



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 539 OF 2013

RAPHAEL KINORU WандаКА.....PLAINTIFF

VERSUS

JOSEPH NJUGUNA WAMWIRI.....DEFENDANT

RULING

(Application for injunction; principles to be applied; defendant seeking to restrain the plaintiff from the suit land pending hearing of the case; no counterclaim by defendant; plaintiff having been in possession; balance of convenience lies in maintaining this status quo; status quo to be maintained pending hearing of the suit)

1. The application before me is that dated 21 December 2015. It is an application filed by the defendant vide the provisions of Order 40 Rule 1 of the Civil Procedure Rules. In the application, the defendant wants the plaintiff restrained by an order of injunction from interfering with the defendant's use of the suit property pending hearing and determination of this case. The application is opposed and before I got into the same, it is prudent that I lay down a little background to this suit.

2. This suit was commenced by way of a plaint that was filed on 19 September 2013. In the plaint, it is pleaded that one Ngugi Gacheru (now deceased) was the lawful allottee of two plots identified as Plot Nos. 142 and 043 in Mukinye Farmers Cooperative Society Ltd. It is pleaded that in the year 1992, the said Ngugi Gacheru died. Since he did not have a family, his interest was inherited by his brother Kariuki Gacheru. Kariuki Gacheru later died leaving his wife Monica Waithira Kariuki to inherit the properties. It is pleaded that on 12 February 1998, Monica sold the two properties to the plaintiff through a written agreement. It is averred that this sale was done with the full knowledge of Mukinye Farmers Cooperative Society. Upon purchase, it is averred that the plaintiff started farming on the land to the time of filing suit. The plaintiff has pleaded that in January 2013, he started hearing rumours that the defendant has been issued with a title to the Plot No. 043 known as Gilgil/Karunga Block 5/43. He did a search which confirmed this, and on 31 August 2012, he cautioned the land. He has contended that the defendant fraudulently got title to the land inter alia by changing its ownership without the consent of Mukinye Farmers Cooperative Society. He has pleaded that he has been possession and farming the land since the year 1998 despite the title held by the defendant. In the suit, the plaintiff has asked for a declaration that he is the owner of the land parcel Gilgil/Karunga Block 5/43 (hereinafter the suit land) and for an order cancelling the title of the defendant.

3. The defendant entered appearance on 8 October 2013 and filed defence on 24 October 2013. In his defence, he has denied that his title was fraudulently acquired and has pleaded that he purchased the suit land from Mukinye Farmers Cooperative Society who transferred the land to him. He has pleaded that he

has a right to cultivate the land or leave it fallow. He pleaded that the plaintiff trespassed into the land without his consent and has no title.

4. Nothing much has been happening with the suit since filing, save that it was confirmed ready for hearing on 16 July 2015.

5. In this application, the defendant has stated that the plaintiff has been attempting to enter the suit property and cultivate it, and unless stopped, he will once again attempt to cultivate it. He has averred that contrary to the assertions of the plaintiff, his title was issued in the year 1991 and he has exhibited the same.

6. In his replying affidavit, the plaintiff has averred that he has been cultivating the land since 12 February 1998. In his view, the best order to have is one of status quo pending hearing of the suit.

7. Both counsels relied on the affidavits of their clients.

8. I have considered the matter. Before me is an application by the defendant seeking to restrain the plaintiff from the suit land pending hearing of this case. I note however that this suit is filed by the plaintiff not the defendant. There is no counterclaim filed by the defendant for eviction or such other orders. The plaintiff has claimed that the defendant acquired the suit property through fraud. It does appear to me that the plaintiff has been in possession of the property for a significant duration of time. In his plaint, the plaintiff averred that he has been in occupation since the year 1998. In his defence, the defendant stated that the plaintiff is not in possession, but then, the defendant would not have needed to file this application if it was not the case that it is the plaintiff in possession. I further observe that this case was filed in the year 2013. No application was filed by the defendant for more than two years since the case was filed. I presume that the defendant was comfortable with the current state of affairs otherwise he would have moved the court immediately this suit was filed.

9. I am of the view that the balance of convenience tilts towards maintaining the status quo pending hearing of this suit. To me, that is the best order given the circumstances of this case.

10. I therefore make an order that status quo be maintained pending hearing and determination of this suit. The costs of this application shall be costs in the cause.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 2nd day of March 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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In presence of :

Mr. Matiri holding brief for Mr Kimatta for the defendant/applicant

No appearance on the part of M/s Wambugu Kariuki & Co advocates for the plaintiff/respondent

Court Assistant : Nelima

MUNYAO SILA

JUDGE

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