



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 212 OF 2017.

NANCY WANJIRU GITHU.....1ST PLAINTIFF/APPLICANT

KELVIN GIKONYO GITHU.....2ND PLAINTIFF/APPLICANT

VERSUS

MOSES KINYANJUI KIMOTHO.....1ST DEFENDANT/RESPONDENT

ROSE NYAWIRA MAMBO.....2ND DEFENDANT/RESPONDENT

LAND REGISTRAR, MOMBASA.....3RD DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 14th June, 2017. It is brought under Section 1A, 1B, 3A, 63e of the Civil Procedure Act Chapter 21 Laws of Kenya, Order 40 Rule 1, 2 and 4, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

2. It seeks orders;

a) Spent.

b) That a mandatory injunction do issue compelling the 1st Defendant to give vacant possession to the Plaintiffs of all that parcel of Land Reference Sub-division Number 1230 (original Number 53/222) Section II, Mainland North situated in Mombasa District containing by measurement nought decimal nought three one one (0.0311) hectares or thereabouts whose boundaries abbutal and dimensions are more particularly set out in the Land Survey Plan Number 120892 annexed to the certificate of Title registered in the Land Title Registry at Mombasa as Number CR. 17308/1 together with the buildings and other improvements being thereon, hereinafter referred to as “the suit property”, with the exercise supervised by both the court bailiff and the OCs Kiembeni Police Station, and, in default of such vacant possession, the Plaintiffs be at liberty to Evict the 1st Defendant from the suit property, with the aid of both the court bailiff and the OCs Kiembeni Police Station.

c) That a temporary injunction do issue restraining the 1st and 2nd Defendants whether by themselves, their agents/employees/servants and/or anyone whosoever laying claim into, dwelling upon, interfering with the Plaintiffs’ occupation, possession, enjoyment and derivative use, and/or in any other manner whatsoever, dealing with the suit property in any manner adverse to the Plaintiffs’ interest thereon, without the Plaintiff’s express consent and/or authorization pending the hearing and determination of this suit.

d) That costs of this application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs 1-19. I do not need to reproduce them here.

4. The application is supported by the affidavit of Nancy Wanjiru Githu, the 1st Plaintiff/Applicant herein sworn on the 14th June, 2017 and a supplementary affidavit sworn on the 3rd November, 2017.

5. The application is opposed. There is a replying affidavit sworn by Moses Kinyanjui Kimotho, the 1st Defendant/Respondent on the 21st July, 2017. There is also a replying affidavit sworn by Rose Nyawira Mambo, the 2nd Defendant/Respondent on the 30th October, 2017 and a replying affidavit sworn by the 3rd Defendant on the 12th September, 2016.

6. On the 6th November, 2017 the court directed that the application be disposed by way of written submissions. A date for highlighting was given.

THE PLAINTIFFS'/APPLICANTS' SUBMISSIONS.

7. The 1st and 2nd Defendants are totally incapable of legally and logically defending against the Plaintiffs' claim to proprietorship of the suit property.

They have relied on Sections 107, 108, 119 of the Evidence Act Chapter 80 Laws of Kenya Sections 24-26, 56-59 of the Land Registration Act 2012, Article 60(1) of the Constitution of Kenya, 2010.

8. They have relied on the cases of;

i) Giella –versus- Cassman Brown And Company Limited (1973) EA 358.

ii) East Africa Industries –versus- Trufoods Limited (1972) EA 420.

iii) Moya Drift Farm Limited –versus- Theuri (1973) EA 114 Pages 116-117.

iv) Mucuha –versus- Ripples Limited (1990-1994) EA 388.

9. That the 1st Defendant's continued occupation of the suit property without the Plaintiffs express consent and/or authorization is improper, inconsumable, unlawful and amounts to gross violation of the Plaintiffs' right to property.

The application has met the threshold for grant of the orders sought and hence the application ought to be allowed.

THE 1ST AND 2ND DEFENDANTS'/RESPONDENTS' SUBMISSIONS

10. The Plaintiffs did not acquire the suit property with vacant possession. The 1st Defendant has been a tenant since 2011. He is not a trespasser on the suit premises and has not committed any acts or omissions that may be deemed to subject the Applicants to irreparable loss or damage. The Plaintiffs have not met the threshold for grant of temporary injunctions.

11. The cardinal principle for granting a mandatory injunction at an interlocutory stage is that the same will only be granted exceptionally and in the clearest case. They have relied on the cases of;

i) Thompson –versus- Park (1944) 2All ER 477 at 479e.

ii) Mucuha –versus- Ripples Limited (1990-1994) EA 388

That granting a mandatory injunction would occasion monstrous injustice to the Defendants/Respondents.

The 2nd Defendant/Respondent claim falls within the exception provided for in Section 26(a) of the Land Registration Act, 2012. The 2nd Defendant/Respondent has already lodged a complaint with the 3rd Defendant.

They urge that the application be dismissed.

THE 3RD DEFENDANT'S/RESPONDENT'S SUBMISSIONS

12. That on 14th June, 2016 a provisional certificate of Title was issued pursuant to the Kenya Gazette Notice No. 2332 of 8th April, 2016. On 5th June, 2016 a Transfer instrument was presented for registration. The vendor (transferor) was Clara Mkamboi Maina and the transferees were Nancy Githu and Kelvin Gikonyo Githu. The title was issued to the 1st and 2nd Plaintiffs and that the title being held by the 2nd Defendant was nullified by issuance of a provisional certificate pursuant to Section 33 of the Land Registration Act, 2012.

13. I have considered the pleadings the Notice of Motion and the affidavits in support plus the annexures. I have considered the replying affidavits and the annexures. I have considered the written submissions, the oral highlights and the authorities cited.

The issues for determination are;

i) Whether the Plaintiffs'/Applicants' application meets the threshold for grant of temporary injunctions.

ii) Who should bear costs?

14. At this juncture, it is necessary for this court to briefly examine the legal principles governing the applications of this nature. In an application for an interlocutory injunction the onus is on the Applicant to satisfy the court that it should grant an injunction.

An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.

15. In the celebrated case of *Giella –versus- Cassman Brown And Company Limited (1973) E.A 385*, the court set out the principles for grant of temporary injunctions.

In the case of *Mrao Limited –versus- First American Bank of Kenya And 2 Others (2003) KLR 125*, the Court of Appeal in determining what amounts to a prima facie case stated;

“A prima facie case in a Civil Case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

I am guided by the above authorities.

16. There is no doubt that the Plaintiffs/Applicants are the registered proprietors of the suit property.

A transfer was effected in their favour by Clara Mkamboi Maina, the original owner. The 1st Defendant/Respondent has no claim on the property as he is a tenant. The 2nd Defendant/Respondents claim that the Plaintiff/Applicants obtained title through fraud with the collusion of the said Clara Mkamboi Maina is neither here nor there.

It is stated that the 2nd Defendant/Respondent souged a complaint with the 3rd Defendant but does not disclose the findings.

17. Section 26 (i) of the Land Registration Act 2012 states;

“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, 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, or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

The 2nd Defendant/Respondent has not put before court evidence to show that the Plaintiffs obtained title through fraud or un-procedurally.

They have put forward no evidence to show that Clara Mkamboi Maina did not have good title to pass on to the Plaintiffs.

Nothing could have been easier than to get the said Clara Mkamboi Maina to swear an affidavit to confirm the averments in paragraph 12 of the affidavit of Moses Kinyanjui Kimotho the 1st Defendant/Respondent.

18. In the case of *Kenleb Cons Limited –versus- New Gatitu Services Station Limited And Another* it was held that;

“to succeed in an application for injunction an Applicant must not only make a full and frank disclosure of all relevant facts to the just determination but must show he has a right, legal or equitable, which requires protection by injunction.”

I am satisfied that the Plaintiffs/Applicants who are the registered proprietors of the suit property deserve this kind of protection.

I find that they have demonstrated that they have a prima facie case with a probability of success at the trial.

I also find that the suit property will be in risk of danger of being wasted if these orders are not granted.

I find that the Plaintiffs/Applicants have demonstrated that they are likely to suffer irreparable loss or injury if these orders are not granted.

19. The Plaintiffs/Applicants herein also seek orders of mandatory injunction. The 1st Defendant/Respondent has no claim on the suit property. He is a tenant. The Plaintiff's'/Applicants' rights are being violated by the 1st Defendant/Respondents unlawful occupation.

In the case of *Kenya Breweries Limited –versus- Washington Okeyo, Court of Appeal, Civil Application No 332 of 2000*, it was held;

“that the court had jurisdiction to award a mandatory injunction even at the interlocutory stage.”

In the case of *Lucy Wangui Gachara –versus- Minudi Okemba Lore Malindi Court of Appeal, Civil Appeal No. 4 of 2015*, the Court of Appeal referred to the case of *Shepherd Homes Limited –versus- Sandahm (1971) 1CH 34*, where Meggarty J. held;

“it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can. I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.....”

I am also guided by the case of *Mucuha –versus- Ripples Limited (1990-1994) EA 388.*

20. I have considered the Plaintiffs’/Applicants case in totally. I find that they have a strong and clear case.

The 1st Defendant/Respondent is a tenant. He has no claim on the suit property.

I find that the Application meets the condition for grant of interlocutory mandatory injunction.

I find that the Application herein has merit.

I have considered the 3rd Defendant’s/Respondent’s submissions and find that they support the Plaintiffs’/Applicants’ case.

21. In conclusion I find that the Application is merited and I grant orders sought namely;

a) **THAT a mandatory injunction be and is hereby issued compelling the 1st Defendant to give vacant possession to the Plaintiffs within sixty (60) days, of all that parcel of land Reference Sub-division Number 1230 (Original Number 53/222) Section II, Mainland North situated in Mombasa District containing by measurement nought decimal nought three one one (0.0311) hectares or thereabouts whose boundaries abbutal and dimensions are more particularly set out in the Land Survey Plan Number 120892 annexed to the certificate of Title registered in the Land Title Registry, at Mombasa as Number CR. 17308/1 together with the buildings and other improvements being thereon, hereinafter referred to as “the suit property”, with the exercise supervised by both the court bailiff and the OCs Kiembeni Police Station, and, in default of such vacant possession, the Plaintiffs be at liberty to Evict the 1st Defendant from the suit property, with the aid of both the court bailiff and the OCs Kiembeni Police Station.**

b) **That a temporary injunction do issue restraining the 1st and 2nd Defendants whether by themselves, their agents/employees/servants and/or anyone whosoever laying claim into, dwelling upon, interfering with the plaintiffs’ occupation, possession, enjoyment and derivative use, and/or in any other manner whatsoever, dealing with the suit property in any manner adverse to the Plaintiffs’ interest thereon, without the Plaintiff’s express consent and/or authorization pending the hearing and determination of this suit.**

c) **That costs do abide the outcome of the main suit.**

It is so ordered.

Dated, Signed and Delivered at Mombasa on the 19th day of April 2018.

L. KOMINGOI

JUDGE

19/4/2018.