



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KAKAMEGA

LAND CASE NO. 153 OF 2012

IN THE MATTER OF

JOSEPH ASWANI IMBUSI.....PLAINTIFF

VERSUS

JACOB OMINDE SHIKOLO.....DEFENDANT

RULING

The first application is dated 3rd February 2014 and is brought under Order 40, rule 1(a) & (b) of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act seeking the following orders;

1. That this matter be certified as urgent and service in the first instance be dispensed with thereof.
2. That pending the inter parties hearing of this application this honourable court be pleased to restrain the respondent from disposing of, or preventing the applicant from re-constructing his house within a portion occupied by the applicant measuring 3/4 acre comprised in L.R no Butsotso/Ingotse/2003.
3. That pending the final determination of this suit, this honorable court be pleased to restrain the respondent from disposing of, or preventing the applicant measuring 3/4 acre comprised in LR no Butsotso/Ingotse/2003.
4. That the Officer Commanding Navakholo Police Station to enforce any order(s) that may emanate herein as a result of this application;
5. That costs be provided for.

This application is based upon the affidavit of the plaintiff/applicant and the grounds that the applicant purchased 3/4 acre of land from the defendant/respondent's L.R No Butsotso/Ingotse/2003 and established his marital home thereon. That in pursuit of the transaction involving the 3/4 acre the parties herein attended the 1st meeting of the relevant land control board. That however, the respondent declined to attend the 2nd meeting of the relevant land control board compelling the application to prefer this suit for specific performance. That in the month of October 2013 the house of the applicant was razed down in an act of arson rendering the applicant homeless and thus forcing him to put up with relation. That the applicant has now been able to access funds to put his house but the respondent has barred him from accessing the said 3/4 acre contending that he intends to dispose of the same to a third party. That the act of the respondent in interfering with the lawful user and occupation of the applicant's 3/4 acre is a slap of the applicant's constitutional right to housing. That it is absurd to expect the applicant to indefinitely seek shelter with his immediate family at the home of his relation pending the determination of this suit. That should the respondent dispose of the 3/4 acre portion this will be rendered an exercise in futility and academic at best.

The applicant submitted that, he did purchase 3/4 acre of land from the respondent on the 30th day of June, 2005, which land is registered in the name of the respondent with its title being L.R. No. Butsotso/Ingotse/2003. Annexed and marked as exhibit 'JA 1' is a copy of an agreement denoting the transaction between the respondent and him. That in pursuit of the agreement they attended the 1st Land Control Board meeting in an effort to have the 3/4 acre portion transferred to him but later on, the respondent inexplicably declined to attend the 2nd Land control Board meeting prompting him to file this cause to have him compelled to see through the agreement. Marked as exhibit 'JAI 2' is a copy of the plaint herein. That however, following the agreement, he did move into the 3/4 acre portion and established a home therein and have been making use of the same until the month of October, 2013 when his house was gutted down by fire in an arson incident which led to the arrest of a suspect. Marked as exhibit 'JAI 3' is a copy of a charge sheet showing that an accused person has been brought before court on suspicion of having burnt down his house. That since the razing down of his house he has had to move with his family into the home of his relatives as he tries to rebuild his life and recently he managed to raise funds sufficient to put up a home once again but the respondent has now restricted him from accessing the 3/4 acre portion claiming that he has already procured a buyer for the same. That it is imperative to note that the respondent's counter-claim and his suit are both pending in court and it is therefore contemptuous for the respondent to proceed

as if he has been triumphant in the cause. That at any rate status quo should be maintained until the cause is determined and part of this status quo would involve him re-constructing his house as he is entitled to housing and shelter under the Constitution of Kenya, 2010. That from the foregoing it emerges that the respondent really does not have any legitimate reason to interfere with his user and occupation of the $\frac{3}{4}$ acre portion.

The second application is dated 9th June 2014 and brought under section 3, 3(A) and 63(c) of the Civil Procedure Act Cap 21 Laws of Kenya and Order 40 Rule 3(1) and 3(3), Rules 9, 10 and 11 of the Civil Procedure Rules 2010 and all enabling Provision of the Law seeking the following orders;

1. That this application be certified urgent and service hereof dispensed with in the first instance.
2. That the plaintiff/ respondent be detained in prison for a term not exceeding six months for disobeying this Hon. Court orders issued by this Hon court on the 6th day of February ,2014.
3. That the costs of this Hon. court of this application be awarded to the defendant /applicant.

It is based on the grounds that, on 6th February 2014 the Court issued specific orders the defendant/respondent (now) applicant from disposing off a portion of land occupied by the applicant (then) now respondent measuring $\frac{3}{4}$ of an acre comprised in LR NO. BUTSOTSO/INGOTSE/2003 until 31st March 2014 when the applicant could come up for inter-parties hearing. That the respondent (then) now applicant has religiously followed and complied with the later. That this Hon. Court did not grant to the plaintiff and /or requested any order restraining the respondents from preventing the applicant from constructing his house within the said portion of the suit land. That on 22nd February, 2014 and the application was inter-parties and/ or determined by the court. The plaintiff using police officers from NAVAKOLO POLICE STATION restrained the defendant (now applicant) and constructed a semi-permanent house on the suit premises without defendants authority and in total defiance of the Hon court as specific orders, which action amounts to gross contempt of this hon. court of which defendant prays that the plaintiff be committed to prison for a period not exceeding 6 months. That in addition to the above contempt the plaintiff/respondent has gone ahead and purported to sell the said suit premises to one CHETINA INDIZI for Ksh. 400,000/= and the said CHETINA INDIZI is now the one illegally occupying the suit premises. That the plaintiff has abused the process of the Hon court by obtaining orders against defendant not to sell or dispose of the subject land while proceeding to purport to sell the same land to another person illegally. That the defendant has suffered and continues to suffer great harm and losses due to the unlawful and unlimited disobedience of the court orders by the plaintiff.

