



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 179 OF 2016

JOSEPH CHEROPPLAINITFF

VERSUS

NGARI MUCHOKI MAIHU.....DEFENDANT

RULING

(Application for injunction; order that status quo be maintained)

1. This suit was commenced by way of a plaint that was filed on 23 May 2016. The case of the plaintiff is that he purchased a parcel of land described as Plot No. 186 in Oljorai measuring 10 acres from one Kipruto arap Chebon in the year 1996. It is said that in the year 2012, the Government Surveyor visited the land but by a gross error, the surveyor indicated that the said land belongs to the defendant and he gave it a new number 1412. The plaintiff has pleaded that on realizing the error, he lodged a complaint and on 28 April 2013, the defendant conceded, in the presence of the Land Adjudicating Officer, the area Chief, the District Officer and Member of County Assembly, that the Plot No. 1412 is owned by the plaintiff. It is averred that in the said meeting, the Surveyor and Land Adjudication Officer, agreed that they had committed a gross professional mistake and their decision was reduced into writing. It is pleaded that the defendant indicated that he had spent a sum of Kshs. 28,000/= in pursuing his title deed which he asked the plaintiff to pay back. It is pleaded that on 18 May 2016, the defendant through his agent, invaded the Plot No. 1412. In the suit, the plaintiff has sought orders of a declaration that the Plot No. 1412 Oljorai Phase II is his exclusive property; a permanent injunction against the defendant and his agents; and an order to have the defendant transfer the Plot No. 1412 to the plaintiff.

2. Together with the suit, the plaintiff filed an application for injunction seeking to have the defendant restrained from entering into the Plot No. 1412 pending the hearing and determination of this suit. It is that application which is the subject of this ruling.

3. To his supporting affidavit, the plaintiff has annexed his sale agreement with Kipruto arap Chebon, some minutes said to be of a meeting held on 26 April 2013 and what is said to be an acknowledgment note from the defendant, acknowledging the sum of Kshs. 28,000/= from the plaintiff.

4. The defendant has opposed the suit by filing a defence and has also opposed the application for injunction through a replying affidavit. His position is that he and one of his partners, a Mr. Mark Kaiganaine, were allocated the Plot No. 1412 measuring approximately 4.4 Ha through the Settlement Fund Trustees. He then paid the required fee of Kshs.27,952/=. He has stated that the plaintiff started spreading rumours to the effect that the said land was wrongly allocated to him in error and that being an honest and busy person, and without verifying the records at the Lands office, he fell into the trap and

innocently requested the plaintiff to refund him Kshs. 28,000/= which he had paid to pursue issuance of a title deed. He has pointed out that the documents displayed by the plaintiff do not reflect the Plot No. 1412 and that there is no letter or document from the Land Registrar or Adjudication Officer, indicating that there was an error in the allocation of the Plot No. 1412.

5. I have considered the above alongside submissions of counsel for the applicant and respondent.

6. To succeed in an application of this nature, the applicant has to demonstrate a prima facie case with a probability of success and also show that he stands to suffer irreparable loss if the injunction is not granted. Where the court is in doubt, it will decide the application on a balance of convenience. These principles were laid down in the case of *Giella vs Cassman Brown (1973) EA 358*.

7. It is the case of the plaintiff that he purchased the suit land from one Kipruto arap Chebon through the sale agreement of 5 June 1996. I have seen the agreement which appears to show a sale of a Plot No. 186 at the consideration of Kshs. 18,000/= per acre. The plaintiff avers that this Plot No. 186 is the same as Plot No. 1412. However, I have no proof of this allegation. There is nothing annexed which indicates that the Plot No. 186 has any connection with the Plot No. 1412. The plaintiff has stated that there was a meeting held where the defendant, the Land Surveyor and the Land Adjudication Officer stated that they had made an error in allotting the Plot No. 1412 to the defendant. I have looked at what is annexed as minutes of the meeting. I can only see one page which states that "the meeting started with a word of prayer from Mr. Mark Cherutich." There are no other recordings of the said meeting. I therefore have no idea what was discussed in the said meeting and no record of anywhere where the Land Surveyor or Land Adjudication Officer indicated that there was an error in the manner in which the plots were allocated. I have however seen the acknowledgment by the defendant of Kshs. 28,000/= on 26 April 2013, which states that it is refund for payment erroneously made for the Plot No. 1412. The defendant on the other hand has displayed his letter of offer and payment receipt made in acceptance thereof.

8. I would probably have held that the plaintiff has not displayed a prima facie case, and dismissed the application, if it was not that there is an acknowledgment of refund of the sum of Kshs. 28,000/= by the defendant. I wonder why the defendant deemed it fit to accept a refund from the plaintiff of this sum of money. His explanation that he is a busy man simply does not add up. I think this requires more interrogation which can only be done after a hearing on merits. In my view, this application is best decided on a balance of convenience and the balance of convenience tilts towards maintaining the current status quo. It does seem that it is the plaintiff who has been in possession for the defendant attempted to move into the land through his appointed agent. I direct that the said status be maintained pending hearing and determination of the case. I further direct that there be no development of any structures on the disputed land and no party should sell or enter into any dealings over the land.

9. On costs, the same shall be in the cause.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 21ST day of June 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr. Ombati holding brief for M/s Karanja Koskei & Company Advocates for the plaintiff/applicant.

Mr. Murache present for the defendant/respondent

Court Assistant : Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU