to his right to property. Consequently he contends that he has demonstrated that he has a prima facie case with a probability of success.

9. On the other hand the Respondent challenges the manner in which the Applicant obtained his title and claims that it was obtained illegally. The Respondent avers that he purchased the suit property from Michael in July 2018. He has attached a bundle of documents showing that the said Michael Onyura was allocated the suit property way back in 1984 and he has had possession thereof. He states Mr. Onyura informed him that he cultivated the plot while he was a resident in Kericho until the year 1993 after which he employed a caretaker namely, Leo Ofunyi, to oversee its use and occupation, until the year 1996.

10. He was further informed by Mr. Onyura that from 1996, the plot remained vacant until year 2001, when Mr. David Ruto who owns the adjacent plot that is, L.R NO. KERICHO MUNICIPALITY BLOCK 4/151 requested him to utilize it as a grazing ground for his livestock; which request he acceded to.

11. The Respondent states that Mr. Onyura also informed him that he was in the process of processing the registration of lease in his favour over the property then known as PLOT N0. 67 but he hit a snag when he discovered that a certificate of lease had been issued in favour of one JOEL KIPTOO TONUUI which was subsequently transferred to the Applicant herein.

12. It is the Applicant’s contention that the Respondent has not established a prima facie case with a probability of success. He asserts that the registration of lease and subsequent issuance of a certificate of lease is a culmination of a long process where several records are generated and it is therefore not enough for the Plaintiff to waive his Certificate of Lease as the ultimate proof of ownership especially when the process of its acquisition is under challenge as is in the instant case.

13. The role of a Court faced with an interlocutory application for injunction is not really to make final findings but to weigh the relative strength of the parties’ cases. This was so held in the case of *Mbuthia Vs Jimba Credit Corporation Ltd (1988) KLR1*, where the court stated as follows: -

“in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties’ cases,”

14. The Applicant has annexed a certificate of lease which clearly shows that the Applicant is the registered owner of the suit property. The Respondents have challenged the manner in which the said title was obtained.

15. From the material placed before me so far, it is clear that the issue of ownership of the suit property is hotly contested. The court will only be able to make a determination on ownership once the case is heard, evidence tendered and subjected to cross-examination. It is therefore my finding that the applicant has established a prima facie case with a probability of success.

Has the Applicant demonstrated that he stands to suffer irreparable loss if an injunction is not granted?

16. It is the Applicant’s contention that if the interim orders of injunction are not issued by the court, then the Applicant will suffer irreparable harm as his constitutional right to quietly enjoy exclusive possession of the suit property has apparently been infringed by the Respondent. In support of this submission he has cited the case of *Panari Enterprises Ltd -vs- Lijoodi & 2 Others (2014) eKLR Gitumbi J*, stated as follows:

“Land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the plaintiff can be compensated in damages. I hold that the damages are not always a suitable remedy where the plaintiff has established a clear legal right or breach”

17. Counsel for the Respondent has submitted that the Respondent is in occupation of the suit property and he is constructing a multi-storey building. He maintains that the applicant has not shown what loss he stands to suffer. It is clear that if the construction is allowed go on before the issue of ownership is determined, the applicant, may suffer substantial loss which cannot be adequately compensated by damages.

18. In the circumstances, I find that the balance of convenience tilts in favour of the Applicant. Consequently, it is my finding that the application has merit and I grant it and make the following orders:

a) A temporary injunction is hereby issued restraining the Defendant/Respondent either by himself or agents/servants from trespassing into, constructing, offering for sale, alienating and to specifically cease all and/or any interference with the suit property or otherwise in any manner interfering with land parcel no. KERICHO MUNICIPALITY BLOCK 4/368, pending the hearing and determination of this suit.

b) THAT the costs of this application shall be in the cause.

Dated, signed and delivered at Kericho this 15th day of May, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Cheruiyot for Mr. Tororei for the Plaintiff/Applicant
2. Mr. Orina for Mr. Koech for the Defendant/Respondent
3. Court assistant – Rotich