



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT

AT KISUMU

ELC NO. 321 OF 2017

BHUPENDRA MOTICHAND SHAH.....PLAINTIFF

-VERSUS-

THRUST BORE TECHNICS LIMITED.....1ST DEFENDANT

COUNTY LANDS REGISTRAR, KISUMU.....2ND DEFENDANT

RULING

1. The Plaintiff vide the Motion dated the 13th November, 2017 filed with the plaint of even date seeks for the following prayers:-

a. Temporary injunction restraining the Defendants by themselves or agents from “entering upon, erecting any structure, carrying out any development, construction or any activity in and on the suit property, alienating, wasting, damaging selling, transferring, disposing charging, leasing, subdividing, dealing with and/or in any other way interfering with land parcel title number Kisumu-Nyalenda/ ‘B’ 925” pending the hearing and determination of this suit.

b. Temporary injunction restraining the Defendants by themselves or agents from “interfering in any way whatsoever and howsoever with the Plaintiff’s rights, title and interests, quiet enjoyment, possession and occupation of the suit property pending the hearing and determination of this suit.”

c. That a mandatory injunction do issue for the eviction of the 1st defendant, its officers, agents, servants, employees, relatives and/or any person/entity acting through or under its instructions form the suit property.

d. Costs.

2. The application is based on the fifteen (15) grounds on its face and supported by the affidavits sworn by the plaintiff on the 13th November, 2017 and 30th January, 2018 among others deponing to the following:-

a. That he became the registered proprietor of the suit land on the 24th April, 1990 and has not transferred it to the 1st Defendant as alleged on the 21st September, 2017.

b. That he learnt that the 1st Defendant had trespassed onto the suit land on or about 26th September, 2017 and started carrying out some works without his consent.

c. That the documents and signature used by the 1st defendant to transfer the land to itself were not his and therefore the transaction was fraudulent.

3. The application is opposed by the 1st Defendant through the replying affidavit sworn by Henry Odongo Gila, director to the 1st Defendant, on the 20th December, 2017 in which he depones to the following among others:-

a. That the 1st Defendant became the registered proprietor of the suit land on 21st September, 2017 after entering into a sale agreement with the vendor on the 9th September, 2017 and therefore has not trespassed onto the suit land.

b. That the transaction and payments were done through the parties’ advocates and the purchase price of Kshs.5,500,000

was fully paid.

c. That the plaintiff has already caused a prohibition to be registered against the suit lands title and the land cannot be transferred until the suit is determined.

4. The 2nd Defendant also opposed the application through the replying affidavit sworn by George O. Nyangweso, the District Land Registrar Kisumu on the 25th April, 2018 among other deponing to the following:-

a. That Plaintiff was registered as proprietor of the suit land on 24th April, 1990 and issued with a title deed. That on the 26th September, 1996, another title deed was issued vide Gazette Notice 5290 and again re-issued on the 28th July, 2017 vide Gazette Notice 8116 of 11th February, 2017.

b. That on the 21st September, 2017 the land was transferred to the 1st Defendant upon presentation of the required documents, payments and surrender of the title deed issued on 28th July, 2017.

c. That on the 28th September, 2017 a restriction was registered through M/s L.G. Menezes based on pending investigations by the Directorate of Criminal Investigations.

5. The application came up for hearing on the 20th November, 2017 when directions on filing and exchanging written submissions, and inhibition order on the title of the suit land among others, were issued. Subsequent to that, the learned counsel for the plaintiff, 1st and 2nd defendants filed and exchanged their submissions dated the 23rd February, 2018, 25th April, 2018 and 8th March, 2019 respectively.

6. The following are the issues for the court's determination:-

a. Whether the Plaintiff has made a prima facie case for the injunction orders he seeks to issue at this interlocutory stage.

b. Who pays the costs.

7. The court has considered the grounds on the motion, affidavit evidence, written submissions and come to the following determinations:-

a. That from the depositions of the Plaintiff and both defendants, the Plaintiff was the registered proprietor of Kisumu/Nyalenda "B"/925 from 24th April, 1990 to the 21st September, 2017 which the transfer in favour of the 1st Defendant was effected. That the Defendants position is that the transfer was procedurally and legally done while the Plaintiff has termed it fraudulent by disowning the sale agreement of 9th September, 2017, the Land Control Board consent, the identity card, PIN and transfer form, photograph and signature thereon. That while the 1st Defendant is undoubtedly the one registered as proprietor of the suit land, that title is being challenged by the plaintiff through these proceedings in accordance with **Article 40 (6) of the Constitution and Section 26 (2) of the Land Registration Act No. 3 of 2012.**

b. That the 1st Defendant is undoubtedly the one in possession of the suit land and had commenced some developments. That the title the 1st Defendant holds over the suit land is as held in (a) above under challenge. That a restriction had been reportedly registered against the title on the basis that the Directorate of Criminal Investigations were carrying out some investigations. That the details, extent and result of the said investigations have not been availed to this court, and hopefully they will assist in confirming whether the documents, photograph and signature attributed to the plaintiff in the transaction leading to 1st Defendant registration as proprietor of the suit land were his. That it is only fair and just that the status of the suit land obtaining when this suit was filed is maintained pending the hearing and determination of this suit.

c. That the costs of this application should be in the cause as the ownership of the suit land is determined through trial.

8. That flowing from the foregoing the court orders that the Plaintiff's motion dated 13th November, 2017 be compromised as follows:-

a. That the physical possession of the suit land do remain with the 1st Defendant as the current registered proprietor.

b. That the 1st Defendant do ensure that the legal status of the suit land remains as was on 20th November, 2017 when an order of inhibition was issued which should remain in force pending the hearing and determination of this suit.

c. That the 1st Defendant do ensure that no construction works are done or continued on the suit land that are likely to alter the physical condition of the suit property, pending the hearing and determination of this suit.

d. That the costs be in the cause.

It is so ordered.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 17TH DAY OF JULY, 2019.

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mr. Anyul for Maganga for Plaintiff and M/s Langat

For 2nd Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE