



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 8 OF 2017

(Formerly Milimani ELC No. 63 of 2017)

JEREMIAH MEPUKORI NAIROWUA.....PLAINTIFF

VERSUS

TUMBES OLE ROIKA KATATO.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 30th January, 2017 brought pursuant to Order 40 Rule 1(a) (b), Rule 2(1) (2), Rule 4(1) of the Civil Procedure Rules, Section 3A and 63 (e) of the Civil Procedure Act and all the other enabling provisions of the Law. The Plaintiff seeks injunctive orders against the Defendant in respect of the Land parcel number KAJIADO/ELANGATA – WUAS/932 hereinafter referred to as the 'suit land'. The application is premised on the grounds which in summary is that the Plaintiff purchased 40 acres of the suit land that is registered in the name of the Defendant, paid the full purchase price and took possession in 2006. Further survey to excise the portion the Plaintiff bought was conducted but the Defendant is yet to transfer the title to him. The Defendant has entered on the portion of land the Plaintiff purchased with a view to resurvey it and dispose of it to third parties. The Plaintiff will suffer irreparably if the orders sought are not granted. Further, that the Defendant placed a Notice of Sale of the said properties thus inviting potential buyers notwithstanding the fact that the Plaintiff is a purchaser for value.

The application is supported by the affidavit of JEREMIAH MEPUKORI NAIROWUA the Plaintiff herein where he reiterated his claim and avers that the Defendant has threatened to evict him. He states that in the year 2011 he sought the intervention of the Kajiado Central Land Disputes Tribunal in case no, TC 656/07/2011 which granted an award in his favour but the same was quashed vide the Machakos Judicial Review Application No. 50 of 2012. He contends that the dispute between him and the Defendant has not been resolved. He claims the value of the suit property has increased tremendously and the Defendant has become greedy and hell bent on frustrating the completion of the transfer. He reiterates that the Defendant is attempting to unlawfully evict him.

The application is opposed by the Defendant TUMBES OLE ROIKA KATATO who filed a replying affidavit who avers that the Plaintiff's/Applicant's application is misconceived, fatally defective, unwarranted and ought not to have been entertained at the first instance. He confirms that he is the registered Proprietor of the suit land and the orders sought by the Plaintiff against him are through misrepresentation of facts for he never entered into a valid agreement to sale 40 acres to be excised from **KAJIADO/ELANGATA-WUAS/932** with the Plaintiff herein in the year 2006 and 2007. He claims the Plaintiff took possession and occupied his 40 acres of land without there being a valid sale agreement and no arrangement capable of giving him rights over the said property in the year 2006 and 2007. He avers that they entered into a valid agreement of sale of the property on 25th January 2016 and annexed a Sale Agreement but the Plaintiff breached the terms of the agreement and he rescinded the same. He denies encroaching on the Plaintiff's property before 25th January 2016 as their actions to enter into an agreement for sale and purchase of the 40 acres of land to be excised from the suit land on 25th January 2016 suggests. He insists the Plaintiff has failed to pay the entire purchase price on the agreed timeline and he rescinded the contract and states that his desire to sell the property cannot be termed as encroaching. He contends that it is Plaintiff who has encroached on the suit land and wants the same transferred to his name even after failing to honour the contract as between them. Further that the Plaintiff has always claimed to have acquired purchaser's interest on the said property of land and even sought to acquire the interest via Kajiado Central Land Dispute Tribunal in case no. T.C. 656/07/2011 but the award of the Tribunal was quashed by the High Court of Kenya at Machakos in JUDICIAL REVIEW MISC APPLICATION NO. 50 OF 2012. He explains that the dispute had been settled when both of them arrived at a binding agreement on 25th January 2016 but the Plaintiff breached the terms. He avers that the Plaintiff's action is an abuse of the court process, misconceived, mischievous and ought to be dismissed with costs. Further, that the Plaintiff will not suffer any irreparable harm or damage if the orders sought are not granted as monetary compensation can sufficiently compensate any harm that may arise.

The Plaintiff filed a further affidavit where he reiterated his claim and responded that that he took possession and proceeded to occupy the forty (40) acres of Land Reference Number KAJIADO/ELANGAT-WUAS/932 (formerly KAJIADO/ELENGAT-WUAS/673) in the year 2006 after purchasing the land from the Defendant and having paid him the entire purchase price. He contends that it was mutually agreed between him and the Defendant that the forty (40) acres were to be excised from Land Reference Number KAJIADO/ELANGATA-WUAS/932 (formerly KAJIADO/ELANGATA-WUAS/673) and registered in his favour. He insists the excision of his portion has till to date not been done as the process has been frustrated by the Defendant under the pretext that his family wishes to only allow him to sell twenty

(20) acres to him. He confirms that he filed a claim for my forty (40) acres land portion at dispute at the **Kajiado Central Lands Dispute Tribunal** in the year 2001 wherein he was awarded twenty (20) acres subsequently the Defendant filed a Judicial Review Misc. Application Number 50 of 2012 at the High Court at Machakos that quashed the said Award. He further stated that on the 25th day of January 2016 he entered into another agreement for sale of forty acres of land to be hived from Defendant's other land parcel number KJD/ELANGATA-WUAS/932 Measuring Approximately 272 acres.

The Defendant filed his submissions but the Plaintiff did not despite being granted leave by the Court to do so. In his submissions the Defendant reiterated his opposition to the Plaintiff's application and relied on Section 24(a) of the Land Registration Act. The Defendant submitted that a mere claim of interest should not and cannot be used to deny a lawfully registered absolute proprietor his constitutional right of use, control and enjoyment of his property. He stated that the Plaintiff has not provided any written and validly executed sale agreement to substantiate his claims of having entered into such an agreement in the year 2006 and or 2007 as between him and the Defendant. He relied on the case of **Pleated Industries (K) Ltd & Another v Allied Industries Ltd (2007) eKLR** to support his arguments. The Defendant referred to the Sale Agreement dated the 25th day of January 2016 for the purchase of the said 40 acres of the parcel of land KAJIADO/ELANGATA-WUAS/932 and averred that this in itself is a clear indication that the Plaintiff knew that there existed no valid agreement on the suit property as before the date of the agreement.

He further relied on the case of **Griella v Cassman Brown & Company Ltd (1973) EA 358** and **John Kirika Kimani & another v Hannah Njeri Ng'anga (2006 eKLR)** to support his argument. The Defendant submitted that an award of compensation can remedy any losses the Plaintiff may suffer due to the orders not being issued.

Analysis and Determination

Upon perusal of the materials, affidavits and submissions presented in respect of the Notice of Motion dated the 30th January, 2017, the only issue for determination is whether the Plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.

The fulcrum of the suit revolves around breach of contract as well as alleged encroachment. It is not in dispute that the Defendant is the proprietor of the suit land. It is further not in dispute that the Plaintiff resides on a portion of the suit land from 2006. What is in dispute is the Plaintiff's allegation that he bought 40 acres to be excised from the suit land which the Defendant has declined to transfer. The Defendant on the other hand claims the Plaintiff took possession of part of the suit land and yet he had not paid for it, culminating in his rescinding the contract. What is interesting is that the Defendant has not indicated the steps he took to evict the Plaintiff from the suit land since 2006. I note there was even a tribunal case which Award was quashed. There seems to be a history between the Plaintiff and the Defendant and hence I cannot term the Plaintiff's claim as baseless. It is the Defendant's contention that since he is the proprietor of the suit land, the Plaintiff has not established a prima facie case as stated in the case of **Giella Vs Cassman Brown**. I note the Plaintiff has been residing on a portion of the suit land for over a decade. This in itself denotes that he has an interest in the suit land that he claims to have purchased and paid the full price. The issues raised by the Plaintiff and the Defendant cannot be determined at this juncture but require viva voce evidence to be adduced.

In the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) K.L.R 125** the Court described a prima facie case as follows:

".... is a case which, on the material presented to the Court, a 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".

In relying on the facts as presented and the above cited judicial authorities, I find that the Plaintiff has indeed established a prima facie case with a probability of success;

As to whether the Plaintiff will suffer irreparable harm that cannot be compensated by way of damages, I note he is already residing on the suit land but claims the Defendant wants to evict him. The Defendant submitted that the Plaintiff can be compensated by way of damages. I note the Defendant stated that the Plaintiff breached their agreement but did not controvert the Plaintiff's averments that he has paid the full purchase price. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, the Court of Appeal was emphatic that for irreparable harm to qualify, it should not be speculative. It held that there must be some unfounded fear or apprehension and that injunctive will issue solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable which cannot be adequately compensated by damages. In the current scenario, I find that since the Plaintiff has already been residing on the suit land from 2006, the alleged injuries are not speculative as intimated by the Defendant, as he has demonstrated the harm he will suffer if the injunctive orders are denied.

On the question of balance of convenience, from the evidence presented by the parties, I find that the balance tilts in favour of the Plaintiff whose rights have been infringed upon by the Defendant.

From the above, it is clear that Plaintiff has established a prima facie case to meet the threshold for the grant of orders of injunction. In so far as I find that Plaintiff's Notice of Motion dated the 30th January 2017 is merited, I will not grant the orders as sought but will proceed to make the following order:

- i) The prevailing status quo be maintained pending the hearing and determination of the suit.
- ii) Costs will be in the cause

Parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 28th day of June, 2018

CHRISTINE OCHIENG

JUDGE