



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 870 OF 2016

JOHN PETER KAMAU RUHANGI.....1ST PLAINTIFF

GEORGE JONATAHN MAARA.....2ND PLAINTIFF

DAVID MBURU GITHERE.....3RD PLAINTIFF

VERSUS

ISAAC MAINA WANDERE.....1ST DEFENDANT

WANDERJOY PARTY WORLD LIMITED.....2ND DEFENDANT

NAIROBI CITY COUNTY.....3RD DEFENDANT

RULING

At the center of the dispute between the parties herein is the ownership of all that parcel of land known as L.R No. 27/326 (Original No. 27/8/26) (hereinafter referred to as “the suit property”). The suit property is a portion of a parcel of land known as LR No. 27/8 (hereinafter referred to as “Plot No. 27/8”) which was owned by the 2nd and 3rd plaintiffs and a company known as Gumchem(Kenya)Limited in which the 1st plaintiff had an interest. Sometimes in the year 1999, the plaintiffs applied to the then Nairobi City Council, the predecessor of the 3rd Defendant under the Physical Planning Act, 1996 for permission to sub-divide Plot No. 27/8 into several parcels. The application by plaintiffs was allowed on several conditions which were set out in the notice dated 28th January, 2000 by the then Director of City Planning and Architecture. One of the conditions on which the said sub-division was approved was that, the plaintiffs were to surrender a portion of Plot No. 27/8 measuring 0.8 ha. which was reserved for public purpose (Nursery School) to the Nairobi City Council free of charge. The plaintiffs accepted the said terms and caused Plot No. 27/8 to be sub-divided into L.R No. 27/310 to L.R No. 27/339. The portion of Plot No. 27/8 which was reserved for public purpose and which was to be to be surrendered to the Nairobi City Council was registered as L.R No. 27/326 (“the suit property”) after the said sub-division.

The Plaintiffs brought this suit against the Defendants on 26th July, 2016 seeking, a declaration that they are entitled to exclusive right of possession and occupation of the suit property, a permanent injunction to restrain the Defendants from trespassing on, continuing being in occupation, selling, erecting structures on and/or in any other manner interfering with the Plaintiffs quiet enjoyment and possession of the suit property, an order of eviction of the defendant from the suit property, an order for the cancellation of the temporary occupation license issued by the 3rd Defendant to the 1st and 2nd Defendants, general damages, special damages, mesne profits, costs and interest.

Together with the plaint, the Plaintiffs brought an application by way of Notice of Motion dated 26th July, 2016 seeking temporary injunction on the terms set out above pending the hearing and determination of this suit. In his affidavit sworn on 26th July, 2016 in support of the application, the 1st Plaintiff stated that he was the registered owner of the suit property while the 2nd and 3rd Plaintiffs have an interest in the suit property pursuant to a consent court order which was made in *Nairobi HCCC No. 748 of 2013, David MburuGithere & Another vs. John Peter KamauRuhangi & 3 others*. The 1st Plaintiff stated that after the subdivision of Plot No. 27/8, the Plaintiffs were allocated eleven (11) parcels of land each. The 1st Plaintiff stated that in accordance with the condition under which their sub-division scheme was approved, they surrendered the suit property to the Nairobi City Council. The 1st Plaintiff claimed that after they surrendered the suit property to the City Council as aforesaid, he requested the City Council to allocate the property back to him so that he could develop a nursery school thereon. The 1st Plaintiff stated that since he was the immediate former owner of the suit property, his application for allocation of the suit property was approved and the property was accordingly allocated to him. The 1st Plaintiff stated that following the said approval and allocation, he regularized his interest in the suit property by obtaining title documents in respect thereof from Ardhi House.

The 1st Plaintiff stated that the 1st and 2nd Defendants own LR No. 27/323, 27/324, 27/325 and 27/329 which they purchased from the 3rd Plaintiff. The 1st Plaintiff stated that the said parcels of land owned by the 1st and 2nd Defendants are adjacent to the suit property and that at the request of the 1st and 2nd Defendants he allowed them to use the suit property as a parking bay. The 1st Plaintiff averred that in the year 2011, he demanded vacant possession of the suit property from the 1st and 2nd Defendants who were using the same free of charge but they refused to yield the same. The 1st Plaintiff stated that in response to his demand for vacant possession, the 1st and 2nd Defendants claimed that they owned the suit property pursuant to a Temporary Occupation Licence (TOL) which they obtained from the 3rd Defendant. The 1st Plaintiff contended that his title to the suit property had not been revoked and that he had approached the court with clean hands to reclaim the suit property from the 1st and 2nd Defendants.

The Plaintiff's application was opposed by the Defendants. The 1st and 2nd Defendants opposed the application through a replying affidavit sworn by the 1st Defendant on 10th August, 2016 while the 3rd Defendant opposed the application through a replying affidavit sworn by N. M. Mungala on 16th August 2016. The 1st and 2nd Defendants contended that the 1st Plaintiff did not acquire valid title over the suit property from Gumchem Kenya Ltd. because the suit property had been surrendered to the Nairobi City Council and Gumchem Kenya Ltd. had no title therein which it could pass to the Plaintiff. The 1st and 2nd Defendants averred further that Conveyance dated 8th July, 2011 was not executed by the 2nd and 3rd Plaintiffs who are alleged to have executed the same and that the Deed Plan attached to the same is not genuine. The 1st and 2nd Defendants termed the said Deed Plan and Conveyance forgeries. The 1st and 2nd Defendants contended that the 1st Plaintiff has never owned the suit property.

