



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.240 OF 2016

GLADNESS WALI KAPALA (Suing as a Donee of Power of

Attorney donated by **JORAM KALLA NDUNDI**.....**PLAINTIFF**

VERSUS

TRANSPARES (K) LTD.....**1ST DEFENDANT**

THE DISTRICT LAND REGISTRAR, KILIFI.....**2ND DEFENDANT**

RULING

1. Before me for determination is a Notice of Motion application dated 1st September 2016 and filed herein on 15th September 2016. By the said application, the Plaintiff Gladness Wali Kapalla (suing as the Donee of a Power of Attorney from Joram Kapalla Ndundi) prays for orders as follows: -

3. That this Honourable Court be pleased to issue an order of injunction restraining the 1st Defendant whether by itself, its servants, agents assigns or whomsoever from gaining ingress, occupying or using or in any manner whatsoever dealing with all that property known as Parcel No. 96 Kawala "A" Kadzonzo pending the hearing and determination of this suit.

4. That an order of prohibitory injunction be issued as against the 2nd Defendant prohibiting it from registering any interest in the property pending the hearing and determination of this application inter-partes.

5. That an order of prohibitory injunction be issued as against the 2nd Defendant prohibiting it from registering any interest in the property pending the hearing and determination of this suit.

6. That the costs of this application be provided for.

2. The application which is supported by an affidavit sworn by the said Gladness Wali Kapalla is anchored on the grounds inter alia:-

i) That the Plaintiff is the owner of the suit property having purchased the same from a third party for a consideration;

ii) That unknown to the Plaintiff, the 1st Defendant in collusion with the 2nd Defendant purported to register the said property in favour of the 1st Defendant;

iii) That pursuant to the illegal and unlawful registration, the 1st Defendant has now erected a fence around the property and has threatened to evict the Plaintiff therefrom;

iv) That the Plaintiff stands to suffer irreparable loss unless the orders sought herein are granted.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on its behalf by its Managing Director Abdulgani Abdulgafur Pasta, Transpares(K) Ltd (the 1st Defendant) avers that it is the registered owner of the property known as Kilifi/Kawala "A" Kadzonzo/96 having purchased the same in 2009 from one Jumwa Jefwa Mboe who was previously the registered owner.

4. The 1st Defendant avers that as at the time of purchase and transfer, the suit property was vacant and not occupied by any person and they

therefore constructed a perimeter wall around the same. Later on in the year 2013 however, part of the wall was broken by the Presbyterian Church of East Africa members who were claiming that one acre thereof belonged to them. There is a dispute pending in Court in regard to that claim.

