



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 24 OF 2012

ABDULRAZAQ ADAN ALL.....PLAINTIFF

VERSUS

BASH HUSSEIN MOHAMED.....1ST DEFENDANT

HAJI DAHIR MOHAMED.....2ND DEFENDANT

HUSSEIN ATO.....3RD DEFENDANT

MOHAMED DUBOW.....4TH DEFENDANT

WARSAME IDRIS.....5TH DEFENDANT

JUDGEMENT

INTRODUCTION

In a plaint dated 4th June, 2012 and filed in court on 5th June 2012, the plaintiff sued the five defendants herein seeking the following reliefs:

a. A declaration that the plaintiff is entitled to ownership and exclusive possession and use of property title No. IRN 6386 LR No. 28966 situated within Garissa Municipality area and to give effect to the said declaration a permanent injunction ordering the defendants by themselves their servants or agents to vacate and remove themselves their servants, agents, their fencing barriers, building materials and improvements and to demolish their building structures thereat and remove debris thereof and restraining the defendants, their servants or agents from trespassing upon, remaining or entering upon, using developing or possessing the suit premises or interfering with the plaintiff's development, use and omit possession and enjoyment thereof.

b. Further or other relief within the inherent jurisdiction of the Honourable Court.

c. Costs and interest at court rates.

The plaintiff avers that on diverse dates between January and May 2012 the defendants by themselves, their servants and/or agents unlawfully entered upon the suit premises and removed beacons and trespassed thereupon thereby disrupting, hindering and preventing the plaintiff and his contractors, workers, servants and agents from freely using, possessing or developing the suit premises and threaten to trespass and disrupt the plaintiff's development, use and possession thereof.

By reasons of the aforementioned matters the plaintiff avers that he is entitled to the reliefs being sought. Filed simultaneously with that suit is a Notice of Motion under order 40 Rule 1 and 2 CPR together with Section 3A CPA. That application has brought under certificate of urgency seeking the following orders.

1. (Spent)

2. THAT an interim order of injunction do issue ex-parte in the first instance restraining the defendants by themselves or by their servants or agents from trespassing on, disrupting, interfering with plaintiff's occupation, use and possession of his property title No. IR No. 6386 LR No. 28966 within Garissa Municipality or howsoever interfering with the plaintiff's contractors, workers, agents and suppliers unhindered access to or exit from the suit premises LR No. 28966 with or without

tracks, motor vehicles, hand carts and/or tools or building materials or interfering with the construction of buildings or other developments thereon pending hearing and determination of the application.

3. THAT an order of injunction do issue restraining the defendants by themselves, or their servants or agents to forthwith from trespassing on, entering, remaining on, disrupting or interfering with plaintiffs occupation use and possession of his property title number IRN 6386 LR No. 28966 within Garissa Municipality or howsoever interfering with the plaintiffs and/or the plaintiff's contractors, workers, agents and suppliers unhindered access to or exit from the suit premises LR No. 28966 with or without tracks, motor vehicles, hand cards, tools or building materials or disrupting or interfering with the construction of buildings or other developments thereon pending hearing and determination of this suit.

4. THAT a temporary order do issue restraining the defendants, their servants or agents from howsoever interfering with the plaintiffs quiet possession, use and enjoyment property title number IRN 6386 LR No. 28966 situated within Garissa Municipality or the development thereof pending hearing and determination of the suit.

5. The Honourable court be pleased to make any other orders deemed necessary for the ends of justice.

6. Costs hereof be provided for.

That application is supported by the affidavit of the applicant sworn on 4/6/2012. In his supporting affidavit, the plaintiff has given an elaborate history how he acquired the suit property way back in 1992. He stated that in February 2012, the commissioner of Lands issued him with a grant of title number IRN 6386 LR No. 28966 for a term of 99 years with effect from 1st March 1998. After the application was placed before the duty Judge and directed that the same be served for inter-parties hearing on 22/6/2012. After hearing the counsels for both the plaintiff and the defendants, the court was satisfied that the applicant had demonstrated that he holds a grant to the suit property. The court granted orders in terms of prayers 3 and 4 in the plaintiff's application dated 4th June, 2012. Upon service of summons, the plaint and verifying affidavit the defendants failed to file defence within the stipulated period.

The plaintiff then requested for interlocutory judgement which was allowed after the Deputy Registrar was satisfied that the affidavit of service was proper.

When the parties came before me for pre-trial conference and directions, the court directed that despite interlocutory judgement being entered, the defendants and their counsel be served with the hearing notice.

PLAINTIFF'S CASE

The plaintiff stated that sometime in the year 1995 he made an application to the Garissa District Development Committee (DDC) for allocation of land within Garissa Municipality Area industrial development.

Following that application, the District Development Committee at a meeting held on 7th August, 1995 recommended allocation to him of a parcel of land for industrial development within Garissa Municipality. He produced a copy of minutes of the District Development Committee as an exhibit in this case. After the recommendation was made by the District Development Committee, the physical planner then circulated the request for allocation of the plot to the relevant heads of departments seeking their response.