The 1st and 2nd Defendants contended that there is no evidence placed before the court that the Nairobi City Council approved and granted the 1st Plaintiff's application for allocation of the suit property. The 1st and 2nd Defendants denied that they entered the suit property as the 1st Plaintiff's licensees and contended that they took possession of the property in the year 2008 pursuant to a TOL which was granted to them by the Nairobi City Council. The 1st and 2nd Defendants averred that they were subsequently granted a lease over the suit property for a term of 25 years with effect from 1st January, 2008. The 1st and 2nd Defendants contended that they had occupied the suit property for the last 8 years on the basis of the said TOL and lease and had carried out several improvements thereon. The 1st and 2nd Defendants denied that they were constructing permanent buildings on the suit property. The 1st and 2nd Defendants contended that the Plaintiff had not made out a case for the orders sought and that the interim orders obtained herein by the Plaintiff *ex parte* were obtained fraudulently through misrepresentation and non-disclosure of material facts.

On its part, the 3rd Defendant contended that it was the owner of the suit property and that the title held by the plaintiffs in respect of the suit property was a forgery, fake, null and void. The 3rd Defendant contended that once the Plaintiffs surrendered the suit property to the 3rd Defendant, it became public property vested in the 3rd Defendant in trust for the public. The 3rd Defendant contended that the Plaintiff had not established a prima facie case with a probability of success to warrant the grant of any of the prayers sought in their application.

The Plaintiffs application was argued by way of written submissions. I have considered the application, the affidavits filed in opposition thereto and the respective submissions by the advocates for the parties. The Plaintiff has sought both interlocutory prohibitory injunction and a mandatory injunction for the eviction of the Defendants from the suit property. The principles upon which the court exercises its discretion in applications of this nature are now well settled. For a temporary prohibitory injunction to issue, the Plaintiff has to satisfy the conditions which were enunciated in the case of Giella –vs- Cassman Brown & Co. Ltd. (1973) E. A. 358. The Plaintiff has to establish a prima facie case and has also to demonstrate that unless the order is granted he will suffer irreparable harm which cannot be compensated in damages. For a mandatory injunction to issue at interlocutory stage, the threshold to be met is higher. The Plaintiff has to demonstrate that he has a clear case with overwhelming chances of success. The Plaintiff must also show that irreparable loss which cannot be compensated in damages would ensue unless the order is granted.

Applying the foregoing principles to this case, I am not satisfied that the Plaintiffs have established a case warranting the grant of the orders sought. It is common ground that the suit property was surrendered by the Plaintiffs to the Nairobi City Council. I am in agreement with the contention by the Defendants that once the suit property was surrendered to the Nairobi City Council, the property became vested in the said Council and due process had to be followed before the same could be allocated to the 1st Plaintiff. The onus was upon the 1st Plaintiff to show that he acquired the suit property lawfully from the Nairobi City Council after it had been surrendered as aforesaid. The 1st Plaintiff has exhibited a letter which he wrote to the City Council requesting for re-allocation of the suit property to him. There is no evidence before the court that the 1st Plaintiff's application to be allocated the suit property was approved and that the property was indeed allocated to him. There is no material before the court showing how the suit property was conveyed back from the Nairobi City Council to the 1st Plaintiff. What the 1st Plaintiff has come out flashing is a conveyance dated 8th July 2011 the authenticity of which is highly contested. The 1st Plaintiff has also exhibited a certificate of official search dated 15th October, 2015 in proof of his ownership of the suit. The Plaintiffs did not make any attempt to respond to the attack that was directed at the Deed of Conveyance dated 8th July 2011 which is the foundation of its title to the suit property.

In the case of MunyuMainavs. Hiram GathihaMaina (2013) eKLR, the Court of Appeal stated that when a registered proprietor's root of title is under challenge, it is not sufficient for a registered proprietor to produce the instrument of title as proof of ownership. He must go beyond the instrument of title and prove the legality of how he acquired the title. The Plaintiff has failed completely to establish that he acquired the suit property lawfully. The 3rd Defendant has contended that it is the owner of the suit property and that the title held by the 1st Plaintiff is a forgery. The 1st and 2nd Defendants have contended that their interest in the suit property is derived from the 3rd Defendant. In the absence of any evidence as to how the 1st Plaintiff acquired the suit property from the 3rd Defendant's predecessor, Nairobi City Council, the validity of the title held by the 1st Plaintiff over the suit property is doubtful.

Due to the foregoing, I am not satisfied that the Plaintiffs have established a prima facie case against the Defendants with a probability of success. On whether, the Plaintiffs would suffer irreparable harm, again, I am not satisfied that that would be the case. This is for two reasons. First, the Plaintiffs have claimed damages in their plaint. This means that the possible loss to the Plaintiffs if the injunction sought is not granted can be compensated in damages. Secondly, I have noted from the material before the court that the Plaintiffs had offered to sell the suit property to the 2nd Defendant at Kshs.30,000,000/=. This also shows that the loss of the suit property can be compensated. For the foregoing reasons, it is my finding

that the Plaintiffs have not met the conditions for granting of the orders sought. Even if the court was to consider the balance of convenience, I am of the view that the same would tilt in favour of maintaining the current status quo pending the hearing of the suit.

In the final analysis and for the foregoing reasons, I find no merit in the Notice of Motion dated 26th July, 2016. The application is dismissed with costs to the Defendants.

Delivered and Signed at Nairobi this 28th day of April, 2017

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff

Ms. Wairimu n/b for Kamara for the 1st and 2nd Defendants

N/A for the 3rd Defendant

Kajuju Court Assistant