



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 22 OF 2018

SUTTON HOLDINGS LIMITED.....PLAINTIFF

VERSUS

ERIC OPON NYAMUNGA.....DEFENDANT

RULING

1. By the notice of motion dated the 27th April 2018, the Plaintiff seeks for the Defendant *“by himself or through his contractors, employees, servants and or agents or howsoever to be restrained from trespassing onto or interfering with suit property and or continuing to construct any structures thereon or in any manner howsoever else deal with the suit property pending the hearing and determination of suit.”* The Plaintiff also prays for mandatory injunction to compel the Defendant *“by himself or his employees, servants, contractors and or agents to forthwith vacate and hand over possession of the property known as Kisumu/Korando/1973 (the suit property) pending the hearing and determination of the suit,”* and for directions *“for service of the process and any orders made herein upon the Defendant.”* The application is based on the six (6) grounds on its face and supported by the affidavit sworn by Shabbir hussein Asgerali M. Tajbhai on the 27th April 2018 summarized as follows;

- a. That the Plaintiff bought Kisumu/Korando/1973, the suit property, from Noovez Nizar Shamji on the 17th December 2010 and has been the registered proprietor at all material times.
- b. That in February 2018 the Defendant went to the suit property, chased away the Plaintiff guards, took possession of it and commenced construction thereon.
- c. That the Defendant had previously through ELC NO. 787 of 2015 [formerly H.C.C No. 202 of 2011] attempted to get possession but his application was dismissed vide the ruling of 8th February 2016.

2. The application is opposed by the Defendant through his replying affidavits sworn on the 14th September 2018 summarized as follows:

- a. That the deponent of the supporting affidavit in support of the motion has no authority from the Plaintiff to swear it as none has been availed.
- b. That the suit land was transferred to him on the 27th July 1990 and he still retains the title.
- c. That in 2000, one Luke Ochieng Ogada fraudulently transferred it to the Plaintiff. That upon discovering that development, the Defendant reported to the Land Registrar and the Police and the said Luke Ochieng Ogada was arrested, charged and convicted and the title reverted to his name.
- d. That on the 4th May 2017, the Defendant filed Kisumu ELC No. 151 of 2017 against the Plaintiff and two others, which suit was later transferred to the Subordinate Court and registered as ELC No. 38 of 2018, and his efforts to serve the Plaintiff has been unsuccessful. That he was granted leave to serve the Plaintiff herein through substituted service on the 8th May 2018.
- e. That the decision in ELC No. 787 of 2015 was not a dismissal of his suit, but the setting aside of the interlocutory judgment and dismissal of the suit for lack of evidence of service. That he subsequently filed ELC NO. 38 of 2018 [formerly ELC No. 151 of 2017].
- f. That as the registered proprietor of the suit land, he has every right to be in possession thereof.

3. The application came up for hearing on the 27th September 2018 when Counsel for the Plaintiff reported that she had already filed and served their written submissions dated the 21st September 2018. The Counsel for the defendant later filed their submissions dated the 31st January 2019.

4. The following are the issues for the court's determinations;

a. Whether the Plaintiffs has made a prima facie case for the injunctive orders sought to be issued at this interlocutory stage.

b. Who pays the costs of the application.

5. The Court has carefully considered the grounds on motion, the supporting and replying affidavit, written submissions by both Counsel and come to the following conclusions;

a. That the suit was commenced by the Plaintiff through the plaint dated 27th April 2018 that was filed contemporaneously with the motion seeking to be declared the lawful registered owner of the suit property, eviction of the Defendant from the suit property, injunction against the defendant, general damages and costs.

b. That the Plaintiff's claim of proprietorship is pursuant to the certificate of official search dated 27th July 2011 and title deed dated the 26th July 2011 that shows that the suit land was registered in their name on the 26th July 2011.

c. The Defendant has also claimed to be the registered proprietor of the suit land and has annexed a copy of a title deed dated the 27th July 1990 and green card issued on the 2nd October 2013 to his replying affidavit. The two documents show that the Defendant became the registered proprietor on the 27th July 1990. The copy of the green card at entry dated the 2nd October 2013 at page 2, shows that entries numbers 5 to 10 had been expunged for being forgeries and entries numbers 3 and 4 reinstated.

d. That further to (c) above, the court has taken note of the fact that among the entries expunged are numbers 9 and 10 dated the 26th July 2011 under which the Plaintiff had been registered as proprietor and title deed issued. That this court is obligated under **Section 26 of Land Registration Act No. 3 of 2012** to take the person named in the certificate of title issued by the Land Registrar as the prima facie absolute and indefeasible owner subjected to the listed conditions until lawfully impugned in accordance with the law. That both the Plaintiff and Defendant have presented documents of ownership of the suit property in support of their claims. That the deposition by the Defendant at paragraph 5 of his replying affidavit has not been controverted through a further affidavit, and the green card having been issued in 2013 will be taken to reflect the latest or current position in relation to the suit property's proprietorship until otherwise proved.

e. That the finding in (d) above leads the court to hold that the Plaintiff has failed to establish a prima facie case upon which restraining orders can issue at this stage. That on the issue of mandatory injunction, the court has considered the authorities cited by both counsel, including **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** and **Olive Mwhaki Mugenda & Another vs Okiya Omtata Okoiti & 4 Others [2016] eKLR** in which the Indian decision of **Ashok Kumar Baipai vs Dr. (Smt) Ranjama Baipai, AIR 2004 ALL 107, 2004 (1) AWC 88 at paragraph 17** was referred to, and come to the considered view that the Plaintiff having failed to convince the court that it deserves the temporarily injunction cannot be entitled to a relief of eviction that is prayed in the plaint without hearing the main suit and determining it on merit.

f. That the Plaintiff having failed to succeed in any of the prayers in the motion should meet the Defendant's costs in the application.

6. That in view of the findings in (5) above, the Plaintiff's motion dated 27th April 2018 is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF JUNE 2019

In the presence of:

Plaintiffs Absent

Defendant Absent

Counsel Mr. Baganda for Ngaira for Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE