



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. SUIT NO. 70 OF 2017

JOSEPH MWANZIA NDUKU.....PLAINTIFF

VERSUS

JOSEPH KIMINZA.....1ST DEFENDANT

NTHUSI MAINGA.....2ND DEFENDANT

RULING

1. This is the Notice of Motion dated 6/3/2017. It is brought under Sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya, Order 40 Rule 1, 2, Order 51 Rule 1 of the Civil Procedure Rules 2010.

2. It seeks orders;

a) Spent

b) Spent

c) Spent

d) That this Honourable Court be pleased to make interim orders that the Defendants/Respondents by themselves, their agents and/or servants be restrained from entering onto and/or encroaching and/or remaining on and/or cultivating on and/or in any other manner whatsoever interfering with land parcel number Taveta/Taveta Scheme Phase 1/749 pending the hearing and determination of this suit.

e) That the said orders be enforced by the OCS Taveta Police Station.

f) That costs of this application be provided for.

3. The grounds are on the face of the application and are listed as in paragraphs 1-5 I do not need to reproduce them here.

4. The application is supported by the affidavit of Joseph Mwanzia Nduku, the Plaintiff/Applicant herein sworn on the 6/3/2017.

5. The application is opposed. There is a replying affidavit sworn by Joseph Kiminza, the 1st Defendant/Respondent on the 24/4/2017.

6. On the 20/9/2017, the court directed that the application be disposed by way of written submissions. The written submissions were to be filed within fourteen (14) days.

7. On the 3/10/2017, Mr. Mkan informed the court that he had been instructed to appear for the Defendants/Respondents. He sought time to put in a response and/or submissions. Consequently the Defendants/Respondents were given fourteen (14) to do so. By 8/11/2017 when the matter came up for mention the Defendants/Defendants had not filed any submissions. A date for ruling was given.

8. It is the Plaintiff/Applicant's case that he is the proprietor of land parcel number Taveta/Taveta Scheme Phase 1/749. He was issued with a certificate of Title on 8/8/2013 by Taveta Taveta Land Registry. The certificate of Title is annexed and marked "JNM 1-b." He told the court that the Defendants/Respondents have since 2016 trespassed, encroached and cultivated the suit land.

9. I have considered the Notice of Motion and the supporting affidavit together with the annexures. I have also considered the replying affidavit and the annexures. I have considered the submissions and the authorities cited.

The issues for determination are;

- (i) Whether the Plaintiff/Applicant's case has met the threshold for grant of temporary injunction.
- (ii) Who should bear costs?

10. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of Giella –versus- Cassman Brown And Company Limited (1973) EA 358.

11. In the case of Mrao Limited –versus- First American Bank of Kenya And 2 Others (2003) KLR 125 the Court of Appeal gave a definition of what amounts to a prima facie case. It stated;

“A prima facie case in a civil application includes but not confined to “a genuine and arguable” case. 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 an explanation or rebuttal from the latter.”

12. Has the Plaintiff/Applicant made out a prima facie case with a probability of success at the trial? It is not in doubt that the Plaintiff/Applicant is the registered proprietor of land parcel number Taveta/Taveta Scheme Phase 1/749. He was issued with a certificate of Title on 8/8/2013 by the Taita Taveta District Land Registry. The said title was annexed and marked “JMN -1b”.

13. The Defendants/Respondents admits this fact. Paragraph 11 of the Replying affidavit of Joseph Kiminza states;

“That Taveta Land Adjudication and Settlement office conspired with others not known to us to arbitrarily take legally acquired land and allocated to different people”

In paragraph 13 he states

“That the Plaintiff's title was issued in contravention of the court order.”

14. This confirms that the Plaintiff/Applicant is the registered owner of the suit land. The Defendant/Respondents refer to an order by Lenaola J. in petition Number 325 of 2011 dated 30/11/2015. I have gone through it and I find that it relates to criminal proceedings pending before the Principal Magistrate's Court – Taveta.

15. It does not relate to the registration of the parcel of land, the subject matter of these proceedings. I find the Plaintiff/Applicant has demonstrated a prima facie case with a probability of success at the trial.

16. Section 26 of Land Registration Act 2012 states;

1) “ The certificate of the title issued by the Registrar upon registration onto a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except –

a) On the ground of fraud, misrepresentation to which the person is proved to be a party or;

b) Whether the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.”

I find that the Defendants/Respondents have not proved any of the scenarios described in sub-rule 1(a) or (b).

17. The court takes it that the Plaintiff/Applicant is the registered proprietor of the suit land.

He told the court that the Defendants/Respondents have trespassed, encroached and are cultivating it.

I find that the Plaintiff/Applicant has demonstrated that he will suffer injury which cannot be adequately compensated by an award of damages if the orders of injunction are not granted.

18. In any case I find that the balance of convenience tilts in favour of the Plaintiff/Applicant who is the registered proprietor of the suit land. There is need to preserve the suit land.

19. The upshot of the matter is that I find merit in this application and I grant the orders sought namely;

a) That interim orders of injunction be and are hereby issued to restrain the Defendants/Respondents by themselves, their agents and/or servants, from entering onto and/or encroaching and/or cultivating on and/or in any other manner whatsoever

interfering with land parcel number Taveta/Taveta Scheme Phase 1/749 pending the hearing and determination of this suit.

b) That the said orders be enforced by the OCS Taveta Police Station.

The costs of this application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered at *Mombasa* on the *31st* day of *January 2018*.

L. KOMINGOI

JUDGE

31/1/2018