



REPUBLIC OF KENYA

IN THE Environment And Land Court At Kajiado

ELC CASE NO. 210 OF 2017

(FORMERLY MILIMANI ELC NO. 1467 OF 2016)

LOCAL AUTHORITIES PROVIDENT FUND (LAPFUND)PLAINTIFF

VERSUS

DANIEL KASIRIMO OLE MUYAADEFENDANT

RULING

The application before this court is a notice of motion application by the Plaintiff dated the 24th November, 2016 brought pursuant to Section 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act and Order 40 Rules 1, 2, 3 & 4 and Order 51 Rule 1 of the Civil Procedure Rules and enabling provisions of the Law. The Application is premised on the grounds that the Plaintiff is the duly registered owner of Land Title Number KAJIADO/KAPUTIEI NORTH/52489 (suit land) which it purchased from TERRY CHEBET MAINA on 5th February, 2015 for Kshs. 285,000,000.00 and a title deed was issued on 23rd February, 2015. The Plaintiff constructed a fence thereon to demarcate its land and on 15th November, 2015 it came to its attention that the Defendant in company of a gang invaded the suit land illegally and unlawfully uprooted the fencing posts, wires thereby destroying the said fence. The Defendant is threatening, harassing and intimidating the Plaintiff's staff, agents, servants or employees from accessing the suit land and thereby interfering with the Plaintiff's right to peaceful and quiet enjoyment of its property as enshrined in the law. The said actions by the Defendant are illegal, unlawful and devoid of any justification and there is imminent threat that the Plaintiff will be disenfranchised of its property if the court does not intervene and conserve the ownership and possession of the suit property. The Defendant will not suffer any prejudice if the orders sought are granted.

The application is supported by the affidavit of DAVID KOROSS who is the Chief Executive Officer of the Applicant corporation where he deposes among other issues that they conducted due diligence before purchasing the suit parcel from one TERRY CHEBET MAINA, after which the Defendant was duly registered as the proprietor of the suit land. He avers that the Defendant without proof of the validity of title and no claim whatsoever is interfering with the Plaintiff's peaceful occupation of the suit land.

The Defendant opposed the application and filed a replying affidavit dated 4th April, 2017 where he deposed that he is the original registered proprietor of Land Parcel Number KAJIADO/KAPUTIEI NORTH/1020 measuring 20.2 hectares and on 30th October, 1987, he entered into a Sale Agreement with one ABRAHAM KIPSANG KIPTANUI to sell the said parcel of land for Kshs. 350,000 per acre. Further that ABRAHAM KIPSANG KIPTANUI only paid a total of Kshs 750,000 leaving a balance of Kshs. 16, 750,000 and as a result the Defendant rescinded the sale and fenced off his property. He states that in 2010 he instituted a dispute with the Kajiado District Land Disputes Tribunal which on 21st October, 2010 ruled that 25 acres of the suit land be returned to him, but the said decision was quashed due to lack of jurisdiction. He avers that in 2010 he learnt that the suit property had been transferred to

TERRY CHEBET MAINA with the same being subdivided into KAJIADO/KAPUTIEI NORTH/36933 and KAJIADO/KAPUTIEI NORTH/36934 respectively; he managed to trace ABRAHAM KIPSANG KIPTANUI who denied transferring the suit property to TERRY CHEBET MAINA. Further that even though the matter was reported to the Directorate of Criminal Investigation for investigations, TERRY CHEBET MAINA transferred the suit land to the Plaintiff but his sons stopped the Plaintiff's representatives from accessing the suit land.

Issues and determination

Upon perusal of the application together with the supporting affidavit, the Defendant's replying affidavit and the parties written submissions, at this juncture the only issue for determination is whether the interim injunction sought by the Plaintiff/Applicant ought to be granted pending the hearing and determination of the main suit.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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."

In line with this principle, the Court will proceed to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

As to whether the applicant has demonstrated a prima facie case with probability of success, the Court notes the Plaintiff stated that it is the proprietor of the suit land and the Defendant and his agents have trespassed upon the same and is interfering with its peaceful ownership and access to it. Looking at the documents presented in the supporting affidavit which included a Sale Agreement and Title deed it is evident the suit land belongs to the Plaintiff. The Court further notes that the parcels of land the Defendant is claiming are KAJIADO /KAPUTIEI NORTH / 36933 and KAJIADO /KAPUTIEI NORTH /36934 respectively which are different from the suit land. The Defendant claims he entered into a contract with one ABRAHAM KIPSANG KIPTANUI who paid him some money for his land, but failed to pay the balance. The Court notes the Plaintiff nor the persons who sold the suit land to it, were part of this transaction. By virtue of this position, it is clear that the claim laid by the Plaintiff over the suit land is not baseless and may indeed succeed at the full trial. Several issues are curious about the Defendant's averments, that he was unable to locate the said ABRAHAM KIPSANG KIPTANUI for a long time and hence rescinded the Sale Agreement. He however does not produce in Court any other agreement to prove he rescinded the Sale Agreement.

On the Defendant's averments that the Plaintiff is not an innocent purchaser, the Court notes the Plaintiff has a title to the suit land. In the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** Justice J.M. Mutungi stated that '**the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Registration of Lands Act entitled to the protection of the law**'. The Court finds that the Plaintiff is entitled to protection of the law as envisaged by section 26 (1) of the Land Registration Act.

On the second principle of **Giella vs Cassman Brown** that an interlocutory injunction ought to be granted in cases where the Applicant suffers irreparable loss which cannot be compensated by way of damages. The Plaintiff submitted that the Defendant and his agents have interfered with its lawful access to the suit land, denying it access and destroyed the fence constructed thereon. The Defendant on the other hand admits his sons stopped the Plaintiff's agents/servants from accessing the suit land claiming he rescinded his contract with ABRAHAM KIPSANG KIPTANUI. The Court finds that if the temporary injunction sought is not granted, the person in control of the suit property may waste it away, and if the Plaintiff

were to win the case against the Defendant no amount of damages can put it back to its rightful position.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the Plaintiff is likely to suffer more inconvenience if the temporary injunction is denied as opposed to the Defendant if the injunction is allowed.

I find merit in the Plaintiff's notice of motion application dated the 24th November, 2016 and allow prayers 3 and 4 of the said application.

The costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 18th day of July, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION.

Odera for the Plaintiff

no appearance for the Defendant

Court Clerk - Mpoye