



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 258 OF 2017**

**MATHEW MWANGI .....PLAINTIFF/APPLICANT**

**VERSUS**

**BERNARD OLUOCH.....DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 14<sup>th</sup> July, 2017. It is brought under Section 1B, 3 and 3A of the Civil Procedure act, Order 40 Rule 1, 2 and 4 of the Civil Procedure Rules and all enabling provisions of the law.
2. It seeks orders;
  - a) Spent.
  - b) Spent.
  - c) **That this Honourable Court be pleased to grant a temporary order of injunction restraining the Defendant, his servant and/or agent from demolishing houses, selling, leasing, charging, transferring or parting with possession, or interfering with the Plaintiff's proprietary rights, interests and/or ownership, or evicting the Plaintiff/Applicant from his portion of land on Plot No. 742/III situated within Mtwapa together with the developments and improvements thereon pending the hearing of the suit.**
  - d) **That costs of this Application be provided for.**
3. The grounds of the application are on the face of the application and are listed as in paragraph 1-5. I do not need to reproduce them here.
4. The application is supported by the affidavit of Mathew Mwangi Wanyoike, the Plaintiff/Applicant herein sworn on the 14<sup>th</sup> July, 2017.
5. The application is opposed. There is a replying affidavit sworn by Bernard Ochieng Oluoch, the Defendant/Respondent sworn on the 24<sup>th</sup> October, 2017.
6. On the 2<sup>nd</sup> November, 2017, it was agreed by consent that the application be disposed of by way of written submissions.
7. It is the Plaintiff's/Applicant's submissions that he bought Plot Number 724/III measuring 38 feet by 24 feet from Rose Nekesa Simiyu on 28<sup>th</sup> February, 2003. A transfer agreement was duly executed. The Plaintiff and the Defendant have been living peacefully as neighbours for more than 15 years until recently when the Defendant started laying claim on the Plaintiff's property.
8. The Defendant started to partially demolish the Plaintiff's structures within the Plaintiff's Plot and notified him to vacate the Plot. The Plaintiff/Applicant has established a prima facie case with high chances of success at the trial. He has a transfer agreement concerning the suit property, has done major developments on the suit property and has been in occupation for more than fifteen (15) years. He has immensely invested in the suit property. He is a bona fide purchaser for value and has sublet part of the premises to other tenants. That he is a bona fide purchaser of Plot No. 742/III which is now Plot No. 10215/III/MN measuring 38 feet by 24 feet hence the balance of convenience tilts in his favour.
9. It is the Defendant's/respondent's submissions that the Plaintiff/Applicant has failed to demonstrate a prima facie case with a probability of success as Plot No. 742/III which he allegedly bought from Rose Nekesa Simiyu is non-existent after formal sub division and titling of CR

64601. The court cannot therefore issue orders which are not enforceable.

They have put forward the cases of;

**John Munyao Ngilai and 15 Others –versus- Joseph Peter Mutisya (2014) eKLR. David 1. Githuku and Others –versus- George Munyiva Mbira And 2 Others (2013) eKLR.**

10. That the purported title 742/III was within Plot No. 10215/III/MN in the names of Esther Nzingo Kalume. Further that the Plaintiff could not have purchased the plot from Rose Nekesa who was a tenant and had no capacity to sell.

The Plaintiff/ Applicant has been paying monthly ground rent as a tenant. Further that the ownership of Plot NO. 10215/III/MN is not under challenge on any of the grounds set out in Section 26(1) of the Land Registration Act, 2012.

11. The Plaintiff has failed to demonstrate irreparable loss incapable of being adequately compensated by an award of damages. They have relied on the case of **Shajan Holdings Limited –versus- Micheal Kisptorus And 3 Others (2017) eKLR.**

The structures on plot NO. 10215/III/MN are capable of being valued for purposes of compensation. The Plaintiff/Applicant has been invited to discuss the way forward regarding any of his structures but has ignored the invitation.

