



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO.50 OF 2017

PETER KIMUNDI.....PLAINTIFF/APPLICANT

-VERSUS-

THE COUNTY GOVERNMENT OF MAKUENIDEFENDANT/RESPONDENT

ANDS

MUKAA TRADING CO. LTDINTERESTED PARTY

R U L I N G

1. The application for ruling before this court is dated 13th June, 2017 and filed in court on 15th June, 2017. It seeks the following orders:-

1. Spent

2. Spent

3. That the Defendant/Respondent be restrained (sic) either by himself, his agents, servants or any other persons acting under his instructions from interfering with the plaintiffs possession and the structures he has erected on the property known as PLOT 135A pending the hearing and determination of the main suit.

4. That cost of this application be provided for.

2. The application is predicated on the grounds on its face and is supported by the supporting and further affidavits of Peter Kimundi, the Plaintiff/Applicant herein, sworn at Machakos on 13th June, 2017 and 29th September, 2017 respectively. It is expressed to be brought under Order 51 Rule 1, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules 2010, Section 26 of the Land Registration Act, Sections 1A and 1B of the Civil Procedure Act and all other enabling provisions of law. Further, there are two undated supporting affidavits filed in court on 02nd October, 2017. The first one is by Abednego Mutunga Maithya, a trained surveyor from the University of Nairobi and the second one is by Annastansia Katile Mutune of P. O. Box 491-90132 Sultan Hamud.

3. The Defendant/Respondent did not oppose the application as it did not file any replying affidavit nor grounds of opposition.

4. The Interested Party herein, Mukaa Trading Co. Ltd, has opposed the application vide the replying affidavit of its director, Joseph Kavingu, sworn at Machakos on undisclosed date and filed in court on 31st August, 2017.

5. Pursuant to the directions to dispose off the application by way of written submissions made on 27th July, 2017, the Plaintiff/Applicant and the Interested Party filed their submissions on 23rd August, 2019 and 26th August, 2019 respectively.

6. The Plaintiff/Applicant has deposed in paragraphs 2, 3, 4, 5 and 6 of his supporting affidavit that he acquired the suit property plot 135A Sultan Hamud Township through allotment by the County Council of Masaku before the town was formally planned in the year 1988, that in the same year he developed the premises with a total of five (5) permanent shops (kiosks) which have since been occupied by rent paying tenants, that during the planning of Sultan Hamud Town, the area was captured as an existing business/residential plot under part development plan PDP Zone 5.21 (annexed and marked as PK1), that he severally applied for formal allocation and registration of the plot by the then Commissioner of Lands and subsequently the National Land Commission and he also gave copies (PK2) to the Defendant/Respondent and that the Defendant/Respondent wrote a letter to the National Land Commission indicating that it is true that he was on the ground and the ownership of the said plot be formalized by him being issued with an allotment letter (PK3).

7. The Plaintiff/Applicant has further deposed in paragraphs 3, 4, 6, 7, 11 & 13 of his further affidavit that when he took possession of his property, there existed an open space between it and that of the Interested Party, now plot No.218 which was a temporary allocation constructed with six mabati shops all facing 20 metres road, that in the year 1996, the Interested Party was allocated the open space between his property and theirs and the same was amalgated to plot No.218 and they constructed one permanent building which is an Mpesa shop facing 20 metres road as shown by photograph of the shop marked as PK2, that on diverse dates between 2008 and 2014 he wrote several letters requesting the government to formalize the allocation of his property as shown by the letters annexed as PK 3, that the National Land Commission officers in Nairobi advised that in order to fast track the formalization, the Plaintiff/Applicant should request it (the open space) as an extension to plot No.135 which is allocated to him and put it as plot 135(A) as they are adjacent to each other and that following the meeting held on 18th December, 2015 attended by the Cabinet Executive Officer for Lands and Urban Planning Makeni County Government and the Director of Planning, he was given a letter on 21st December, 2015 from the department of Lands and Urban Planning addressed to the National Land Commission recommending that he formally be allocated plot number 135 (A) as shown by the letter annexed as PK6.

8. On the other hand, the Interested Party has deposed in paragraphs 2, 3, 4, 8 and 9 of his replying affidavit that he has been advised by his advocate on record which advise he verily believes to be true that the application together with the supporting affidavit and the annexures are: -

- a. Bad in law and incompetent
- b. An abuse of the court process
- c. Ill advised
- d. Unmeritorious
- e. Brought in bad faith,

That in the interest of justice and all fairness, the application should be dismissed with costs, that the Interested Party be the registered owner of the plot otherwise known as Sultan Hamud Town/218 which is adjacent to the Plaintiff's/Applicant's Mabati kiosk a copy of the title deed which is annexed and marked as JK1, that the identity of the alleged plot No.153A by the Plaintiff/Applicant does not exist and where the Plaintiff/Applicant has created mabati kiosk is a public land and is actually public road reserve and a parking lot which the Plaintiff/Applicant cannot be allowed to construct and of course its not plot No.135A and that the Plaintiff's/Applicant's application to the National Land Commission for allocation of the said public land (road reserve) for commercial purposes was declined and the Plaintiff/Applicant has no business in keeping the said kiosk in a public land which kiosk has blocked access to the Interested Party's plot No. Sultan Hamud Town/218 as shown in the copy of letter annexed and marked as JK5.

