



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 141 OF 2017 (O.S)

IBARA NGARI.....1ST PLAINTIFF

ANTHONY MUGO IBARA.....2ND PLAINTIFF

VERSUS

LUCAS MWANIKI MARI.....DEFENDANT

RULING

1. The 1st and 2nd Plaintiffs filed an originating summons dated 6th September 2017 brought under Order 37 of the Civil Procedure Rules, sections 37 and 38 of the Limitation of Actions Act (Cap 22) and section 28 (h) of the Land Registration Act 2012 seeking determination of the following questions;

a) Whether the Plaintiffs are entitled to an order under section 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya) to be registered as the absolute proprietors of the whole of land parcel number Embu/Gangara/3299 measuring 1.80 Ha.

b) Whether the title held by the Defendant on the aforesaid land parcel number Embu/Gangara/3299 stands extinguished.

c) Whether the Plaintiffs are entitled to costs of the suit.

2. The said originating summons was supported by an affidavit sworn by the 2nd Plaintiff on his own behalf and on behalf of the 1st Plaintiff. He stated that the Plaintiffs and their entire family had resided on *Title No. Embu/Gangara/3299* (hereinafter described as “parcel No. 3299”) for over 22 years. It was stated that the Defendant had recently threatened them with eviction since the said land was registered in his name.

3. It was the Plaintiffs’ case that the 1st Plaintiff had sometime in 1995 bought the entire suit property which was a sub-division of *Embu/Gangara/1878* (hereinafter described as “parcel No. 1878”).

4. Simultaneously with the filing of the originating summons, the Plaintiffs filed a notice of motion dated 6th September 2017 brought under section 28 (1) of the Land Registration Act, 2012, Order 51 Rule 10 Civil Procedure Rules, section 3A of the Civil Procedure Act (Cap 21) and all other enabling provisions of the law seeking various interim orders against the Defendant. The main orders for purposes of this ruling were an order of inhibition forbidding all dealings with parcel No. 3299 and an interim injunction to restrain the Defendant from evicting them pending the hearing and determination of the suit.

5. The said application was supported by an affidavit sworn by the 2nd Plaintiff who reiterated the contents of the affidavit in support of the originating summons. The Plaintiffs maintained that they were in occupation of the whole of parcel No. 3299 and had occupied it with full knowledge of the Defendant. It was further stated that the Defendant intended to sell the said land to third parties.

6. The Defendant filed a replying affidavit sworn on 18th September 2017. He stated that he bought parcel No. 3299 from one Nguru Kaumbuthu (hereinafter called “the vendor”) in 2015 and took possession thereof immediately. He further stated that the 2nd Plaintiff was the owner of *Title No. Embu/Gangara/3301* (hereinafter called “parcel No. 3301”) which he had bought from the said vendor in 2014. Both parcel Nos 3301 and 3299 were subdivisions of parcel No. 1878 and they shared a common boundary.

7. The Defendant further stated that the Plaintiffs had never claimed any part of parcel No. 1878 while it was still owned by the vendor or even after its sub-division. It was his case that he was only aware of a boundary dispute with the Plaintiffs who had encroached on the northern part of parcel No. 3299.

8. The Defendant also filed a further affidavit sworn by the vendor on 23rd October 2017. The vendor stated that at all material times, he was the owner of parcel No. 1878 which he later on sub-divided into 13 parcels in 2013. He sold and transferred parcel No. 3301 to the 2nd

Plaintiff in 2014 whereas he sold and transferred parcel No 3299 to the Defendant in 2015. He stated that the said two parcels share a common boundary and exhibited a copy of the relevant mutation forms to demonstrate it.

9. It was the vendor's evidence that at the time he sold and transferred the two parcels to the parties herein each of them were shown their respective boundaries by the surveyor. It was his case that it is the 2nd Plaintiff who was encroaching into parcel No. 3299 because he was cultivating it before it was sold to the Defendant. He denied that the Plaintiffs had resided on parcel No. 3299 for 22 years and maintained that he sold parcel No. 3301 to the 2nd Plaintiff in 2013.

10. It was agreed by the parties that the said application shall be canvassed through written submissions. The parties filed their respective written submissions on 6th November 2017.

11. The court has considered the Plaintiffs' said application, the various affidavits filed by the parties and their respective submissions. The Plaintiffs are seeking an order of injunction to restrain the Defendant from evicting them and an order of inhibition to prevent any dealings with the suit property.

