



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIROMENTAL COURT
ELC NO 566 OF 2014

NANCY MUGURE NJUGUNA.....PLAINTIFF/RESPONDENT

VERSUS

LEONARD MUNGAI NJOROGE.....1ST DEFENDANT/APPLICANT

KIAMBAA KAWAIDA COMPANY.....2ND DEFENDANT/APPLICANT

RULING

The Application for determination is the 1st Defendant/*Applicant's Notice of Motion* dated *2nd June 2016*, brought under *Order 40 Rules 1,2 3& 4 of the Civil Procedure Rules 2010 and Sections 1A,1B and 63(e) of the Civil Procedure Act, Cap 21* seeking for orders, inter-alia, that;-

i. Spent.

ii. That a temporary injunction do issue restraining the Plaintiff/ Respondent whether by herself, servants and/or agents from trespassing on, encroaching, constructing on, causing destruction thereon, alienating or otherwise interfering with the 1st Defendant's/Applicant's property known as plot L.R No Tigoni/Tigoni Block 1/2899(hereinafter refereed as the "the suit property") pending the hearing and determination of this application and consequently the suit.

This application is premised on the supporting affidavit of *Leonard Mungai Njoroge* ("the Applicant"), who avers that he is the registered owner of *L.R No Tigoni/Tigoni Block 1/2899*(hereinafter ("the suit property"), situated at *Tigoni, Kiambu County* vide a Title deed issued to him on *29th November, 2005*. He states that he is the registered proprietor of the suit properties whereas the Plaintiff/Respondent is the registered proprietor of the parcel of land known as *L.R No Tigoni/Tigoni Block 1/3970*.

1st Defendant/Applicant further stated that sometime in *2006*, the Plaintiff/Respondent trespassed on the suit property and uprooted crops planted therein, and subsequently *lodged a Caution* on *22nd March 2006*, over the property. The alleged acts of malicious damage to property were reported and charges preferred against the Plaintiff/Respondent, wherein she was charged under *Criminal Case No. 983/2006*. However she was later acquitted.

He further averred that the Plaintiff lodged the dispute before the Land Disputes Tribunal wherein the same could not be enforced in Court as the Board did not have jurisdiction to determine a dispute

involving title to Land. It was at this juncture that the Plaintiff filed the current suit vide a **Plaint** dated **7th March 2007**, and an Application seeking temporarily injunctive reliefs which the 1st Defendant/Applicant aver that orders were not granted.

Subsequently, on or around **May 2016**, the Plaintiff/Respondent again invaded his property and destroyed property constraining him to file this Application seeking this court to grant the temporary injunction pending the hearing and determination of this suit.

The Application was opposed by the Plaintiff/Respondent **Nancy Mugure Njuguna**, who filed her **Replying Affidavit** on **5th June, 2016**. She stated that she had always being **in possession** of the suit property since **24th August 1996**, when she purchased the same. That on or around **October 2015**, despite Orders from this Honourable Court that **status quo** be maintained, the Applicant erected pre-fabricated steel structures on the property. The Plaintiff urged this Honourable Court to dismiss the Application.

Parties filed their respective submissions. The Applicant filed his submissions on **28th September 2016**. In his submissions he relied on the case of **Giella –vs- Cassman Brown Limited [1973]E A 358**. He submitted that he was the registered proprietor of a parcel of land known as **L.R No Tigoni/Tigoni Block 1/2899**. This he asserted was contrary to the allegation made by the Plaintiff/Respondent who stated that the Applicant had acquired the suit land fraudulently in connivance with the 2nd Defendant. He submitted that the Plaintiff/Respondent had failed to exhibit ownership of the property and this went against the cardinal principles set out in Section 26 of the Land Registration Act, 2012 wherein Certificate of title can only be challenged on the ground of fraud or misrepresentation which was not the case in the suit herein. He therefore submitted that he had established a prima facie case with a high chance of success.

