



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L 156 OF 2016

GEORGE OSOGO LIJUNGU.....PLAINTIFF

VERSUS

VEMINA SHANYISA.....1ST DEFENDANT

PETER MULOMA.....2ND DEFENDANT

EVERLYNE WALEKHWA.....3RD DEFENDANT

RULING

INTRODUCTION

By an application brought by way of Notice of Motion dated 22nd June, 2016, the Plaintiff/Applicant sought for the following orders.

1. THAT a temporary injunction do issue restraining the defendants by themselves their servants, agents and/or assigns from in any way entering, occupying, utilizing, fencing off, subdividing, transferring, disposing off, wasting, cultivating, unlawfully, interfering with, trespassing onto and for in any other way dealing with parcel No. LANGAS 111/9 pending the hearing and determination of this application *inter partes* as well as the main suit.
2. THAT a temporary injunction do issue against the Land's Registrar, Uasin Gishu barring, restraining him from registering the 3rd defendant EVERLYNE WALEKHWA as the new proprietor of all that parcel of land known as LANGAS 111/9.
3. THAT the OCS Langas Police Station to ensure compliance with this order.
4. THAT costs of this application be provided for.

This application came up for hearing on 1st July 2016 when it was agreed by both counsels to file written submissions in respect of the application. Written submissions were filed and a ruling date given by the court.

PLAINTIFF/APPLICANT'S CASE.

The Plaintiff/Applicant's application was supported by an annexed affidavit of GEORGE OSOGO LIJUNGU sworn on 9th June 2016, it was the Plaintiff's case that he bought all that parcel of land known

as NANDI/KAMOBO/681 annexing two (2) acres in the year 1969. He averred that since he was too young to undertake a legal transaction by himself, he bought and through his late father Charles Asoga to whom the title was transferred. He then stayed on the said land for ten (10) years before moving to Eldoret.

He further avers that he came to learn in 1981 that his step mother the 1st defendant herein had secretly without his consent or knowledge sold off the said land to a third party. He stated in the supporting affidavit that his late father advised him not to pursue recovery of the said land in return for parcel known as LANGAS 111/9.

The Plaintiff averred that he headed his father's advise and established his matrimonial home on the suit land where he lived peacefully with his family until 14th January 2016, when some people suddenly invaded the land claiming that they had bought it. The Plaintiff further stated that his sons were served with an eviction notice by the 1st, 2nd and 3rd defendants dated 31.12.2015.

The Plaintiff urged the court to allow his application for a temporary injunction.

DEFENDANTS' RESPONSE

The defendants opposed the Plaintiff's application vide a replying affidavit dated 14th July, 2016.

The defendants averred that the 3rd defendant entered into a land sale agreement with the 1st defendant who is the step mother of the Plaintiff/applicant herein and the 2nd defendant witnessed the said agreement. The 3rd defendant further averred that she paid Kshs 850,000/- (Eight hundred and Fifty thousand only for plot known as LANGAS 111/9 the suit property).

The 3rd defendant further averred that the plaintiff applicant has not produced any documentary evidence to prove that the suit property LANGAS 111/9 belongs to him. She urged the court to dismiss the Plaintiff's application with costs to the defendants.

ISSUES AND DETERMINATION.

As earlier stated, parties were directed to file written submissions to canvass the Plaintiff's application. The Plaintiff and the defendants counsel both filed their submissions dated 25th October, 2016. The matter was not given a ruling date until 2nd March, 2017 when it came up for high lighting of the submissions. Both counsels highlighted their submissions on the said date.

It is apparent that both counsels are in agreement that the issues for determination are as set out in the case of **Giella Versus Cassman Brown (1973) EA 358.**

1. Has the Plaintiff made out a prima facie case with a probability of success.
2. Is the Plaintiff likely to suffer irreparable injury which would not be adequately compensated by an award of damages.
3. In whose favour does the balance of convenience tilt if the court is in doubt?

I have read and carefully considered the pleadings filed, supporting affidavits annexures and submissions made herein by the counsels for both parties. I have also applicable and the fact that the remedy sought is equitable in nature in granting interim injunctions. The court must exercise this discretion judiciously as was stated in the case of **Hasmukh Khetsi Shah Vs Tinga Traders Ltd. Civil Appeal No. 326 of 2002 KLR 46Z.**

The first question is as to whether the Plaintiff has established a prima facie case with a probability of

success. The Plaintiff's deposition is that he has been living on the suit land peacefully for more than 35 years with his family until 14th February, 2016 when some people invaded the suit claiming ownership. The Plaintiff's sons were served with Notice to vacate the premises dated 31st December, 2015.

Evidently therefore the Plaintiff and his family have been living on the suit land hence the necessity to issue them with a notice to vacate. Does this make him the owner?

Why didn't the 1st defendant issue such notices for vacant possession before if she was the rightful owner of the suit property?

The Plaintiff annexed several letters posing that there has been an ongoing unresolved dispute over the suit property.

It is not in doubt that the 1st Plaintiff's the step mother of the Plaintiff as submitted by the defendant's counsel. It is also not in doubt that the Plaintiff has not produced any title documents to show ownership of the suit land as it is still unregistered. The defendant has also not controverted the Plaintiff's claim that the suit land was in exchange of NANDI/KAMOBO/681 which was registered in the late Plaintiff's father's name Charles Lijungu and sold to one Kipketer. Some time in 1982 as per the search certificate.

At this juncture, from the evidence and documentation presented before this court, the issue of ownership of the suit property is not clear. This can only be unearthed during a full hearing of the suit. On that note I find that it would be difficult to say conclusively that the Plaintiff has established a prima facie case with a probability of success.

On the second limb as to whether the plaintiff would suffer irreparable injury which cannot be adequately compensated by an award of damages, it was deponed by the plaintiff that he has lived on the suit property with his family for more than 35 years.

Unceremonious removal of a person from his matrimonial home where he has enjoyed peace and quiet would not be adequately compensated by way of damages. This would cause irreparable injury.

I am further guided by what was held in the case of **Wairimu Mureithi -vs- City Council of Nairobi Civil Appeal No. 5 of 1979 KLR 332, 396.**

"However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them".

In answer to the question in whose favour the balance of convenience tilts in the event that the court is in doubt is crucial in this application. As earlier stated that the court is in doubt as to the ownership of the suit property from the evidence and documentation produced to support his application and in response, it is only a full trial that would unearth it through further evidence.

Interim injunctions are equitable remedies in which the court must exercise its judicial discretion. The Plaintiff applicant has been in occupation of the suit land together with his sons who were given notice to vacate. They are still on the suit land. It is also not in doubt that the 3rd defendant has not been in occupation as she purportedly bought the said parcel of land in December, 2015 hence the eviction notice.

From the above analysis, I find that the balance of convenience tilts in favour of the Plaintiff/Applicant.

I therefore accordingly allow the Plaintiff's application dated 22nd June, 2016.

The costs of this application shall be in the cause.

The parties to comply with order 11 and fix the main suit for hearing within 30 days.

Dated and delivered at Eldoret on this 9th day of March, 2017.

M.A ODENY

JUDGE