



REPUBLIC OF KENYA

ENVIRONMENT & LAND COURT

AT MILIMANI

ELC NO.167 OF 2015

SAMWEL NJERU M'UTHI.....PLAINTIFF/APPLICANT

=VERSUS=

IMMACULATE CHEPTUM CHEPKONGA.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. This is a Ruling in respect of two separate applications filed by the Plaintiff and the Defendant. The Plaintiff's application is dated **26th February 2015**, and filed in Court on the same date. The one by the Defendant is dated **15th June 2015**, and filed in Court on **16th June 2016**. Both applications seek injunctive Orders.

2. The two applications relate to **LR No.209/14990/23(IR No. 9033)** (suit land).Both the Plaintiff and Defendant contend that they are the registered owners of the said suit land.

PLAINTIFF'S APPLICATION

3. The plaintiff contends that he is the registered owner of the suit land which was transferred to him on **24th August 2003**. That he has been in possession and that the Defendant and her proxies have trespassed into the suit land with an intention to evict him. It is on this basis that he is seeking an injunction against the Defendant.

DEFENDANT'S APPLICATION.

4. The Defendant on her part deponed that on **16th September 2008**, she entered into an agreement with one Jane Kizito Bwire in which she bought a property described as **LR No. 209/14990/21. Jane Kizito Bwire** had bought the said property from Teleposta pension scheme Trustees Registered (Teleposta).

5. There were other persons who had also bought properties from Teleposta. The properties had been subdivided from a large portion owned by Teleposta. Titles were processed and the Defendant was given certificate of title for **LR No.209/14990/21**. It however turned out that some people including the Defendant were occupying different parcels from what was reflected in the survey plan.

6. The Defendant had title for **LR No.209/14990/21** but on the ground, she was occupying **LR No. 209/14990/23. LR No. 209/14990/21** on the ground was occupied by **Peter Gichuki Kingara** whereas

Stephen Mutuku Nzonzi and Fidelina Mueni Sila occupied **LR No.209 /14990/22**.

7. The three affected persons agreed to swap the three plots to reflect the position on the ground. A deed of exchange was duly prepared and lodged at the lands office. The titles were changed to reflect the position on the ground. The defendant now became the registered owner of the suit land.

8. In May 2015, the defendant received information that there were certain persons who were masquerading as agents who had instructions to sell the suit land. This prompted her to put up advertisements in the local dailies warning people that the suit land was not on sale. The defendant also learned that the deed file in respect of the suit land was missing from the lands office. She had to execute a deed of indemnity in order for a fresh file to be opened.

9. It is around this time that the plaintiff came and started building a perimeter wall round the suit land claiming that he was the owner. The Defendant contends that the Plaintiff is laying claim to the suit land based on a spurious title document.

ANALYSIS

10. I have carefully considered the two applications as well as the submissions filed in support of the same. These are applications for injunctions and for any of the two to succeed, the applicant must meet the conditions set out in the celebrated case of **Giella Vs casman Brown & Co. (1973) EA 358**.

11. The first issue to be determined is whether any of the two has demonstrated that they have a prima facies case with probability of success. In the case of the Plaintiff, he had only annexed a copy of certificate of title to the application for injunction. He contends that he is the registered owner of the suit land. In his submissions, he states that he bought the suit land from Teleposta.

12. In a replying affidavit to the defendant's application, the Plaintiff contends that he bought the suit land from Teleposta . He takes issue with the documents annexed to the defendant's supporting affidavit. In a further affidavit in reply to the defendant's application, the Plaintiff has annexed a copy of a Land Rent request from the Department of Lands dated 13th May 2015, and two property rates payment request both dated 13th April 2015.

13. Though the Plaintiff alleges that he bought the suit land from Teleposta, there is no evidence that , that was the case, He has not annexed any evidence that he has been paying rent and rates in respect of the suit land. What the plaintiff had annexed in his further replying affidavit are demands for rent and rates but no evidence of payment. At least he should have annexed evidence of even a single payment receipt. One cannot have a property from 2003 yet fail to present even a single receipt for payment of rent or rates.

14. Apart from a copy of certificate of title, the plaintiff does not have any other documents to support his claim that he is the registered owner of the suit land. In the case of **Samuel Kamere Vs Land Registrar, Kajiado Nairobi Court of Appeal, Civil Appeal No. 28 of 2005 eKLR** in which the court cited the case of **Munyu Maina Vs Hiram Gathira Maina Civil Appeal No. 239 of 2009 at Page 5**, it was stated as follows:-

“We stated that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register “emphasis ours”.

15. The Plaintiff in the instant case has merely claimed that he is the registered owner of the suit land. His title is being challenged by the defendant. He was expected to prove that he indeed bought the suit land from Teleposta as he claims. He cannot just dangle a copy of title and say that he is the owner without

showing that he properly bought the same and has been paying rents and rates.

16. In the case of the defendant, she has demonstrated that she bought the suit land from Jane Kizito Bwire who had purchased it from Teleposta. When it was realized that certain persons including the defendant were occupying land which did not tally with the survey plan, a deed of exchange was duly prepared and lodged at the lands registry where appropriate changes were made.

17. The defendant has annexed a bundle of demand for rent and rates and payment receipts showing that she has been paying rent and rates in respect of the suit land. The few anomalies pointed out in the replying affidavit of the defendant in response to the defendant's application do not make any material difference as to affect the defendant's case. On the material presented before the court it is clear that the defendant has established that she has a prima facie case with probability of success.

18. It is the defendant who has been in possession of the suit land. The plaintiff only came to build a wall around the suit land claiming that he was the owner. The court ordered *status quo* to be maintained and the *status quo* was that it was the defendant who was in possession. The Plaintiff by that *status quo* was asked not to do any further constructions.

CONCLUSION

19. On the analysis of the materials presented in support of the respective cases. I find that the Plaintiff has not demonstrated that he has a prima facie case with probability of success. On the other hand, I find that the defendant has demonstrated that she has a prima facie case with strong chances of success. The upshot of this is that the Plaintiff's Notice of Motion dated **26th February 2015**, is hereby dismissed with costs to the defendant. The defendant's Notice of Motion dated **15th June 2015**, and filed in Court on **16th June 2015**, is allowed in its entirety with costs to the defendant.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** on this **2nd** day of **March, 2017**

E.O.OBAGA

JUDGE

In the presence of :-

None appearance for the Plaintiff/Applicant

Mr Waswa for Mr Odoyo for Defendant/Respondent

Court Assistant: Kevin

E.O .OBAGA

JUDGE