It was his further submissions that without the issuance of an injunctive relief, he was bound to suffer irreparable damages. He contended that there was need for an Order to stop the Plaintiff's perpetual invasion of his suit property which culminated to goons causing massive uprooting of his crops, which were his source of income. In further submission, Applicant stated that as the registered owner of the suit land he had acquired indefeasible Title over the same. He rebutted the Plaintiff's/Respondent's contention that she was in possession of the suit property since **1996** as evidenced by the Criminal case preferred against the Plaintiff and it was certain that she was encroaching on the Applicant's land. He cited the case of **Samuel Mwangi..Vs- Jeremiah Mitobu (2012) eKLR** where it was held that **a possessor had no actual right of property, however he can maintain trespass against anyone who interferes and cannot himself show that he has the right to recover possession immediately**. He further submitted that the Plaintiff was a trespasser on his land.

On the issue of contempt of Court Orders, the Applicant submitted that as far as he was concerned, he was not aware about any orders issued prior to **1st April 2016**, he only got to obtain a copy from the Court record. It was his further submissions that the order for **status quo** to be maintained was obscure as no earlier orders had been issued. He contended that by the time the alleged orders were issued, he was already in possession. He urged this

Court to issue a prohibitory injunction Order again the Plaintiff in respect to the suit property.

In her submissions filed on **29th September 2016**, the Plaintiff/ Respondent submitted that **on 6th July 2015**, both counsels for both parties agreed that the "**status quo** be maintained" and hearing dates be taken as matter of expediency. However as the Plaintiff embarked on taking a hearing date, the 1st Defendant's counsel filed an application dated **15th October 2015**, seeking leave to cease from acting for the 1st Defendants'. The Court granted the said leave and the **status quo** was maintained on **23rd November 2015**. It was at this juncture that the 1st Defendant proceeded to interfere with the suit property in wanton disregard of the Court Orders. Consequently the Plaintiff sought the assistance of the area chief to serve the 1st Defendant with the said Order issued on **23rd November 2015**.

The Plaintiff submitted that she had always been in possession of the Suit property and urged this

Honourable Court to dismiss the 1stDefendant's Application and allow the matter to proceed substantively for the full hearing and determination.

This Court has now carefully considered the instant application, annexed evidence and submissions made by the Plaintiff and 1stDefendant respectively. From the Court records, it is important to highlight that Plaintiff/Respondent herein had filed an Application dated **19th May 2010**. The Application was placed before the **Hon. Msagha Mbogoli J.** on **20th May 2010**. However no Interim orders were issued and the Court directed that the Plaintiff/Applicant (then) serve the Defendant/Respondent (the Applicant herein). Subsequently the Application came before the **Hon. Mutungi J.** on **22nd July 2015**, wherein the parties recorded a consent that the Application dated **19th May 2010**, be dispensed with on terms that the parties will maintain the obtaining status quo pending the hearing of the suit. This was buttressed on the **23rd of November 2015**, when this Honourable Court ordered that the Status quo be maintained as earlier ordered.

The first question to be answered therefore is what the **status quo** was as at **19th May 2010**, and when the Order was issued **on 22nd July 2015**. The 1st Defendant /Applicant submitted that he was not aware about any orders issued prior to **1stApril 2016**, and he only got to obtain a copy from the Court record. It was his submission that the order for **status quo** to be maintained was obscure as no earlier orders had been issued. He contended that by the time the alleged orders were issued, he was already in possession. In rebuttal the Plaintiff/Respondent claimed the contrary.

It is evident that the 1st Defendant/Applicant was ably represented by Counsel on **22nd July 2015**, wherein a consent Order was recorded that the status quo be maintained and this order has not been impugned or appealed by the parties.

His **Lordship Honourable Ombwayo J.** in **PricillahWanja Kibui..Vs..James Kiongo Kibui & Another [2014] eKLR** expounded on what is meant by **status quo**.