5. The District Land Registrar sued herein as the 2nd Defendant has neither entered appearance nor filed any response to the application.
6. In the course of hearing this application, the parties applied and this Court agreed to visit the locus in quo at Mariakani. That visit was conducted on 3rd October 2018 in the presence of the Plaintiff, the 1st Defendant's representatives and the Learned Advocates appearing for the Plaintiff and the 1st Defendant.
7. I have considered the Plaintiff's application and the response thereto by the 1st Defendant. I have equally perused and considered the written submissions filed herein by the Learned Advocates for the parties as well as the notes made by the Court during the visit to the locus in quo.
8. The threshold for the grant of an interlocutory injunction was laid down in the oft-cited case of ***Giella –vs- Cassman Brown & Company Ltd (1973) EA 358***. That threshold requires the Plaintiff to demonstrate that he has a prima facie case with a probability of success and that he stands to suffer irreparable loss and/or damage unless the orders sought are granted. Where the Court is in doubt as to the foregoing, it will decide the matter on a balance of convenience.
9. It is the Plaintiff's case that he bought the suit property in or about the year 1970 from one Bongo Mundzyi for a consideration and that he has occupied the property ever since, erected some semi-permanent structures, cultivated the same and reared chicken thereon.
10. The Plaintiff further states that sometime in the year 2009, a dispute arose where one Anderson Thoya Mboe moved to the then Land Disputes Tribunal alleging that he was the owner of the suit property. That dispute was determined in favour of the said Anderson Thoya Mboe. Aggrieved by the said decision, the Plaintiff lodged ***Judicial Review Application No. 49 of 2011*** at the High Court at Mombasa seeking to have the decision of the Tribunal quashed. It is also the Plaintiff's case that the said decision was quashed and he accordingly settled on and continued occupying the suit property.
11. On its part the 1st Defendant denies the Plaintiffs allegations. It is its case that it purchased the suit property from the registered owner one Jumwa Jefwa Mboe vide a Sale Agreement dated 25th November 2009. The Defendant asserts that at the time of the purchase of the suit property, the same was vacant and it proceeded to construct a perimeter wall around the same in the year 2011. A section of the wall was however broken by members of a nearby church who claim ownership of an acre of the suit property. That church and the 1st Defendant are in Court in a separate matter over the same.
12. I note from the material placed before me that while the Plaintiff asserts that he bought the suit property in the year 1970, for a consideration, the Sale Agreement between the Plaintiff and the said Bongo Mundzyi or anything to show that the said Bongo Mundzyi owned the suit property has not been annexed to the application.
13. Indeed in the Plaintiff's Further Affidavit sworn and filed herein on 14th February 2017, the Plaintiff tacitly agrees that Jumwa Jefwa Mboe who sold the property to the 1st Defendant had an interest in the property. At paragraph 3 of the said Further Affidavit, he avers that Jumwa Jefwa Mboe only had his instructions to source for a buyer to purchase the property but not to sell it. In support of that contention, the Plaintiff has annexed what is headed a Memorandum of Understanding between himself and Jumwa Jefwa Mboe dated 16th August 2010.
14. Paragraph 1 of that Memorandum of Understanding acknowledges that Jumwa Jefwa Mboe described therein as the 2nd Interested Party was at that time the registered owner of the property as per the adjudication register and that the Plaintiff had lodged an Appeal to the Minister in regard to the decision. Paragraphs 4 and 5 of the understanding further shows that the parties agreed to solicit for a potential buyer and that as the registered owner of the land, the said Jumwa Jefwa Mboe was authorized to execute a Sale Agreement in favour of the prospective buyer but the parties were to share the sale proceeds.
15. In my view even though the Memorandum of Understanding appears to have been executed a couple of months after the Sale Agreement between the said David Jumwa and the 1st Defendant, it would appear that the main dispute herein ought to be between the Plaintiff and Jumwa. The said Jumwa having executed the Sale Agreement as authorized in their Memorandum of Understanding, the Plaintiff cannot turn around and seek an injunction against the buyer, and, without joining the said Jumwa Jefwa Mboe in these proceedings.
16. At any rate, nothing was placed before me by the Plaintiff to demonstrate any interest he had on the land. While he claims that the decision of the Land Dispute Tribunal was quashed in Mombasa High Court ***Miscellaneous Application No. 49 of 2011***, the evidence placed before me shows that the said application was indeed dismissed for want of prosecution on 22nd July 2015. The Plaintiff in fact admits to the dismissal at paragraph 9 of the Further Affidavit but contends that that was not a decision made on merit.
17. When this Court visited the suit property on 3rd October 2018, the Court was shown around the property including the section where the Plaintiff claims to have had his house. Other than the 1st Defendant's caretakers' house on the land, there was no sign of any other structures having been recently on the suit property.
18. Giving an explanation of what amounts to a prima facie case in a matter such as the one before me, the Court of Appeal observed in ***Mrao Ltd –vs- First American Bank of Kenya Ltd (2003)*** as follows:

“... A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an

infringement of a right and the probability of the Applicant's case upon trial....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 a rebuttal or explanation from the latter."

19. In the matter before me, I was not satisfied on the material presented before me so far that the Plaintiff's right had been infringed by the 1st Defendant and/or that the Plaintiff stands to suffer any irreparable loss unless the orders sought herein are granted.

20. On the other hand, it was evident that the 1st Defendant had purchased the suit property from a previously registered owner thereof for a consideration and that the 1st Defendant is presently the registered owner of the suit property. It was also evident that the 1st Defendant has constructed a perimeter wall around the property and stands to be more prejudiced if the orders sought herein are granted.

21. The Plaintiff's application dated 1st September 2016 is accordingly dismissed with costs to the 1st Defendant.

Dated, signed and delivered at Malindi this 20th day of September, 2019.

J.O. OLOLA

JUDGE