



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT DIVISION

ELC SUIT NO. 375 OF 2013

FRANCIS KAGUMBA

GITONGA

**MARKDONALD LIJODI MAKAKA T/A MARKTON BULK
SUPPLIERS.....PLAINTIFFS/APPLICANTS**

VERSUS

**KENYA CIVIL AVIATION AUTHORITY.....DEFENDANT/
RESPONDENT**

RULING

The matter for determination is the Plaintiff/Applicant's Notice of Motion application dated **18th March 2013**, brought under **Order 40 Rules 1(b), 2, 2, A3 and 9, Order 8 Rule (2) and 20 of the Civil procedure Rules, Section 3A of the Civil procedure Act, Section 27 and 28** of the Registered **Land Act (Cap 300) Laws of Kenya** and all enabling provisions of the Law. The applicant has sought for these orders;-

1. Spent

2. Spent

3. That the Honourable Court do subsequently confirm the Interim Orders sought in paragraph 2 hereinabove, restraining the Defendant by themselves, their servants, agents and/or employees from interfering with the Plaintiffs quiet enjoyment and user of parcel of land known as L.R No. 9042/800 situated in Embakasi Nairobi, pending the hearing and determination of this suit.

4. That the Officer Commanding Embakasi Police Station do supervise the enforcement of this order.

5. That costs be in the cause.

The application is premised on the grounds stated on the face of the application and on the affidavit of **Francis Kagunda Gitonga**. The grounds in support of the application are:-

That the Plaintiff is the bonafide proprietor of parcel of land known as L.R No. 9042/800 situated in Embasasi Nairobi.

1) That the Plaintiff has all along been in possession of the said property.

2) That the defendant has trespassed upon the plaintiff's parcel of land by erecting a perimeter wall.

3) That the Defendant is using its position to frustrate the plaintiff and it is engaging in wanton destruction of the plaintiff's property and unless the orders herein are supervised by the police, it will be difficult for the plaintiff to enforce the same.

4) That the plaintiff is supported by the Affidavit of FRANCIS KAGUMBA GITONGA and on such other grounds as may be adduced at the hearing hereof.

In his Supporting Affidavit, **Francis Gitonga** averred that the Plaintiff was allocated the above property on **1st July 1998**, as **UNS. Residential Plot.No."B"** Embakasi Nairobi as per annexure marked '**FKG**'. He also averred that subsequently thereafter the aforesaid property was duly surveyed and the **F/R** prepared being **458/171** and the parcel number changed to **L.R No.9042/800** as per annexure '**FKG2**' and that the plaintiff was awaiting the issuance of its title for the said suit property.

He also alleged that the defendant owns a property adjacent to the Plaintiff i.e. **L.R No. 9042/664** and which property is registered in its name as per annexure '**FKK**'. He further alleged that the defendant has in the recent past invaded and encroached into the plaintiff's property and its current constructing a perimeter fence around the said property as per annexure '**FKK4**'. That the Plaintiff had on several occasions tried to restrain the defendant to no avail. It was his disposition that the Defendant is engaging in acts of wanton destruction of the plaintiff property and unless restrained by this Honourable Court, the plaintiff stands to suffer irreparable loss and damages. He urged the court to allow the application as prayed.

The application is contested and **Cyril S Wayongo**, the Legal Officer of the Defendant who swore a Replying Affidavit and averred that prior to its creation by statute, the Defendant's predecessor in title, i.e the Directorate of Civil Aviation, a Government Department within the Ministry of Transport was allotted for use, occupation and ownership for training and educational purposes a parcel of land known as **L.R No.39/1/R** situated in Embakasi Area of Nairobi Province measuring approximately **87 acres** to which houses the East Africa School of Aviation, a department of the Defendant which was built in the year **1982**.

a. Registration of cautions over all available titles

b. Placing by means of a Emptor adverts in local dailies

c. Placing and erecting bill boards on and around the property

d. Erecting a perimeter wall around its property

He further averred that **L.R No. 9042/800** was fraudulently created from **L.R 9042/641,9042/642,9042/643,9042/644, and 9042/645** which were illegally excised from **L.R No.39/1/R** as per annexure "**FKG-2**" in support of **Francis Kagumba Gitonga**, which purports to show that **L.R Nos.9042/ 641,9042/ 642,6041/643,9041/644** and **9042/645** were cancelled and **L.R No.9042/800** created sometimes in the year **2006**.

He also alleged that **L.R 39/1/R** or any part thereof was not available for allocation to anybody as it was already committed for future development of the East Africa School of Aviation thus any purported issuance letter of allotment or title to the Plaintiffs is/will be null and void ab initio. It was his contention that the Defendant is the beneficial owner of all that property known as **L.R No. 39/1/R** measuring approximately **87 acres** and states that the Title Deed for **L.R No. 9042/664** measuring **56.57 acres** was fraudulently issued to it with the sole intention of the plaintiffs and other officials at the Ministry of Land to deprive it of its rightful property.

