



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 320 OF 2017

BONIFACE NZUKI MUTIA.....PLAINTIFF/APPLICANT

VERSUS

COSMAS KODI AKHULA.....1ST DEFENDANT/RESPONDENT

ROSE MKAMWAKONDO.....2ND DEFENDANT/RESPONDENT

RULING

1. The notice of motion dated 4th September 2017 is coming up for determination. In it, the Plaintiff/Applicant seeks the following orders:

i) Spent

ii) Spent

iii) That this Honourable Court be pleased to issue an order of temporary injunction against the defendants, whether by themselves or their servants and/or agents from building, constructing or in any other manner interfering with the plaintiff's quiet enjoyment, possession and occupation of the piece of land measuring (50ft x 100ft) situate adjacent to the main road Birikani – Voi Sub County pending the hearing and determination of this suit.

iv) Costs of this application be provided for.

2. The motion is supported by the several grounds listed on the face of it and an affidavit sworn by the applicant Boniface Nzuki Mutia inter alia that the seller told the plaintiff that he had sold to the defendant a plot measuring 50 feet by 100 feet but not the suit plot. That the plaintiff and the seller have without success persuaded the defendant to stop construction on the suit plot thus necessitating the filing of this application and suit.

3. The application is opposed by the replying affidavit of Cosmas Kodi Akhula. He deposed that the sale to the plaintiff was not genuine as he had earlier bought the suit property on 7.8.2011. That he sued the vendor in Voi SPMCC No 155 of 2016 when the vendor wanted to renege on their agreement. The defendant also deposes that he is in physical possession of the suit land. The defendant relied on the documents contained in his list of documents already filed in Court.

4. In the applicant's annexure 'BN 5' Sammy Mwakangalu admits selling a plot to both parties in this case. He has denied that the plot in dispute is the one he sold to the defendants. He has described the location of the suit plot but has not given a specific description of the location of the plot he sold to the defendants. In his affidavit Mr Mwakangalu stated thus at paragraph 8;

"The plot I sold to Cosmas and Rose is in a different area from where the plot in question is situated."

At paragraph 10 *"that I confirm that the plot which is subject of this suit i.e. piece of land measuring 50 feet by 100 feet situated Adjacent to the main road 'Birikani' belongs to Boniface Nzuki."*

5. In the sale agreement dated 7.8.2011 between Mr Mwakangalu and the defendants, the plot sold is said to be at Birikani. It is also indicated that it is measuring 50 feet by 100 feet. It is not sufficient for the said Sammy later to depose that the plot he sold to the plaintiff is different from the one claimed by the defendants without being specific. He is the cause of the current dispute. The defendants in an attempt to enforce their rights already sued him in Voi SPMCC 155 of 2016.

6. In the instant case, I find both parties have demonstrated a stake in the suit plot. There is need to determine if the location of the plot sold to the defendants who is the first buyer is different from the one sold to the plaintiff. Such determination can only be done through evidence. Consequently the appropriate order to make under the principle of balance of convenience is to preserve the suit plot by ordering that both parties keep off undertaking any activities on the suit plot pending hearing and determination of this suit. Accordingly the orders of temporary injunction as contained in prayer 3 of the motion are granted but varied to apply to both the plaintiff and the defendants. Each part to meet their costs of the application.

7. This suit is also transferred to Voi SPM's Court in whose jurisdiction the subject matter is. The value of the property as discerned from the pleadings also falls within the pecuniary jurisdiction of that Court.

Dated, signed & delivered at Mombasa this 31st day of July 2018

A. OMOLLO

JUDGE