These include the provincial physical officer, the surveyor, the District Land Officer, the District Commissioner, the town clerk and the provincial Commissioner. After a while, the heads of those departments gave their feedback to the effect that they had no objection to the allocation of the parcel of land to the plaintiff herein. The provincial physical planner then prepared a Part Development Plan (PDP) which he sent to the commissioner of lands through the director of physical planning, the provincial Commissioner at Garissa, the District Commissioner, The District Land Officer, the District Surveyor and the town clerk. After the letters of no objection were issued, the commissioner of land issued a letter of allotment. After receiving the letter of allotment and fulfilling the conditions therein, the plaintiff was issued with a title deed in February, 2012 being IRN 6386 LR No.128966. He conducted a search and was issued with a certificate indicating that he is the sole proprietor of the suit property. The suit property from the deed plan is measuring approximately 4.379 HA. He has been paying rates and rent as and when it becomes due and payable. The plaintiff stated that in 2007, he encountered problems in the suit land and he lodged a complaint.

The District Commissioner invited the defendants for a meeting on 25/9/2007. The purpose of that meeting was to resolve the dispute between the plaintiff and the defendants amicably. The defendants were given an opportunity to present any documents showing that they own the suit property but they presented none. The plaintiff averred that in the year 2012 his workers were doing a perimeter wall round the suit property when they realised that one beacon was missing.

The provincial surveyor then wrote to the District Commissioner who convened the meeting between the two sides. The plaintiff also complains that whenever he wants to develop the suit property he faces resistance and hostility from the defendants.

DEFENDANT'S CASE

Since the defendant did not file any defence there was therefore no defence to plaintiff's claim.

ANALYSIS AND DETERMINATION

I have considered the pleadings and evidence adduced by the plaintiff. The hearing of this case proceeded ex-parte after the defendants failed to file defence within the stipulated period. The gist of the dispute between the parties is title number IRN 6386 LR No. 28966 situated

within Garissa town of Garissa County. The plaintiff explained in his testimony how he applied for the allocation of the plot sometime in 1995.

The District Development Committee held a meeting on 7th August 1995 and in Min 22/95 they recommended the allocation of the suit property to the plaintiff to establish a chalk manufacturing factory. The issue was then referred to the provincial physical planner who wrote a circular seeking views from various head of departments in what is similar to the present day public participation exercise. After a while, the head of departments referred herein above wrote back saying they had no objection to the recommendation by the District Development Committee. The commissioner of Lands then issued the plaintiff with a letter of allotment dated 26th March, 1998. Attached with the said letter of allotment is the part development plan (PDP) indicating the size and location of the property in question. The plaintiff was later issued with title deed IRN No. 6386 LR No. 28966. The plaintiff's testimony and the evidence in support of the suit property have not been challenged by the defendants who failed to file any defence. The evidence was not shaken on cross examination by the first defendant. The rights of a holder of a certificate of title are well stated under Section 26 of the Land Registration Act, 2012 as follows:

“26 (1) The certificate of title issued by the Registrar upon registration, or to 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, easement, 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 grounds of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through corrupt scheme....”

The defendants in this case have not offered any allegations of fraud, misrepresentation, illegality or corrupt practices in the acquisition of the certificate of title by the plaintiff. The defendants have not even filed defence to the plaintiff's claim. The relief being sought by the plaintiff in this suit is an equitable relief of an injunction. This court has rendered itself on the principles governing the grant of injunctive orders as set out in the celebrated case of GRIELLA –VS- CASSMAN BROWN CO. LTD. (1973).

The first principle is that an applicant has to show a prima facie case with a probability of success. The second principle is that an 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 third and last principle is that where the court is in doubt, it will decide the matter on a balance of convenience. From the evidence adduced which has not been challenged, I am satisfied beyond any shadow of doubt that this case is suitable for the application of the first principle.

The plaintiff has demonstrated how he applied for the allocation of the suit property from the then County Council of Garissa who took the application before the District Development Committee. The matter was then forwarded to the various heads of departments who undertook what is similar to the present day “Public participation exercise”. The outcome was a recommendation of no objection to the property being allocated to the plaintiff.

The Provincial Physical Planning Officer then drew the Part Development Plan (PDP) which was later used by the commissioner in issuing a letter of allotment. The plaintiff was finally issued with a certificate of title to the suit property. I find and hold that the plaintiff is the bona fide proprietor to the suit land. In the result, I entered judgement for the plaintiff against the defendants jointly and severally in the following terms:

1. A declaration be and is hereby issued to the effect that the plaintiff is the absolute proprietor and is therefore entitled to exclusive ownership, use and possession of all that property known as title No. IRN 6386 LR No 28966 situated within Garissa Municipality Area measuring approximately 4.34 Hectare.

2. A permanent injunction ordering the defendants by themselves, their agents and/or servants from entering and/or trespassing into the plaintiff suit land LR NO. 28966.

3. An order of eviction of the defendants by either themselves, or their servants, agents and/or employees from the plaintiff's suit land together with any of their belongings including any fencing barriers, building materials and structures thereat.

4. The costs of this suit to be borne by the defendants jointly and severally.

Read, delivered and signed in the open court this 26th day of February, 2018.

Hon. Justice E. Chero

ELC JUDGE

In the presence of:

1. Mr. Mbaluka holding brief Wamalwa

2. Defendants (Absent)