That the Defendant is entitled to protect its rightful property being **L.R NO.39/I/R** measuring **87 acres**. It was his contention that the Plaintiff's application as drawn and filed does not satisfy the principles for the grant of injunction given the circumstances surrounding the excision of the Defendant's **L.R No. 39/I/R**. He urged the Court to dismiss the plaintiff's application.

The application was canvassed by way of written submissions. The Law Firm of **Njeru Nyaga & Co. Advocates** filed the written submissions on **21st October 2014**, and urged the Court to allow the application.

The Law Firm of **Kipkenda & Co. Advocates** filed the written submissions on **29th May 2015**, and urged the Court to dismiss the Notice of Motion with costs.

This Court has carefully considered the instant Notice of Motion and the annexures thereto. The Court has also considered the written submissions and the relevant provisions of Law. The application is premised under **Order 40 Rule 1** which provides as follows:-

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

Further the application is premised under **Section 3A** of the Civil Procedure Act which grants the Court the inherent power to issue or make such orders that are necessary for the end of justice to be met and to prevent abuse of the Court process.

The applicant has sought for injunctive order which is an equitable relief or remedy granted at the discretion of the Court. However the said discretion must be exercised judiciously. The Principles to be considered in deciding whether to grant or not to grant an order of injunction were well laid out in the case of **Giella Vs Cassman Brown Co.Ltd 91973 EA 358**. Further in the case of **Noor Mohammed Janmohammed Vs Kassam Ali Virji Madhau(1953)20 LRK** the Court held that:-

“To justify temporary ex- parte injunctions, there must be evidence of immediate danger to property by sale or any other disposition and the purpose of temporary injunction is to preserve the status quo”.

The Court is therefore called upon to decide whether the applicant herein is deserving of the orders sought. The applicant has alleged that it is the rightful owner of **LR No. 9042/800** situated in **Embakassi** by virtue of the letter of allotment issued to **Markton Bulk Supplies** on **12th July 1998**, and marked **FKK 1**.

Further that the Defendant is the owner of the adjacent parcel of land **LR No. 9042/664** measuring **23.12 hectares** as evident from the certificate of title **FKG 3**. The Defendant has admitted owning the said parcel of land. The Plaintiff has alleged that the Defendant has trespassed on its parcel of land by erecting a perimeter wall. The Defendant has not denied erecting the said perimeter wall but has alleged that it is protecting what is its rightful property being **LR No. 39/1/R** measuring **87 acres**.

From the affidavit on record, the parties herein have made various allegations. However at this juncture, the Court is not called upon to make definite conclusions based on contradictory affidavits but the court is

only supposed to make a finding based on the usual standard to be considered in an application for injunction. See the case of **Airland Tours & Travel Ltd Vs National Industrial Credit Bank, Nairobi High Court, (Milimani) Civil Case No. 1234 of 2002** where the court held that;-

“In an interlocutory application , the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

The applicant has alleged that it owns the suit property **LR No. 9042/800** and that Defendant has encroached on it. The Defendant has alleged that it is the rightful owner of the parcel of land in issue as the Plaintiff fraudulently acquired it and that the Defendant is only protecting what rightful belongs to it. The issues raised herein by both parties are contradictory and can only be determined after calling evidence in the main trial. The plaintiff has not produced a certificate of title herein though it has a letter of allotment. The Court cannot find and hold that as provided by **Section 26(1)** of the **Land Registration Act**, the Plaintiff is the absolute and indefeasible owner of the suit property as no certificate of title was attached.

However , both the plaintiff and Defendant have weighty issues which need to be determined and the said issues will only be determined by calling of evidence and especially witness from the lands office to shed light on what really transpired before the Defendant was issued with certificate of title issued on **21st July 2006**. However before the contradictory issues herein are resolved, there is need to preserve the suit property. The suit property herein can be preserved by maintenance of **status quo**. The Court has noted that there is an order inforce issued on **9th October 2015**, to the effect that no party should have any dealing or interfere with the disputed property until further orders of the Court. The Court finds that in the circumstances of this case, it is prudent to extend the said **status quo** order until the final determination of this suit. The Court of Appeal in the case of **Ougo v Otieno & another, Civil Appeal No. 3 of 1987 (1987) eKLR** stated that;-

“the general principle is that where there are serious conflicts of facts, the trial court should maintain status quo until the dispute has been decided on trial”.

There are disputed facts herein. The court finds that the best order herein would be to maintain the **status quo** and that means that no party herein that is neither the plaintiff nor the Defendant would have any dealing whatsoever or any interference on the disputed suit property **LR No. 9042/800** until the suit is heard and determined or until any further orders of this Court. Further, costs of this application shall be in the cause.

Dated, signed and delivered at Nairobi this **27th** day of **January 2017**.

L.GACHERU

JUDGE

In the presence of

Mr Muthui holding brief for Mr Nyaga for the Plaintiff/Applicant

None attendance for the Defendant/Respondent

Hilda : Court Clerk

Court:

Ruling read in open Court in the presence of the above stated advocates and absence of the counsel for the Defendant. Notice of entry of Ruling to be served on the Defendants Advocates by the Plaintiffs advocate.

L. GACHERU

JUDGE