



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 952 OF 2017

FRANCIS MWAURA NJUGUNA.....PLAINTIFF

VERSUS

THE REGISTRAR OF TITLES KAJIADO.....1ST DEFENDANT

JOHN GITAU.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 6th December, 2017 brought pursuant to Article 40 of the Constitution; Order 40 and 51 of the Civil Procedure Rules; and Section 3A of the Civil Procedure Act. The Plaintiff seeks for restraining orders against the Respondents from evicting him pending the outcome of the suit.

The application is premised on the summarized grounds that the Plaintiff together with Dominic Makara were registered proprietors of land parcel number Kajiado/ Kitengela/ 3916 hereinafter referred to as the 'suit land'. The Plaintiff has established that there exists another title to the suit land, which was issued fraudulently, and some strangers have been visiting the said land with a view to evicting the Plaintiff's licensees who currently occupies it. The Plaintiff will suffer irreparable harm if orders sought are not granted. Further, the orders sought will not prejudice the Defendants in any manner.

The application is supported by the affidavit of FRANCIS MWAURA NJUGUNA who is the Plaintiff herein where he avers that together with DOMINIC MAINA MAKARA they purchased the suit land through PANSTAFF Company Limited. He states that DOMINIC MAINA MAKARA passed away on the 6th August, 2002 and upon his demise, he sought for subdivision of the suit land so that the deceased's share would be included in his estate. He conducted a search and realized that one ELIAS OYAMO NGUCHE had been registered as a proprietor of the suit land and on 1st October, 2009, one JOHN GITAU who is the 2nd Respondent herein was registered as its owner. He contends that he thereafter lodged a caution restricting any dealings on the suit land. He confirms having licensed some people to occupy the suit land but they have informed him that persons who allege to have been sent by the 2nd Respondent have been visiting it and threatening to evict them. He insists he holds a title deed in respect to the suit land and prays for protection from court.

The 2nd Defendant opposed the application and filed a replying affidavit where he contends that he is the registered proprietor of the suit land and the instant application is brought in bad faith. He explains that he was registered as a proprietor of the suit land on 2nd October, 2009 after undertaking due diligence as well as conducting an official search. He insists he adhered to the proper legal process in obtaining registration of the suit land in his name. He denies being privy to any illegal transactions nor having knowledge of fraud in respect of the suit land. He claims he is an innocent purchaser for value and that the plaintiff has been indolent. Further, that the Plaintiff has not proved fraud.

The Plaintiff filed a further affidavit where he reiterates his claim above and insists he has not been indolent as he registered a caveat over the suit land on 16th December, 2009 when he noticed strange dealings with regards to it. Further, after he discovered the 2nd Defendant had been registered as a proprietor of the suit land, he lodged a complaint with the 1st Defendant who summoned the 2nd Defendant to his office on 14th January, 2010 to present all relevant documents in respect to it but he failed to do so. He contends that on 30th December, 2009, he reported the matter to the Directorate of Criminal Investigations (DCI) at Rongai Police Station and he also authored a letter dated the 5th March, 2010 to the Permanent Secretary, Ministry of Lands complaining about the fraudulent registration of his land. He claims that after investigations, the DCI had intimated their intentions to charge the 2nd Defendant together with ELIAS OYAMO NGUCHE with the offence of obtaining false registration contrary to section 320 of the Penal Code and the 2nd Defendant cannot purport to invoke the provisions of the law to sanctify his illegal actions. He reiterates that he has been in actual possession of one half (1/2) of the suit land while the family of the late DOMINIC MAKARA has been occupying the other half.

The 2nd Defendant filed a further affidavit where he denied the averments in the Plaintiff's further affidavit and reiterated his claim above where he insisted that he met all the legal obligations for a purchaser to acquire the indefeasible title to the suit land. He states that no one has interfered with his physical, quiet possession and occupation of the suit land. He contends that the instant application lacks merit and should be dismissed.

