



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1484 OF 2016

JAMES NGUGI GITU.....PLAINTIFF

=VERSUS=

HON MAINA KAMANDA.....1ST DEFENDANT

JOSHUA ORERO.....2ND DEFENDANT

JOHN GATURU.....3RD DEFENDANT

RULING

1. On 29/11/2016 the plaintiff commenced this suit against the defendants seeking among other prayers, a permanent injunction restraining them against dealing with Land Reference Number 209/11081, situated in Starehe, Nairobi City County [**the suit property**]. He also sought an order directing demolition of structures erected on the suit property by the defendants. The 1st defendant is a Nominated Member of Parliament and was at the time of filing this suit the Elected Member of Parliament for Starehe Constituency. The 2nd defendant was at the material time the Fund Account Manager for Starehe Constituency Development Fund (CDF). The 3rd defendant was the Projects Co-ordinator for Starehe Constituency Development Fund.
2. The plaintiff contended that he was the legitimate registered proprietor of the suit property. He further contended that the defendants encroached on the suit property and commenced construction thereon while aware that he was the rightful owner of the suit property.
3. Together with the plaint, the plaintiff filed Notice of Motion dated 29/11/2016 seeking interim restraining orders. The application is supported by his affidavit sworn on the same day. He reiterates his case as outlined above. Annexed to the affidavit as exhibits are copies of Grant Number 48384 in which Land Reference Number 209/11081 is comprised, showing that on 2/10/1990, the plaintiff acquired the suit property through a transfer from Mary Nyai Njeru. He also annexed a land rate payment receipt dated 28/9/2015 for Kshs 68,308, photographs of structures under construction and demand letter dated 10/10/2016 from M/s Kinyua Mwaniki & Wainaina Advocates to the defendants.
4. On 26/5/2017 the defendants filed a joint statement of defence in which they denied the contention that the plaintiff was the registered proprietor of the suit property. They further contended that the title held by the plaintiff was not authentic and was obtained fraudulently. They further contended that the Starehe CDF was constructing a social hall for the benefit of the constituents and the general public.
5. The defendants opposed the application through a verifying affidavit sworn on 13/12/2016 by Joshua Odera (2nd defendant). He reiterated that the plaintiff was neither the registered nor the beneficial owner of the suit property. He further reiterated that the title held by the plaintiff was not authentic and was obtained through fraudulent means. The 2nd defendant further deposed that the plaintiff lacked locus standi and that the construction works were complete hence the application had been overtaken by events. The application was canvassed through written submissions.
6. The court has considered the application, the rival affidavits and the written submissions. The single question to be determined in the application is whether the applicant has satisfied the criteria for the grant of an interlocutory injunction as spelt out in **Giella v Cassman Brown (1973) EA358**. In summary, the applicant was required to demonstrate a prima facie case with a probability of success, demonstrate that unless the injunctive order is issued he would stand to suffer damage that cannot be compensated through an award of damages. If the court were to be in doubt, the application is to be decided on a balance of convenience.
7. The applicant's case is that he is the legitimate owner of the suit property. He has presented to the court copy of a Grant registered on 25/10/1989. The Grant shows that he became proprietor of the suit property on 2/10/1990 upon purchase from the previous owner, Mary Nyai Njeru. The respondents' case is that the applicant's title is not authentic and that it was acquired fraudulently. The respondents have however not presented any material to support this contention. In the absence of evidence to support that allegation, the materials presented by the plaintiff remain unchallenged. Consequently, the court has no option but to find that at this point, the plaintiff has demonstrated that he has a registered proprietor's interest in the suit property and that his rights as a registered proprietor are under threat.

8. Suffice to add that, Sections 24, 25 and 26 of the Land Registration Act protect the rights of a registered proprietor. A title to land is to be held as conclusive evidence of proprietorship and is not subject to challenge except on grounds of fraud, misrepresentation to which the proprietor is a party or on ground of statutory illegality, unprocedural or corrupt scheme. As pointed out, the onus to prove that the title held by the plaintiff suffers from any of the vitiating grounds set out in Section 26 of the Land Registration Act lay with the defendants. They have presented nothing to support their allegations.

9. The court observes that whereas construction of a social hall for community use is a noble project, the project implementors have a public duty to implement the project within the confines of the law. It defeats logic to invest public money on a piece of land whose title is registered in the name of a private citizen. Secondly, if indeed the plaintiff's title was obtained fraudulently, there is a procedure for invalidating the title. I will not say more at this point.

10. In my view, the damage that results from forceful seizure of private property without regard to the law cannot be fully compensated through an award of damages. Real or threatened violation of the law calls for prevention.

11. The upshot of the above finding is that the court is satisfied that the applicant has satisfied the criteria for grant of an injunction. Consequently, the Notice of Motion dated 29/11/2016 is allowed in terms of prayers 3 and 4. The applicant shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JUNE 2018.

.....

B M EBOSO

JUDGE

In the presence of:-

No appearance for the Plaintiff

No appearance for the Defendant

Ms Halima Abdi - Court clerk