12. That the balance of convenience tilts in favor of the Defendant/Respondent who has paid a deposit and committed huge resources towards improving and expanding the restaurant. They pray that the application be dismissed.

13. I have considered the pleadings, the notice of motion and the affidavit in support plus the annexures. I have considered the replying affidavit and the annexures. I have considered the written submissions of counsel and the authorities cited.

The issues for determination are;

**i) Whether the Plaintiff/Applicant’s application meets the threshold for grant of temporary injunctions.**

**ii) Who should bear costs?**

14. At this juncture it is necessary for this court to briefly examine the legal principles governing the applications of this nature. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction.

An injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.

15. The conditions for grant of temporary injunctions were set out in the celebrated case of **Giella –versus- Cassman Brown And Company Limited (1973) EA 358.** In the case of **Mrao Limited –versus- First American Bank of Kenya Limited And 2 Others (2003) KLR 125** the Court of Appeal in determining what amounts to a prima facie case stated;

**“A prima facie case in a civil application includes but not confined to a “genuine and arguable” case. It is a case which on the material presented to the court a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

I am guided by the above authorities.

16. It is the Plaintiff/Applicant’s case that he bought the Plot No. 742/III from Rose Nekesa Simiyu. That he has been in occupation for over fifteen (15) years. The agreement between himself and Rose Nekesa Simiyu is annexed and marked “MM 1”.

He has also annexed an agreement of lease between Rose Nekesa Simiyu and Shabani Kalume marked “MM3”. The same is dated 1<sup>st</sup> July, 1992. This confirms that Rose Nekesa Simiyu was a tenant.

She was not the registered owner hence she was not capable of passing any good title to the Plaintiff/Applicant.

17. I have also seen the sale agreement between the Plaintiff and Rose Nekesa Simiyu made on 1<sup>st</sup> October, 2002. The word “Seller” and “Buyer” are written in quotes. It appears the parties were aware that this was not a proper sale agreement.

The Defendant/Respondent has exhibited and marked “BO 5” receipts confirming that the Plaintiff/Applicant was paying monthly rent. He cannot therefore claim to have purchased the suit plot.

18. The Plaintiff/Applicant has not exhibited any certificate of title to confirm ownership. The Defendant/Respondent on the other hand has annexed a sale agreement between himself and Esther Nzingo Kalume as exhibit “BO 4”.

The certificate of search shows it is plot Number 10215/III/MN. The Plot No. 742/III which the Plaintiff/Applicant insists he bought does not exist after formal sub-division and cutting of CR 64601.

19. The plaintiff/Applicant has failed to put before the court any material to show that the Plot No 742/III exists. I find that the Plaintiff/Applicant has failed to establish a prima facie case with a probability of success at the trial.

In the case of *Kenleb Cons Limited –versus- New Gatitu Service Station Limited and Another (1990) KLR 557*. It was held by Bosire J. (as he then was) that;

**“to succeed in an application for injunction an applicant must not only make full and frank disclosure of all relevant facts to the just determination of the application but must show he has a right, legal or equitable, which requires protection by injunction.”**

I am not persuaded by the facts presented by the Plaintiff/Applicant that he deserves this kind of protection.

20. The Plaintiff/Applicant has also failed to demonstrate that he is likely to suffer irreparable injury or loss which cannot be compensated by an award of damages if these orders are not granted. Structures are capable of being valued for compensation.

21. I find that the balance of convenience tilts in favour of the Defendant/Respondent who has entered into an agreement with the registered owner Esther Nzingo Kalume. Her ownership of the suit property has not been challenged.

22. All in all in find no merit in this application and the same is dismissed. The costs of the application do abide the outcome of the main suit.

**It is so ordered.**

**DATED, and SIGNED at Mombasa on the 13<sup>th</sup> day of June, 2018.**

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**L. KOMINGOI**

**JUDGE**

**DATED, SIGNED and DELIVERED at Mombasa on the 13<sup>th</sup> day of June, 2018.**

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**A. OMOLLO**

**JUDGE**