The Plaintiff and the 2nd Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the Plaintiff's Notice of Motion Application dated the 6th December, 2017 together with the respective parties' affidavits and submissions, the only issue for consideration is whether the Plaintiff is entitled to restraining orders against the Defendants in respect of the suit land pending the outcome of the suit.

Both the Plaintiff and the 2nd Defendant are staking claim over the suit land. The Plaintiff insists that together with the late DOMINIC MAKARA they are the registered proprietors of the suit land and were issued with a title deed to that effect. Further, that they have been in actual possession of the suit land and seeks orders to restrain the 2nd Defendant from evicting his licensees therefrom. The Plaintiff contends that the 2nd Defendant acquired his title through fraud. The 2nd Defendant on the other hand contends that he undertook due diligence and adhered to all the legal processes to acquire suit land through ELIAS OYAMO NGUCHE. He actually disputes the Plaintiff's title and insists he is a purchaser for value without notice.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In the first instance as to whether the applicant has demonstrated a prima facie case with probability of success, I note the Plaintiff has a title deed to the suit land, while the 2nd Defendant also holds a title deed in respect of the said land. The Plaintiff has submitted that he is entitled to protection as enshrined in Article 40 of the Constitution. He relied on the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** to support his argument. The 2nd Defendant submitted that the Plaintiff is not entitled to the orders sought and that it is actually the Plaintiff who should be restrained from interfering with his land.

Looking at the documents presented by the Plaintiff, it is clear that his claim over the suit land is not baseless. Although several issues arise as to how both the Plaintiff and the 2nd Defendant both hold title to the same parcel of land. The Plaintiff has explained how he acquired his title while the 2nd Defendant insists he obtained his title from one ELIAS OYAMO NGUCHE. I note the issue relating to the title to the suit land has actually been under investigation by the DCI. However, at this juncture, and based on the evidence before me, I hold that the Plaintiff has indeed established a prima facie case with probability of success at the full trial.

On the second principle as to whether the Applicant stands to suffer irreparable loss, which cannot be compensated by way of damages. Both the Plaintiff and Defendant claim ownership of the suit land and it is not in dispute that the Plaintiff is in actual occupation therein. There are also allegations of fraud made by the Plaintiff against the 2nd Defendant which he has refuted. In the case of **UCB Vs Mukoome Agencies (1982) HCB22** it was held as follows *'that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit'*. In the instant case I find that it would be pertinent if both the Plaintiff and the 2nd Defendant are granted an opportunity to be heard to enable the court make a determination on the ownership of the suit land. Further, in the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, the Court of Appeal held that in an application seeking injunctive relief, speculative injury cannot suffice and there must be more than unfounded fear and the injury should be actual as well demonstrable that cannot be compensated by damages. I note the Plaintiff holds title to the suit land and his licensees are in actual occupation of the same. The 2nd Defendant insists he is a purchaser for value and has threatened to evict the Plaintiff's licensee from the land. In my view, I find that the Plaintiff's injuries are not speculative but actual as well as demonstrable. In the circumstances, I hold that he will indeed suffer irreparable harm which cannot be compensated by way of damages.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the property is not preserved, it may be wasted away.

Since both the Plaintiff and the 2nd Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and the Plaintiff being in occupation thereon, I find that these are issues best determined at a full trial. I find the instant application merited and will proceed to make the following order:

1. An inhibition order be and hereby registered by the Land Registrar Kajiado as against land parcel number Kajiado/ Kitengela/ 3916 of any dealings, lease or charge pending the hearing and determination of the suit.
2. Prevailing Status Quo be maintained where the 2nd Defendant is restrained from evicting the Plaintiff or his licensees from the suit land pending the outcome of the Suit.
- 3.. The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 14th day of October, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Ochieng holding brief for Njoroge for the Applicant.

Nyakenya for 2nd Respondent

Court assistant- Mpoye