The defendant submitted that, he is the registered owner of Land parcel No. BUTSOTSO/ INGOTSE/2003 at one stage he agreed $\frac{3}{4}$ of Acre to Plaintiff at Kshs.80,000 in June 2005. Before Defendant pointed out the portion to be applied by Plaintiff, Plaintiff went ahead and constructed atemporary house in a portion Defendant had preserved it contains the grave yard of his late parents.

Defendant later sub-divided the land and allocated to Plaintiff the portion shown as "C" on thefield diagram and observation on site at mutation form - certified copy on 27/06/1998 matter was adjudicated by Lurambi District land Control Board which orders Plaintiff to move the area allocated by Defendant. The tribunal Rulings was confirmed in Court by Hon. Moranga (PM,then). Instead of Appealing to Provincial Appeal Board Plaintiff filed this suit. Defendant filed his defence and attached documents supporting his case as exhibits 1-10 on or about 1st November 2012.

Plaintiff Application dated 3rd February 2014 Plaintiff sought orders restraining defendant from disposing or preventing the Applicant (Plaintiff) from reconstructing his house within aportion occupied by the applicant measuring $\frac{3}{4}$ of an acre on the site land. Item 2 and 3 the Hon. Dulu J. Certified Application Urgent and granted orders "That pending the inter-parties hearing of the application dated 3/2/2014 the Respondent is hereby restrained from disposing from a portion occupied by the applicant measuring $\frac{3}{4}$ of an acre comprised in LR. NO. BUTSOTSO/INGOTSE/2003 and that the Application dated 3rd February 2014 be fixed for hearing on 31/3/2014. The Hon Judge never ordered for construction of a house on the suit land.

But when Plaintiff came to the land accompanied by builders who commenced toconstruct a semi-permanent house on the suit premises, totally contrary to the Court Order that when Defendant tried to protest, he was restrained by Police Officers from Navakholo Police Station. This was contrary to the Court Orders served. The Orders were given on 6/2/2014 and the construction was carried out on 22/2/2014 before the application came up for inter-parties hearing on 31/3/2014. Defendant was forced to seek Court leave to file contempt proceeding against Plaintiff. Leave was grantedin open Court and Applicant/Plaintiff allowed 14 days to file response. Defendant submit that applicant's application of 3/2/2014 was dishonest misuse of Court Orders and it be dismissed with costs to Defendant. Any person who comes to Equity must come with clean hands. There is evidence that Applicant/Plaintiffs handswere fainted when he exceeded the authority given by Court and he should be punished for contempt. Defendant further submit that his application of 9th June 2014 be granted.

This court has considered both applications and submissions therein. The Plaintiff submitted that, he purchased the $\frac{3}{4}$ acre from the Defendant on the 30thday of June 2005 and built a house therein which had been razed down by an act of arson in the month of October 2013 leaving him homeless. However, his efforts at re-constructing the house were being hampered by theDefendant who had barred him from accessing the $\frac{3}{4}$ acre on the grounds that he intended to dispose of the same to a 3rd Party. As the Motion was under a Certificate of Urgency this Honourable Court considered it ex parte on the 6th day of February 2014 and granted temporary orders (ex parte orders) restraining the Defendant from disposing of the $\frac{3}{4}$ acre. The Defendant filed a Replying Affidavit sworn on the 25th day of March 2015 inresponse to the Motion and at paragraph 4 thereof he has accused the Defendant of going against the ex parte orders, i.e, that he went ahead to re-construct a house underthe auspices of the Officer Commanding Navakholo Police Station. The Defendant went ahead to expound on paragraph 4 of the Replying Affidavit bylodging a Motion filed in court on the 9th day of June 2014 praying for the detention of the Plaintiff for a term not exceeding 6 months ostensibly for being in breach of the exparte orders.

The Defendant'ssubmission is that this Honourable Court never granted the Plaintiffleave to re-construct the house and that the Plaintiff has

disposed of the ¾ acre to a 3rd by the name of Chetina Indazi for a consideration of Kshs 400,000. In his Replying Affidavit to the Defendant's Motion sworn on the 20th day of June 2014 the Plaintiff deponed that this Honourable Court did not restrain him from proceeding with the reconstruction of his house. He has further disputed the allegations of disposing of the ¾ acre to Chetina. Instead the Plaintiff states that Chetina is his aunt who is looking after the house when he is away in Nairobi on duty so as to prevent another arson attack.

On the second application on contempt I have perused the court file. The Motion was under a Certificate of Urgency this Honourable Court considered it ex parte on the 6th day of February 2014 and granted temporary orders (ex parte orders) restraining the Defendant from disposing of the ¾ acre. No evidence of breach of the order and the application must fail. I dismiss the same.

As regards the first application, the principals governing the grant of interlocutory injunction are clear. As stated in the case of **Giella vs. Cassman Brown (1973) EA 358**.

“The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003)** Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or 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”

Further he goes on to state that *“..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”*

It is not in dispute that the defendant is the registered owner of Land parcel No. BUTSOTSO/ INGOTSE/2003 at one stage he agreed ¾ of Acre to Plaintiff at Kshs.80,000 in June 2005. I find that the applicant has shown a prima facie case with a probability of success and I grant the following orders;

1. That an inhibition order to issue against any dealings with Land parcel No. BUTSOTSO/ INGOTSE/2003 pending the hearing and determination of this case.
2. That the status quo be maintained on Land parcel No. BUTSOTSO/ INGOTSE/2003 pending the hearing and determination of this case.
3. Costs of both applications to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 31ST DAY OF MAY 2018.

N.A. MATHEKA

JUDGE