



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 179 OF 2018

ISSA JUMA MBAYA.....PLAINTIFF

VERSUS

BENARD KISUMO SANDU.....DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant vide his plaint dated 8th August 2018. Together with the plaint he sought orders of interlocutory injunction under Order 40 of the Civil Procedure Rules. The applicant urges the court to issue the following orders;

(a) Spent;

(b) Spent;

(c) That this Honourable Court do hereby issue an Order of temporary injunction restraining the defendant by himself, his employee, servants and/or agents from trespassing, constructing and/or having any dealings with the Plot No. 14/MIRITINI/VIKOBANI pending the determination of the main suit;

(d) The costs of the application be provided for.

2. The application is supported by the following grounds;

(i) The plaintiff is the rightful owner of the parcel Land No. 14/MIRITINI/VIKOBANI having bought it on the 2nd November 2016 from the land.

(ii) The defendant has trespassed onto the land and is in the process of allowing 3rd parties to enter, occupy and construct on the parcel of land.

(iii) The applicant's intended use of the land is likely to be affected by the encroachment of the defendant.

(iv) That in the circumstance there is urgent need to preserve the suit property against the unlawful encroachment.

3. The plaintiff deposed through his attorney in the supporting affidavit that he purchased the suit Title No. 14/MIRITINI/VIKOBANI from the defendant on 2nd November 2016 but the defendant has refused to give possession. That he stands to suffer irreparable loss as the on-going constructions are against his intended use of the property.

4. The defendant opposed the application, vide his affidavit filed on 28th September 2018. The defendant avers that he owns Plot No. 3661 MIRITINI/VIKOBANI which he purchased from Esther Wachira in November 2007. That he placed Mwavula Hamisi as his caretaker but never gave the caretaker any powers to sell the land. That the applicant has not annexed any documents to show he was aware of the sale between (Hamisi & the Applicant) thus the suit as filed is incompetent.

5. Parties filed written submissions which I have considered. The principles for granting interim injunctions are well settled. On prima facie case against the defendant, the applicant annexed a sale agreement executed between him as purchaser and Hamisi Mwavula on behalf of the defendant as vendor. As stated by the defendant and not rebutted by the plaintiff, there is no document shown that the said Hamisi had authority to transact on behalf of the defendant.

Secondly, the applicant avers that there are on-going constructions which are contrary to what he wanted to use the land for. No evidence of such constructions was presented to court in the supporting affidavit or list of documents file. For these twin reasons, I find no prima facie case made out.

6. On irreparable loss, the applicant pleaded that he bought the piece of land for Kshs850,000/= hence the inference drawn is that the value of the land is quantifiable. In the prayers contained in the plaint, the plaintiff prayed for a refund of Kshs850,000/= and also general damages. I find that the applicant has failed to demonstrate that the loss is irreparable if the orders are not issued.

7. Lastly on balance of convenience, the plaintiff deposed in paragraph 3 of his supporting affidavit that he has never been given possession of the Suitland. That instead the defendant allowed 3rd parties to trespass and occupy the land and are currently constructing on it. If he purchased the land in 2016, has never been in possession but chose to file this suit two years later demonstrate indolence. An order of injunction is an equitable remedy and equity does not aid the indolent. On this account, I find that the balance of convenience does not tilt in favour of the applicant in granting the orders now.

8. In conclusion, I find that the application dated 8th August 2018 has failed to meet the threshold set in the case of **Giella -vs- Cassman Brown**. There is no basis laid for the orders of interim injunction. Accordingly, I dismiss it with costs to the defendant.

DATED, SIGNED and DELIVERED at Mombasa this 14th day of June 2019.

A. OMOLLO

JUDGE.