



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 1053 OF 2015

HERMAN NJOROGE KAMAU.....PLAINTIFF

VERSUS

ANDREW KUBAI.....RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 26th October 2015 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendant/Respondent from entering, trespassing upon, taking over, remaining, damaging or in any other manner howsoever interfering with the Plaintiff's quiet enjoyment of all those parcels of land known as Ndumberi/Riabai/2928, 2930 and 2931 (hereinafter referred to as the "suit properties") pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Herman Njoroge Kamau, sworn on 26th October 2015 in which he averred that in the year 2002, he bought the parcels of land known as Ndumberi/Riabai/2928 and 2931 from one Gideon Blacklaw Kubai and the same were registered in his name and he was issued with title deeds, copies of which he produced. He further averred that he purchased the parcel of land known as Ndumberi/Riabai/2930 from one Timothy Kubai Kubai in the year 2006 and he was issued with a title deed, a copy of which he annexed. He further annexed copies of the green cards in respect of the suit properties, indicating the transfer of the suit properties into his name. He averred that as per those green cards, the Defendant/Respondent has never at any one time or at all been registered as the owner of the suit properties. He further averred that he has been in total uninterrupted occupation of the suit properties since acquisition and has extensively developed them. He averred that the premises are occupied by tenants as per the photos he annexed. He further averred that prior to commencing the development on the suit properties, he obtained all the necessary approvals from the relevant authorities as per the copies of his development plans which he annexed. He further averred that on 22nd October 2015, one of his tenants called him and advised him that the Defendant/Respondent had dropped into his house an undated letter purporting to execute an alleged court order issued on 24th April 2006 in Kiambu Criminal Case No. 2102 of 2004 in respect of a parcel of land known as Ndumberi/Riabai/1911. He annexed a copy of that purported court order. He further averred that the said letter also annexed an undated and unsigned letter addressed to nobody indicating that Kissinger International Limited had been appointed by the Defendant to manage parcel of land Ndumberi/Riabai/1911. He averred that upon his scrutiny of the said documents, he deciphered that he had never dealt with the Defendant/Respondent in all his transactions

relating to the suit properties and he does not know him and further that he never bought or obtained title to the parcel of land known as Ndumberi/Riabai/1911 to which the Defendant's documents relate. He challenged the Defendant to provide the court with a search showing that either himself or the purported family of Fred Kubai is the registered owner. He also averred that the purported court order is fake as it reproduces the proceedings of the criminal case but does not constitute a court order. He averred that the Defendant is merely a busy body basking in the perceived glory of the family name of Fred Kubai yet he has no known claim over the suit properties which is capable of protection by any court of law. He added that the Defendant's entry into the suit properties is trespass as he had not consented to it and sought for the court to allow this Application.

The Application is contested. The Defendant/Respondent, Andrew Kamau Kubai, filed his Replying Affidavit sworn on 16th February 2016 in which he averred that he is a beneficiary of the estate of the late Fredrick Polwarth K. Kubai by virtue of being his grandson through his late father Samson Owen K. Kubai. He challenged the right of his uncle Gideon Blacklaw Kubai and Timothy K. Kubai to transfer the suit properties to the Plaintiff/Applicant, claiming that they belong to the estate of his late grandfather Fredrick Polwarth K. Kubai. He informed that there was ongoing Succession Cause No. 1940 of 1996 which was still ongoing. It was his averment that the estate of his said late grandfather including the suit properties has never been distributed amongst the beneficiaries because of the pending succession cause. He averred that the Plaintiff obtained title to the suit properties through collusion with his uncle. On that ground, he sought for this Application to be dismissed.

In response thereto, the Plaintiff/Applicant filed his Further Affidavit sworn on 10th May 2016 in which he averred that the Defendant/Respondent did not produce any evidence that he is a beneficiary of the late Fredrick Polwarth K. Kubai in the form of a Certificate of Grant of his Estate. He further pointed out that even if the Defendant/Respondent was a grandson to the late Fredrick Polwarth K. Kubai, he would only be a beneficiary of the estate of his grandfather through his parents, a fact he did not prove. He averred that the Defendant is not an administrator of the estate of his late grandfather and is therefore not in a position to claim the suit properties as being part of that estate. He further averred that the court in Kiambu Criminal Case No. 2102 of 2004 set aside all previous orders issued in that case on realization that the Defendant had misled it.

The issue that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiff/Applicant. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must point out to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

With that background laid down, I turn to assessing whether or not the Plaintiff/Applicant has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial. The Plaintiff/Applicant asserted that he is the registered proprietor of the suit properties, having purchased them from one Gedion Blacklaw Kubai and Timothy Kubai in the years 2002 and 2006. In support of that assertion, he annexed copies of his title deeds as well as green cards relating to the suit properties. The Defendant/Respondent on his part claims that the suit properties are part of the estate of his late grandfather Fredrick Polwarth Kubai, of which he is a beneficiary. The law is very clear as regards the position of a title holder of land. **Section 26(1) of the Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or***
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

The Defendant/Respondent has not succeeded in demonstrating that the title deeds held by the Plaintiff/Applicant were obtained by way of fraud or misrepresentation to which they have been proved to have been a party and neither has it been demonstrated that those titles were acquired illegally, unprocedurally or through a corrupt scheme. So far as I can tell, at this juncture, the title deeds held by the Plaintiff/Applicant are prima facie evidence that he is the absolute and indefeasible owner of those two parcels.

The Plaintiff/Applicant has raised the question whether the Defendant/Respondent has the authority of this court and therefore the *locus standi* to defend this suit on behalf of the estate of the late Fredrick Polwarth Kubai. Under **section 82 of the Law of Succession Act (Cap 160 Laws of Kenya)** provides that,

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers; (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate

The extent of the powers of an administrator were described by Musyoka J., in ***Re the Estate of Thiong'o Nginyayu Muthiora (Deceased) Succession Cause Number 2131 of 2011*** as follows,

“..... He is the person to be sued by third parties over the estate or to sue such third parties to protect the estate. He is the person with power to enter into contracts on behalf of the estate and to enforce contracts that exist between the estate and third parties. He has the power to sell assets, to convert them into money, to invest estate funds, to compromise suits on behalf of the estate, among others. He has these powers, given to him by Section 79 and 82 of the Law of Succession Act, and by various provisions of the Trustee Act, Cap 167 Laws of Kenya.”
[Emphasis mine]

The Defendant/Respondent's only claim to the suit properties is as a beneficiary thereof. He has not produced to this court any document to demonstrate that he is a legal representative of the estate of his late grandfather. Accordingly, I find that he is not entitled to claim the suit properties as he has no legal capacity to do so on behalf of the estate of his late grandfather.

The upshot of this is that I find that the Plaintiff/Applicant has demonstrated that he has a prima facie case

with a probability of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's right of possession over the suit properties pending the hearing and determination of this suit.

In whose favour does the balance of convenience tilt? In the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the court had this to say:

“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted.”

The Plaintiff/Applicant is in possession of the suit properties which he has developed and leased out to tenants. In these circumstances, I have no difficulty in holding that the balance of convenience also tilts in favour of the Plaintiff/Applicant.

In light of the foregoing, I hereby allow this Application with costs to the Plaintiff.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF JULY 2017.

MARY M. GITUMBI

JUDGE