“On Status quote Blacks Law dictionary 8th Edition states that this is a Latin word which means “the situation as it exists”. Status quo order effect has been explained by Murithi J. in Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc.Civil Cause No 11 of 2012 where he states:

“In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is an substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof.

It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo.”

In other words a restraining injunction has the same effect as status quo order, as they preserve the state as it is at the date of the order.”(emphasis mine)

From the available record, both parties claim ownership and possession of **L.R No Tigoni/Tigoni Block 1/2899**. This court has now been called upon to determine this application in light of the status order issued prior. Therefore the court will be guided by the **locus classicus** case on Injunctions; **Giella Vs Cassman Brown & Co Ltd, (1973) EA 358** for a grant of temporary injunction. These requirements for the grant of such an injunction are;

“That the applicant must establish a prima facie case, and that he would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience”.

The second question the Court must therefore determine is whether the 1st Defendant has established a *prima facie* case. At the heart of the suit is a dispute over ownership of the suit land. The disputants have laid claim to ***L.R No Tigoni/Tigoni Block 1/2899***. The 1st Defendant has made a claim that he is the registered owner of ***LR. No. L.R No Tigoni/Tigoni Block 1/2899***, after purchasing it from the Second Defendant and subsequently obtained a certificate of Title Deed on ***28th December 2005***. On the other hand the Plaintiff has made a claim that she has always being in possession of the Suit land since she purchased it back in ***1996*** and claims the same was wrongfully registered in the name of the 1st Defendant/Applicant. What is in contention is that the 1st Defendant claims that the Plaintiff rightful parcel of land is ***LR. No. L.R No Tigoni/Tigoni Block 1/3970***, and not ***LR. No. L.R No Tigoni/Tigoni Block 1/2899***. The Plaintiff however has not produced any documents to show that she owns ***LR. No. L.R No Tigoni/Tigoni Block 1/2899***, that she has made a claim to. The Court therefore finds that the 1st Defendant has made a prima facie case with a probability of success. As the suit property is registered in the name of the 1st Defendant, this court is guided by the decision of the Court of Appeal in ***Dr. Joseph arap Ngok... Vs... Justice Moiwo ole Keiwa & 4 Others, Nairobi CA No 60 of 1997*** where it was held that ***a party who has been issued with a good title takes precedence over other equitable rights to the title.***

Nevertheless, the determination of the legal owner is the true sphere of the trial court on tested evidence after the parties have been cross examined on their statements and documents. There is ample evidence from the 1st Defendant/Applicant that he is in possession of the suit property. He has averred that he has crops planted therein. Possession is an important component of claim to title. The balance of convenience would then tilt a little more in favour of the 1st Defendant. If the plaintiff's claim was to prevail at the main trial, it is evident that the values of the suit property can be ascertained. Therefore, damages would be recoverable and Plaintiff would be adequately compensated. In the case of ***Esso (K) Ltd Vs Makwata Okiya Civil Appeal No. 69 of 1991***, the Court held that; -

“Injunction is not to be granted if the event meant to be restrained has taken place. The purpose of injunction is to maintain Status Quo”

It is this Court's finding that the Order of status quo envisaged on ***22nd July 2015***, was that the party who was in possession, that is 1st Defendant be maintained until the determination of the suit.

It is for these reasons that this court finds that the 1st Defendant's/Applicant's application dated ***2nd June 2016***, ***has merit*** and is consequently ***granted entirely in terms of prayer 2. Costs in the cause.***

It is so ordered.

Dated, Signed and Delivered at Nairobi this 31st day of August, 2017.

L GACHERU

JUDGE

31/8/2017

In the Presence of:-

Mr. Kimathi for the Plaintiff/Respondent

No appearance for the 1st Defendant/Applicant though served

No appearance for the 2nd Defendant/Respondent though served

Catherine - Court Clerk

L GACHERU

JUDGE

31/8/2017