



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO 260 OF 2013

SIMON WILLIAM NJUMWA.....PLAINTIFF

VERSUS

SAMUEL KARISA KAHINDI.....DEFENDANT

RULING

1. This is the Notice of Motion dated 13.11.2013. It is brought under Order 40 Rule 1 & 2 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law.

2. It seeks orders;

a) Spent.

b) Spent.

c) That the Honourable Court be pleased to grant orders reserving the parcel of land measuring 3.0 acres situated within Gotani Trading Centre, Kaloleni District from interference by any member of the general public pending the hearing and determination of the suit.

d) That costs of this application be provided for.

3. The grounds are on the face of the application and are;

i) The Defendant has fraudulently sold the Plaintiff's parcel of land to a third party, whereas the Plaintiff is the owner of the said plot having purchased it from the Defendant in the years of 2005.

ii) The third party who is unknown to the Plaintiff and with Defendant's authority proceeded to clear the land and placed construction materials at the site intending to make improvements therein.

iii) The Plaintiff's efforts to establish who are carrying out the activities on the said parcel of land have been fruitless and hence a prima facie case has been established against the Defendant.

4. The application is supported by the affidavit of Simon Njumwa, the Plaintiff/Applicant hereby sworn on the 13.11.2013 and 21.2.2014.

5. The application is opposed. There is a replying affidavit sworn by Samuel Karisa Kahindi, the Defendant/Respondent herein sworn on the 13.1.2014.

6. It is the Plaintiff's case that he purchased a plot measuring 3.0 acres from the Defendant/Respondent. On 5.1.2005 at a consideration of Kshs.57,000/=. The said amount was paid by instalments to completion. That the Defendant/Respondent later disposed the said plot to a third party.

7. By reason of this subsequent sale, the Plaintiff/Applicant has been unable to enjoy quiet possession of the said plot. He has been denied access. He said third parties started clearing the land despite him having taken possession of the same.

8. I have considered the pleadings, the application and the affidavits in support. I have also considered the replying affidavit and the

submissions of counsel. The issued for determination are;

a) Whether the Plaintiff/Applicant's case has satisfied the conditions for grant of temporary injunctions.

b) Who should bear costs?

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

10. In the cases of *Mrao Limited –versus- First American Bank Limited And 2 Others (2003) eKLR* 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 is 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.”

11. Has the Plaintiff/Applicant made out a prima facie case with a probability of success at the trial? In his replying affidavit paragraph 3, the Defendant/Respondent admits he sold an unregistered parcel of land at Gotani Trading Centre to the Plaintiff/Applicant.

12. The Plaintiff/Applicant has annexed copies of sale agreement and acknowledgements of purchase price. In total he paid Kshs57,000/=. He also annexed photographs showing that a third party he cleared the suit land. There are also photographs showing lorries ferrying building materials into the suit land.

The Defendant/Respondent denies that he has sold the portion to a third party.

13. I find that the Plaintiff/Applicant has demonstrated that he has a prima facie case with a probability of success at the trial. I find that there is need to preserve the suit property in the meantime.

14. All in all I find merit in this application and I grant the orders sought namely;

a) That the orders are hereby granted reserving the parcels of land measuring 3.0 acres situated within Gotani Trading Centre, Kaloleni District from interference by any member of the public pending the hearing and determination of the suit.

b) The costs of the application do abide the outcome of the main suit.

It is ordered.

Dated, signed and delivered at Mombasa on the 21st day of February 2018.

L. KOMINGOI

JUDGE

21/2/2018