12. In my opinion, the main question for determination is whether or not the Plaintiffs are entitled to those two orders. The principles for the grant of an order of interlocutory injunction are well settled in Kenya. They are enunciated in the case of **Giella Vs Cassman Brown & Co Ltd [1973] EA 358**. First, the applicant must establish a *prima facie* case with a probability of success. Second, the applicant must demonstrate that he might otherwise suffer irreparable damage which cannot be adequately compensated by an award of damages. Third, if the court is in doubt, it shall decide the case on a balance of convenience.

13. On the first principle, the 1st Plaintiff claimed to have purchased the suit property way back in 1995 for Kshs 15,000/-. A perusal of the sale agreement purportedly signed by the parties thereto did not specify the acreage of the land bought nor the particular parcel the subject of the agreement. It simply stated that it was a portion of parcel No. 1878. It is also not stated that the 1st Plaintiff was to take possession of the portion of land pending completion. On the contrary, the agreement indicated that the portion was to be excised from parcel No. 1878 upon full payment of the purchase price. There was no indication in the affidavits of the parties if the price was ever paid in full.

14. The Plaintiffs did not back the claims of having taken possession of and extensively developed the whole of parcel No. 3299. No photographs or expert reports were adduced to demonstrate the nature, location, and extent of the alleged developments. Both the Defendant and the vendor vehemently denied the Plaintiffs' allegations of possession and developments on parcel No. 3299. The court is aware that no definitive conclusions should be made at this interlocutory stage as they may prejudice the fair trial of the suit later on. However, on the material on record, the court is not satisfied that the Plaintiffs have demonstrated possession and development of parcel No. 3299.

15. The court has considered the Plaintiffs' averment in paragraph 6 of the supporting affidavit sworn on 6th September 2017 that they had been in possession of parcel No. 3299 for 22 years with the Defendant's "full knowledge". The court is unable to believe such statement. There is ample material on record to demonstrate that the Defendant bought the suit property only in 2015 or thereabouts. It is, therefore, highly improbable that he could have had such "full knowledge" of occupation for 22 years as alleged or at all. There is also no evidence of the Plaintiffs having made any prior claim against the vendor of parcel No. 1878 either on account of purchase or adverse possession.

16. The court, therefore, finds that the Plaintiffs have not demonstrated a *prima facie* case with a probability of success against the Defendant as required by law. In the event, it shall not be necessary to consider the 2nd and the 3rd grounds for the grant of an interlocutory injunction.

17. The court has also considered the conduct of the Plaintiffs in these proceedings. They came to court *ex-parte* under certificate of urgency and obtained interim orders *ex-parte*. In my view, they were not candid enough and did not make a full and faithful disclosure of all material facts at the *ex-parte* stage. They did not disclose that both they and the Defendant bought separate parcels of land from the vendor. They did not disclose that they were the Defendant's neighbor and that they shared a common boundary. They created a false impression that the Defendant was an absentee land owner who had suddenly appeared and threatened them with eviction. In my view, a party who seeks an equitable remedy must make a full and faithful disclosure of all material facts, especially at the *ex-parte* stage. A material non-disclosure may disentitle a party to an equitable remedy regardless of the merits of his case.

18. In the case of **Owners of Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd [1989] KLR 1**, the Court of Appeal cited with approval the following passage by **Warrington L.J in Reg Vs Kesington Income Tax Commissioners ex-parte Princess Edmund de Polgnac (1917 1 KB 486 at P. 509;**

"It is well settled that a person who makes an *ex-parte* application to court - that is to say, in the absence of the person who will be affected by that which the court is asked to do - is under obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it".

19. Since the Plaintiffs have failed to demonstrate a *prima facie* case with a probability of success at the trial, there would be no basis for granting an order of inhabitation at this stage. The prayer for such an order is accordingly declined.

20. The upshot of the foregoing is that the court finds no merit in the Plaintiffs' notice of motion dated 6th September 2017 and the same is accordingly dismissed with costs. For the avoidance of doubt, the interim orders in place are hereby discharged.

21. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 24th day of MAY, 2018.

In the presence of Ms Mutegi holding brief for Mr Andande for the Plaintiffs and Mr P.N. Mugo holding brief for Mr Ithiga for the Defendant.

Court clerk Muinde.

Y. M. ANGIMA

JUDGE

24.05.18