9. In their submissions, Makundi & Co. Advocates for the Plaintiff/Applicant submitted that the arguments by the Interested Party as contemplated by the replying affidavit do not hold water. The Counsel went on to submit that the Defendant/Respondent did not oppose the application or file any document as provided for under **Order 51 Rule 14 of the Civil Procedure Rules** which states that:-

“Any Respondent who wishes to oppose any application may file any one or combination of the following documents;

- a. A notice of preliminary objection and/or
- b. Replying affidavit and/or
- c. Statement of grounds of opposition”

10. The Counsel added that the Defendant/Respondent elected none of the above in respect of the Plaintiff's/Applicant's application.

11. I wish to point out at the outset that even though the Interested Party herein describes itself as such, by virtue of the consent Order recorded on 04th May, 2016 whereby it was ordered: -

“1. Machakos CMCC No.220/2012 which was transferred to this court by the order that was made by Kariuki J on 19/03/2015 shall be assigned a new case number at --- ELC, Machakos and shall thereafter be consolidated with Machakos ELC No.215 of 2014 for hearing and final determination.

2. The Notice of Motion dated 10/2/2015 is marked as withdrawn with no orders as to costs.

3. This file shall be taken back to Machakos ELC.”

The parties in the aforementioned Machakos Chief Magistrate CMCC 220/12 are Mukaa Trading Co. Ltd vs. Peter Kimundi, Muthiani Kingola and John Muma Mutevu. The file having been so consolidated with this matter which appears to be the lead file, the Interested Party should have elected whether to be treated as a Defendant or Plaintiff. For purposes of this application, I will treat the Interested Party as a Respondent since no orders can be issued for or against an Interested Party in a civil suit. However directions on the way forward regarding the Interested Party herein as well as the other Defendants who are named in the said CMCC 220/12 will have to be given at a later date.

12. Having made the above observations, I do note that the application before me is one for interlocutory injunction. The plaintiff/Applicant and the Interested Party are in agreement that the principles for the grant of the interlocutory injunction are as set out in the celebrated case of **Giella vs. Cassman Brown and Co. Ltd. [1973] EA 358**. I need not repeat those principles herein save to say that as regards the principle that an Applicant must show a prima facie case with probability of success, the Plaintiff/Applicant's Counsel was of the view that the Plaintiff/Applicant has demonstrated that he has proprietary interest in the land and hence a prima facie case is established.

13. On the principle that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, the Counsel submitted that the Plaintiff/Applicant has been in occupation or possession of the suit property since 1988 and he has invested heavily on the same as there are rent paying tenants. That if the orders sought are not granted, the Defendant/Respondent may go ahead and enforce the notice of demolishing the developments erected by the Plaintiff/Applicant on Plot No.135A Sultan Hamud Township thereby occasioning irreparable harm and damage.

14. Regarding the principle that if the court is in doubt, it will decide the application on the balance of convenience, the Plaintiff's/Applicant's Counsel submitted that the status quo be maintained based on the heavy investments the Plaintiff/Applicant has made on the suit property.

15. The Counsel concluded by urging the court to grant the orders sought.

16. On the other hand, the Counsel for the Interested Party submitted that the Plaintiff/Applicant has failed to meet the criteria to necessitate the grant of the orders sought.

17. I have read the submissions and the authorities that were cited to me by the Counsel on record herein for the parties. My finding is as follows: The first principle set out in Giella's case, the Plaintiff/Applicant herein contends that he has been in occupation of the suit property since the year 1988. The Plaintiff/Applicant further contends that he has constructed buildings where he has rent paying tenants. On the other hand, the Interested Party contends that it owns plot number Sultan Hamud Township/218 as shown in the certificate of lease marked JK1. The Interested Party has stated that its plot is adjacent to that of the Plaintiff/Applicant who has constructed mabati kiosk. In my view the Interested Party has tacitly admitted occupation of the suit property by the Plaintiff/Applicant even though there is a dispute regarding the plot number of the suit property which each one of them is claiming.

10. Given the above circumstances and without considering the other two principles, I am of the view that the most appropriate order to issue at this stage is one of status quo as at the time of filing this suit and the application. I, therefore, proceed to issue an order of status quo as at the time of filing the suit and the application so that the Plaintiff/Applicant remains in occupation of the suit property with an order that neither the Plaintiff/Applicant nor the Interested Party carries further development of the suit property until this matter is heard and determined.

Signed, Dated and Delivered at Makueni this 16th day of December, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Makundi for the Plaintiff present

Mr. Muthiani holding brief for Mr. Kamolo for the Interested Party present

No appearance for the Defendant/Respondent

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

16/12/2019.