



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 275 OF 2015

JULIUS TOYA BUCHER PLAINTIFF/APPLICANT

VERSUS

HERBERT MUKUNZI INDIMULI DEFENDANT/RESPONDENT

RULING

This application is dated 9th October 2016 seeking the following orders;

1. That this application be certified as urgent and be heard exparte in the first instance.
2. That pending the hearing of this application interparties, there be a temporary injunction restraining the defendant/respondent his employees, servant or agents from entering , accessing, using and or erecting structures on the suit and No.MARAMA/LUNZA/2211.
3. That pending the hearing and determination of this suit, there be an injunction restraining the defendant/respondent his employees servants and or agents from entering, accessing, using and/or erecting structures of the suit land No. MARAMA/LUNZA/2211.
4. That the restriction placed on the suit land No. MARAMA/LUNZA/2211 by the defendant/respondent be removed, cancelled or lifted.
5. The defendant/respondent to bear the costs of this application.

The plaintiff submitted that, sometime in the year 1995, the plaintiff purchased the property from one Richard Mukunzi Indimuli at an agreed purchase price of Kshs.85,000.00 which was fully paid and a transfer of the property completed (see the defendant's father's father' own affidavit dated 28.1.2016). Mr. Mukunzi's son, the defendant herein, sometime in the month of June 2015 trespassed the said property and started erecting illegal structures without the Plaintiff's consent. The plaintiff reported the matter to the matter to local chief who summoned both parties for arbitration which was unfruitful.The defendant placed a restriction to the said property and resorted to the use of police officers who keep threatening the plaintiff to vacate the said property.

The defendant's father swore an affidavit on the 28th day of January 2016 to the effect that he sold the property to the plaintiff for the sum of Kshs.85,000.00. He further states in paragraph 9 of the same affidavit that he is of sound mind, he therefore has the capacity to institute his own claims in case of any grievance.

The Court of Appeal in Mumo MatemuVs. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No.290 of 2012 stated regarding locus standi,

“It may therefore now be taken as well established that where a legal wrong injury is caused or threatened to a person or to a determinate class of persons by reason of violation or any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 22 and 258 of the constitution.

Against the backdrop of the sound dicta of Learned Judges espoused above and in light of the averments of the Defendant's father in his affidavit that he voluntarily transferred the property to the plaintiff, we humbly submit that the defendant has no right to the said suit property and accordingly has no claim.Whether the plaintiff has a valid title to the property and whether he acquired the title to the property legally.

The defendant alleges that although the plaintiff is the registered owner of the property, the same was obtained through fraud. This

allegation is rebutted by the father who states in his affidavit that the plaintiff did not grab the land but acquired it through purchase.

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-

On the ground of fraud or misrepresentation to which the person is proved to be a party; or

Where the certificate of the title has been acquired illegally, unprocedurally or through a corrupt scheme

On allegations of fraud or misrepresentation, the Court of Appeal in *Stephen Onyango Achola & another vs Edward Sule Hongo & 2 others* [2016] eKLR quoted with approval the dicta of Law, JA (as he then was) in *Gudka vs Dodhia* Civil Appeal No. 21 of 1980 where he succinctly observed;

“the respondent was in effect being accused of fraudulent conduct and allegations of fraud must be strictly proved. The fraudulent conduct must be strictly proved more than a mere balance of probabilities as required in R G Patel Lalji Makanj [1957] EA 314.”

In addition, section 109 of the Evidence Act, provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

It is not in dispute that the property belonged to the defendant's father who has confirmed that he transferred it to the plaintiff. It is their humble submission that the defendant has not proven satisfactorily or at all that the plaintiff acquired the property through fraudulent means. Accordingly, the title of the plaintiff cannot be challenged.

The plaintiff has prayed for orders of injunction restraining the defendant from trespassing the property and that the restrictions placed on the property be lifted.

The principles upon which an interlocutory injunction may be granted are now fairly settled and the case of *Giella -vs- Cassman Brown & Co. Ltd* [1973] E. A 358 remains in junction must satisfy as follows:-

The plaintiff has established a prima facie case with probability of success by virtue of the valid title. In making this submission, we rely on the dicta of Tuiyott J in the case of *Salim Mohamed Mwavende & 9 others vs Edgar-Gear Investments & 3 others* [2012] where he opined,

“... As things stand the interests of the 1st and 2nd defendants cannot be dismissed off hand as they hold valid titles. They in fact hold strong credentials to the land. The titles assist them in establishing a prima facie case...”

The plaintiff has suffered irreparable damage on account of the restriction put on the land by the defendant. He has been unable to develop his land for over one year.

This court has carefully considered both the applicant's and the respondent's submissions and the annexures therein. The principles 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 be 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 prima 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.”*

The Plaintiff /Applicant instituted this suit by a plaint filed on 9th October 2015 seeking judgment against the defendant for a permanent injunction restraining the defendant or his agents from in anyway trespassing with the suit land No. Marama/Lunza/2211 (hereinafter referred to as the property). The defendant entered appearance on 27/11/2015. On the same date, the plaintiff also filed a notice of motion application together with a supporting affidavit under a certificate of urgency seeking orders that pending the hearing of the application interparties, there be a temporary injunction restraining the defendant from interfering with the property and that the restriction placed on the property by the defendant be removed or cancelled.

In response to the notice of motion, the defendant filed a replying affidavit on the 1st day of December 2015 to which the plaintiff replied by a further replying affidavit filed on the 3rd day of March 2016 and dated 29th February 2016. The grounds of this application are that the

plaintiff/applicant is the absolute registered proprietor of the suit land No. MARAMA/LUNZA/2211. That the defendant/respondent who has no title to the suit land is illegally in use of the property. That the defendant/respondent has without colour of right and/or consent placed restriction on the suit land thereby denying the plaintiff/applicant right to use the suit land. That the defendant/respondent has resorted to use the C.I.D/Police Officers from Butere Police Station and unless the defendant/respondent is restrained by an injunction of this Court, the plaintiff stands to suffer irreparable loss and damage. That the restriction placed on the suit land No. Marama/Lunza/2211 illegally by the defendant/respondent be removed, cancelled and or lifted.

The defendant alleges that although the plaintiff is the registered owner of the property, the same was obtained through fraud. I find that the orders sought in this application are final orders and the same cannot be granted at this stage. The applicant has failed to show a prima facie case with a probability of success. The applicant has also failed to show that he might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. I however, order that the status quo be maintained pending the hearing and determination of this suit. Cost of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE