



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 374/2016

JOHN NGOWA ZIRO.....PLAINTIFF/APPLICANT

-VS-

1. FELIX MUTHEE

2. BONFACE ONYANGO.....DEFENDANTS/RESPONDENTS

RULING

1. The Application under consideration is the Notice of Motion dated 2nd December, 2016 in which the Plaintiff/Applicant is seeking the following orders:

1. Spent

2. Spent

3. THAT pending the hearing and determination of the Main Suit, the Defendants be restrained whether by themselves, their servants or agents or otherwise howsoever from subdividing, fencing or carrying out any new/fresh subdivisions, demarcations and occupation fencing and erecting concrete poles and/or carrying out further acts of construction with the sole aim of further alienating of the Suit Property and further disposition of the Suit Property to third parties.

4. THAT costs of the Application be provided for.

2. The Application is based on the grounds on the face of the motion and supported by the Affidavit of John Ngowa Ziro, the Applicant sworn on 2nd December 2016. The Plaintiff avers that he is the registered owner of all that parcel of land known as **CR. NO.55381/2** situated North of Mombasa Municipality measuring 0.0495 hectares or thereabouts and being sub-division **NUMBER 6325 (ORIGINAL NO.390/115)/II MN**. He states that he has always desired to develop the Suit Property by constructing his matrimonial home but his efforts to do so have been jeopardized by the Defendants herein, whom he refers to as squatters who have encroached upon the Suit Property and have continued to be in illegal possession of it by themselves or their agents, servants and/or persons claiming title under them and have been subdividing demarcating and occupying, fencing and erecting concrete poles, constructing houses and/or carrying further acts of construction with the sole aim of further alienating the Suit Property and efforts to have them vacate the Suit Property have borne no fruit hence the Suit and Application. The Plaintiff further states that he enlisted the services of a surveyor who identified the beacons and ascertained that the encroachment was on the Suit Property. It is the Plaintiff's contention that there is a likelihood that the Defendants are going to continue with encroaching, sub-dividing, selling and erecting upon the land without the Plaintiff's consent resulting in irreparable harm on the part of the Plaintiff.

3. The application is opposed by the Defendants through a Replying Affidavit sworn by the 1st Defendant on 10th March 2017 in which he depones that **CR. NO.55381/2** is a subdivision of plot **NO.390/11/MN** which comprises of about 28.3 acres wherein there are squatters who have stayed for over 12 years and the squatters who include the Defendants are seeking for Adverse Possession. He further depones that there is a pending suit on Adverse Possession being **ELC Case No. 232 of 2014** wherein the Defendants have filed an Application to be enjoined as parties to the suit. He further avers that it would be detrimental to issue injunctive orders in this Suit yet there is a pending Suit for Adverse Possession. The Defendants deny that they have carried out the acts complained of as the land has been occupied by the families of indigenous communities in Kenya and the Applicant has only recently threatened to evict them from the plot. The Defendants aver that the Interlocutory Orders cannot issue at this stage because they have been in continuous possession of the Suit Plot for over 12 years, a fact they state the Applicant is aware of and is trying to use malicious means of intimidating and wanting to evict them from the plot. The Defendants further state that the Applicant has on several occasions been colluding with police officers to demolish their houses without any Court order.

4. On 29th June, 2017, the Court gave directions to have the Application canvassed by way of Written Submissions. Only the Plaintiff filed his submissions on 20th September 2017. The Defendants did not file submissions and neither did they attend Court on 15th March 2018 for the hearing and the matter proceeded in their absence.

5. This being a **Giella –v-Cassman Brown** Application, the Plaintiff must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage; and that, in the event of doubt, the balance of convenience lies with him. In determining whether the Plaintiff has a *prima facie* case two issues arise for consideration:

a. The sanctity of title and the rights of a registered proprietor, and

b. Whether the Defendants who have admitted are squatters on the suit land have a right to continue carrying out the acts complained of before acquiring proprietary rights over the land for which the Plaintiff is the registered owner.

6. The evidence on record shows that the Plaintiff is the registered proprietor of the Suit Property. **Section 25 of the Land Registration Act, 2012** provides as follows: -

i) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances and claims whatsoever, but subject –

a. To leases, charges and other encumbrances and conditions and restrictions, if any, shown in the register, and

b. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

7. **Section 26** of the Land Registration Act provides that the certificate of title issued by the Registrar is to be held by all Courts as conclusive evidence of proprietorship, and the person named as proprietor of the land is to be taken as the absolute and indefeasible owner, and the title of that owner shall not be subject to challenge, except; on ground of fraud or misrepresentation to which the person is proved to be party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

8. No evidence has been brought forward by the Defendants that falls within the exceptions outlined under **Section 26(1)** of the Land Registration Act. In the absence of fraud or evidence that the Plaintiff acquired the land through a corrupt scheme, I have no reason why I should not take the Certificate of Title held by the Plaintiff as *prima facie* evidence that he is the proprietor of the land and therefore is the absolute and indefeasible owner. The Defendants have stated that they have applied to be enjoined in **ELC Case No. 232 of 2014** in which they would seek orders of Adverse Possession. No order has been exhibited. I also do not wish to pretend to determine the issues of ownership at this Interlocutory Application without full facts.

9. The Application seeks to have the Defendants restrained from sub-dividing, fencing or carrying out any new or fresh subdivisions, demarcations and erecting concrete poles and/or carrying out further acts of construction pending the hearing and determination of the suit. In my considered view, if the court were inclined to grant the orders sought, it would mean that the Defendants would remain in possession but not carry out any further subdivision, demarcations or construction.

10. I find that the plaintiff has a *prima facie* case with a probability of success. A *prima facie* case does not mean a case that must succeed at the trial as the Defendants may through their defence demonstrate a legal right over the property such as to disentitle the Plaintiff to the relief sought.

11. As regards irreparable damage, the conventional thought on land related matters is that deprivation of an interest in land is not sufficiently remediable by an order of compensation in damages. In addition, the effect of the refusal of the order for injunction in this case is that the Defendants may totally change the state of the land if they are allowed to carry on with their activities and may also alienate it. I find such loss to be an irreparable damage to the Plaintiff. The balance of convenience, if I had doubt in the matter, lies with the registered proprietor of the Suit Property rather than with an apparent trespasser. Should the Defendants eventually succeed all they would have suffered is the delay in their sub-divisions and developments on the land.

12. Accordingly, I grant the order for Temporary Injunction in terms of prayer 3 of the Notice of Motion dated 2nd December 2016. The Plaintiff shall have costs of the Application.

Dated, signed and delivered at Mombasa this 24TH day of May 2018.

C. YANO

JUDGE