



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 1413 OF 2016

WILLIAM MUTHAMA HIPPOH.....1ST PLAINTIFF/APPLICANT

JOYCE NYOKABI.....2ND PLAINTIFF/APPLICANT

ESTHER MALIA KILWENGE.....3RD PLAINTIFF/APPLICANT

JOHN IRUNGU CHEGE.....4TH PLAINTIFF/APPLICANT

ROSEMARY WANJIRU.....5TH PLAINTIFF/APPLICANT

JULIUS MWEBIA KIRIGIA.....6TH PLAINTIFF/APPLICANT

MICHAEL ITHONG'A MUGO.....7TH PLAINTIFF/APPLICANT

=VERSUS=

FABIAN OTTO KIMONG.....1ST DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR.....2ND DEFENDANT/RESPONDENT

RULING

1. This is the notice of motion dated 15th November 2016. It is brought under order 40 rules 1 9a) and 2(1) of the Civil Procedure Rules 2010 and Section 3A and 63(e) of the Civil Procedure Act.

2. It seeks order:-

(1) Spent

(2) Spent

(3) That the 1st defendant by himself, his agents or servants or anybody or otherwise howsoever be restrained by an interim injunction from entering, constructing, disposing transferring or in any other manner dealing with title NO. Nairobi/block 126/184 pending the hearing and determination of this suit.

(4) That an order do issue to the 1st defendant to restrain from threatening to evict the applicants from the disputed land until the hearing and determination of this suit.

(5) That an order do issue to the 2nd defendant to restrain from allowing any transaction regarding Title No. Nairobi/Block 126/184 pending the hearing and determination of this suit.

(6) That costs be provided for.

3. The grounds are on the face of the application and are listed as in paragraph 1 to 3.

4. The application is supported by the affidavit of William Muthama Hippoh the 1st plaintiff/applicant herein sworn on the 15th November

2016 and an undated further affidavit filed in court on the 28th April 2017.

5. The application is opposed. There is a replying affidavit sworn by Fabian Otto Kimong, the 1st defendant/respondent on the 22nd March 2017.

6. On the 22nd May 2017, it was agreed that the application be disposed of by way of written submissions. Each party was given fourteen (14) days to file their submissions.

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

8. The issues for determination are:-

(i) Whether the plaintiffs/applicants application meets the threshold of grant of temporary injunction.

(ii) Who should bear costs.

9. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for temporary injunction, the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out on the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**.

10. In the case of **Mrao Limited vs First American Bank of Kenya Limited [2003] KLR 125** the Court of Appeal stated what amounts to prima facie case. I am guided by the above authorities.

11. It is the plaintiffs/applicants case that they bought their respective plots from Josephat Nyagah Kabirua surveyor who had authority to subdivide and sell the plots. They paid the full purchase price to the said Josephat Nyagah Kabirua, a duly appoint agent. They relied on the letter of authority by the late Claire A Obare dated 27th October 2016 and the agreement by Hayanga & Co. Advocates dated 15th May 2007. Their occupation and development of the suit premises is legal.

12. It is the 1st defendant's/respondents' case that the surveyor, Josephat Nyagah Kabirua had been instructed in 2006 by the deceased Claire A Obare to sub divide the property but she passed on before the sub division was done. That the plaintiff's/applicants have not attached any title documents to prove ownership. They only rely on the share certificate issued by the surveyor which does not confer ownership. Further that the plaintiffs/applicants infringed on his right to enjoy his property as enshrined in Article 40 of the Constitution 2010.

13. He has relied a Section 26, of the Land Registration Act 2012. The plaintiffs/applicants have failed to show that they have a prima facie case with a probability of success at the trial.

They have failed to demonstrate that they will suffer irreparable loss or injury not curable in damages. They paid Kshs 300,000 which can be refunded. The balance of convenience tilts in favour of the 1st defendant/respondent who is the registered owner of the property. He urges this court to dismiss the application.

In the case of **Njenga vs Njenga [1991] KLR 401**. Bosire J (as he then was) held that:-

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

I am persuaded by the fact presented by the plaintiffs/applicants that they deserve the orders sought.

14. In **Kenleb Cons Limited vs Gatitu Service Station Limited & Another [1990] KLR 557 Bosire J** (as he then was) held that:-

“to succeed in an application for injunction an applicant must not only make a 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 satisfied that the plaintiffs/applicants deserve this kind of protection. I find that they have established a prima facie case with a probability of success at the trial.

15. The plaintiffs/applicants are innocent purchasers for value having followed due process in acquiring the suit plots which they have developed. If there was any impropriety as alleged the plaintiffs/applicants were not a party. The Court of Appeal in **Mary Syevutha Peter vs Abdulrahim Kassim Jaffer & 2 Others [2012] eKLR** held that:-

“..... the interested party has a compelling case founded upon acquisition of the suit property avowedly, as an innocent purchaser for value with notice of no irregularity, accession to putative ownership status through acquisition of registered titles, attaining legitimate, equitable interest by moving into possession and occupancy, and exhibiting public presence showing a tenable interest by conducting well recognized commercial operations on the suit property”.

16. I also find that the plaintiffs/applicants have demonstrated that they will suffer irreparably if those orders are not granted. The 1st defendant/respondent is now the registered owner of the suit property. The plaintiffs/applicants risk losing their plots with developments thereon if these orders are not granted. I am also of the view that the balance of convenience tilts in favour of the plaintiffs/applicants who are in occupation.

17. All in all I find that this application has merit. I do grant the orders sought namely:-

(a) That an order of temporary injunction be and is hereby issued against the 1st defendant/respondent by himself, his agents or servants or anybody claiming his authority or otherwise howsoever from entering, constructing, disposing of, transferring or in any other manner dealing with Title No Nairobi/Block 126/184 pending the hearing and determination of this suit.

(b) That an order be and is hereby issued restraining the 1st defendant/respondent from threatening to evict the plaintiffs/applicants from the suit property until the hearing and determination of this suit.

(c) That an order be and is hereby issued restraining the 2nd defendant/respondent from allowing any transaction regarding Title No. Nairobi/Block 126/184 pending the hearing and determination of this suit.

(d) That costs of this application do abide the outcome of the main suit.

18. It is so ordered.

Dated, signed and delivered in Nairobi on this 17TH day of OCTOBER 2018

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L. KOMINGOI

JUDGE