



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 167 OF 2017

JOSEPH MWATHI KITONGA.....APPLICANT

VERSUS

CHRISTOPHER KIMANI KAMAU.....RESPONDENT

RULING

1. Coming up before me for determination is the Notice of Motion dated 10th October 2014 and filed on the 13th October 2014 in which the Applicant seeks orders of temporary injunction restraining the Respondent, his agents, workers or anybody claiming under his name from interfering, entering, charging, leasing, encroaching, trespassing, and/or evicting him from the parcel of land Ref No. Nyandarua/Olkalou Salient/344 (“Suit property”) pending the hearing and determination of this application and/ or suit.
2. The application was premised on the annexed affidavit sworn by the Plaintiff/Applicant Mr. Joseph Mwathi Kitonga dated the 13th October 2014.
3. The grounds to which the said application was based on included:
 - i. That the defendant has illegally, unlawfully and fraudulently registered land parcel no. Ref No. Nyandarua/Olkalou Salient/344 and obtained Title deed in respect of the above parcel of land.
 - ii. That the Respondent has threatened the Plaintiff with eviction from the said parcel of land claiming that he has sold it to a third party.
 - iii. That the plaintiff has stayed for over 26 years on the said parcel of land after purchasing the same for value from the then duly registered owner one Musyoka Mwengu.(now deceased)
 - iv. That the Plaintiff has extensively developed the land and has over the years cultivated the same and is where he calls home.

Background

4. On the 23rd July 2014 when the Applicant appeared before Hon. Lady Justice L. Waithaka sitting at the Environment and Land Court, Nakuru to argue his application dated 23rd July 2014, ex-parte, the court directed him to serve the same for inter-partes hearing on the 30th September 2014.
5. On that day, counsel for both parties consented to the withdrawal of the said application, which had been drawn and filed by the Applicant in person and which was defective.
6. On 14th October 2014 Mr. Nyaribo, Counsel for the Applicant appeared before court to argue the present application (which had been filed afresh) ex-parte wherein the same was certified as urgent and he was directed to effect service. A mention date was fixed for the 11th November 2014 with the status quo to be maintained as at that day.
7. On the 11th November 2014, the Applicant was granted 7 days to respond to the Respondent’s replying Affidavit.
8. The court directed that the application be heard inter-partes on the 18th January 2015.
9. The matter was placed before Hon Justice Sila Munyao on the 19th January 2015 wherein both parties were represented and the court granted the Applicant leave to file and serve their supplementary affidavit within 14 days, corresponding leave was granted to the

Respondent to respond within 14 days thereafter. The court further directed the parties to file their written submissions and the hearing was scheduled for the 5th May 2015 with the status quo to be maintained.

10. The matter was later re-scheduled in chambers for the 21st April 2015 as the Judge was away on official duty.

11. On the scheduled day, the parties were not in court and the court directed for dates to be taken in the Registry. The matter remained unprosecuted until it was transferred to the Environment Land Court Nyahururu wherein the Applicant's counsel appeared before me on the 6th April 2017 pursuant to a Notice to Show Cause why the same should not be dismissed for want of prosecution.

12. The court having been satisfied with the explanation given by the Applicant's counsel, granted the Applicant 14 days leave to file and serve their papers. Corresponding leave was granted to the Respondent to file their response. A mention date to confirm compliance was fixed for the 30th May 2017.

13. On the scheduled day, the Applicant appeared before me in person with an application to act in person. He had filed the written submissions pursuant to the orders issued on the 6th April 2017. There was no appearance by the Respondent. The court directed that the Applicant serves the application. A mention date was set for the 31st May 2017

14. On the 31st May 2017 when the matter was called out only the Applicant/Plaintiff's was present in court, the court observed that an affidavit of service dated 5th May, 2017 had been filed in court on the 8th May, 2017 stating that the Respondent's counsel had been duly served on the 5th May, 2017 with the written submissions which he received under protest, but despite the service, they had neither filed their response nor appeared in court. The court proceeded to give the Applicant a date for ruling on his application dated the 10th October 2014.

APPLICANT'S SUBMISSIONS

15. The applicant's written submission is to the effect that he bought the suit parcel from one Musyoka Mwengu the registered owner, who is now deceased, and shall be referred to as the vendor for the purpose of this application.

16. Both parties entered into an agreement to that effect on the 9th July 1987.

17. That upon completion of the payment on 10th October 1990, the Applicant and the deceased vendor visited the OL- kalou land Control board and a letter of transfer was issued for the transfer of the land. The parties then went to register the said transfer at the District settlement officers' office Nyahururu where the transfer was duly executed. That the valuation was subsequently done and the Ministry of Lands and Housing-Nairobi gave him a document for the final payment of stamp duty and other charges.

18. That when he presented the said documents for registration, he discovered that the Respondent had obtained a title deed to the suit land.

19. The Applicant then lodged a caution on the suit land.

20. The Applicant's overall submission thereof is to the effect that the Respondent's title deed was obtained fraudulently based on the grounds that;

i. deceased vendor, who was the registered owner did not sell the suit land to the Respondent.

ii. the consent from the Land control board was obtained in the absence of the deceased vendor.

21. The Applicant has further averred in his affidavit that the Respondent has threatened to evict him and his family from the suit land where they have lived for 26 years. That on the 26th September 2014 the Respondent sent thugs to his home who destroyed a store which he had just put up in readiness for the harvesting season.

22. The issue for determination is therefore whether this court should grant the Applicant the interim order for injunction pending the hearing of the suit so sought.

23. It is trite law that before an interim injunction can be issued by court, an Applicant must prove that (s)he has a *prima facie* case with chances of success; that unless the injunctive order is issued, (s)he is likely to suffer irreparable damage that cannot be compensated by way of damages; and if the court is in doubt, then it should decide the case on a balance of convenience.

24. The Respondent in this matter did not file his written submissions to the Application despite having participated in the proceedings of 30th September 2014, 4th November 2014, and 19th January 2015 where directions were taken to file written submissions and further having had been served with the Applicants' written submissions thereafter. Consequently, the court finds that the Applicant's Application is unopposed.

25. I have therefore considered the Applicant's Application, the Supporting Affidavit and the Applicant's written submissions hereto.

26. The Applicant has annexed the copy of the sale agreement executed by both parties confirming that the Applicant bought the suit property from the deceased vendor on 9th July 1987, copies of the consent letter and transfer forms, correspondence letters as well as photos of the damaged store.

27. The Applicant's depositions having been unopposed, I find and hold that the Applicant has established a prima facie case with chances of success and if the injunctive orders are not granted, he is likely to suffer irreparable damage which cannot be compensated by way of damages.

28. Accordingly I grant the following orders:-

i. That a temporal injunction is hereby issued restraining the Defendant/Respondent, his agents, workers or anybody claiming under his name from interfering, entering, charging, leasing, encroaching, trespassing, and/or evicting him from the parcel of land Ref No. Nyandarua/Olkalou Salient/344 pending the hearing and determination of this suit.

ii. The Applicant is also awarded costs of the Notice of Motion dated 10th October 2014.

Dated and delivered at Nyahururu this 25th day of July 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE