

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 333 OF 2015

JAMES GICHO MAKUMI.....PLAINTIFF/APPLICANT

-VERSUS-

WANJE HOLDINGS LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The application for determination is the amended notice of motion dated 27th June 2016 brought by the plaintiff/applicant. It is brought under the provisions of Order 40 of the Civil Procedure Rules and section 1A & 3A of the Civil Procedure Act. The following orders are sought:

i) Spent

ii) the defendant by itself, its agents, employees and/or servant be and are hereby restrained from evicting or otherwise interfering in any way with the plaintiff's peaceful possession of the plot known as MN/VI/2362 located at Port Reitz, Mombasa and all developments thereon pending the hearing and determination of this application;

iii) That the defendant by itself, its agents, employees and/or servant be and are hereby restrained from evicting or otherwise interfering in any way with the plaintiff's possession of the plot known as MN/VI/2362 located at Port Reitz, Mombasa and all developments thereon pending the hearing and final determination of this suit;

iv) That the cost of this application be provided for.

2. The application is supported by the grounds on the face of it inter alia that there have been no proceedings against the plaintiff seeking his eviction yet he is in actual possession. The application is supported also by the affidavits of James Gicho Makumi and Margaret Njeri Gicho. The applicant deposed that he has been in occupation of the suit premises for over 40 years and is the subject of on-going proceedings in MSA HCC 266 of 1996 between himself and KENATCO. That attempts to evict him by the defendant were unprocedural and unlawful prejudicial to his claim over the property

3. The application is opposed by the Defendant through a replying affidavit sworn on its behalf by Mr Peter Waweru, the operations manager. The defendant deposed that it purchased the suit property through a private treaty on 11.8.2014. That at the time of buying the plot, the defendant deposes that it knew there were people illegally occupying and they asked the bank to provide them with documents to assist in evicting the said persons. The defendant deposed further that at the time the bank sold the property, there was no Court order, prohibition or caveat against the title to stop the bank from selling. That the estate of the deceased has no legitimate claim over plot No MN/VI/2362 and their claim if any falls against KENATCO for compensation by way of damages. The defendant deposed that it effectively evicted the squatters who had invaded plot No 2360 having obtained judgement in ELC 168 of 2015. The Respondent urges the Court to dismiss both the suit and the application.

4. The parties filed written submissions which I have considered. The principles for granting interlocutory injunction are well settled that the applicant must establish a prima facie case with a

probability of succeeding. Secondly that the loss to be suffered if the orders are not granted is irreparable and when in doubt in whose favour the balance of convenience tilts. To start with, the pleadings does not show that there is any privity of contract between the applicant and the Respondent. The applicant's claim is that he purchased the suit property from KENATCO while the Respondent is a purchaser from National Bank Ltd in exercising its statutory power of sale.

5. The Respondent explained how it purchased the suit property from the bank. More importantly is the documentation showing that at the time the property was sold to it, there was no order of caveat barring the bank from going on with the sale. The applicant on his part deposes that the sale transaction between KENATCO was rescinded and he was told to vacate on 1.11.1983 hence his occupation thereafter became that of an adverse possessor. That this is the reason he filed the counter – claim in MSA HCCC No 266 of 1996. This suit is still pending until it is decided in favour of the applicant, it cannot be said that there is demonstration of prima facie shown.

6. The applicant is in possession as far as he is concerned although the defendant says otherwise. The applicant deposed that the Respondent was aware they were in occupation of the premises before filing of ELC 168 of 2015 and wondered why the Respondent did not endeavour to join them in that suit. That their eviction if allowed to go on is unjustified as they will not have been afforded an opportunity to present their case.

7. Without attempting to set aside or varying the terms of the judgement obtained in ELC 168 of 2015 by the Respondent, it is imperative to give the applicant a chance to present his case however flimsy it may be so that he is not condemned unheard thus uphold the tenets of natural justice. On this account only I find the balance of convenience tilting in his favour to remain in the premises pending the determination of this case. I will allow the application in terms of prayer (2) & (3) with a rider that the applicant shall file an undertaking as to damages in the event his suit is dismissed. The undertaking be filed within 30 days of the delivery of this ruling.

Dated, signed and delivered at Mombasa this 25th day of April 2017

A. OMOLLO

JUDGE