



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC.NO.678 OF 2014

MARTIN SAID KILONZO WAMBUA.....PLAINTIFF/APPLICANT

-VERSUS-

NJUMA MATINI JAMES.....1ST DEFENDANT/RESPONDENT

EMBAKASI RANCHING CO. LIMITED..... 2ND DEFENDANT/RESPONDENT

R U L I N G

The matter for determination is the Plaintiff/Applicant's *Notice of Motion* application dated **28th May 2014**, brought under Order 40 Rules 1,2,3 & 9 of the Civil Procedure Rules, Section 3 of the Civil Procedure Act, Cap 21 Laws of Kenya and all enabling provisions of law.

The Plaintiff/Applicant has sought for following orders:-

i. Spent

ii. Spent.

iii. That pending the hearing and determination of this suit the Defendants/Respondents by themselves, their agents, employees, servants or officers be restrained by an order of injunction from interfering, trespassing, wasting, selling or in any other way dealing with the Plaintiff's property known as Plot Nos. V 11760 and V 4151 situated at Ruai, Embakasi Ranching Company Limited.

iv. The Honourable court do issue such orders and give such directions as it orders and give such directions as it may deem fit and just to meet the ends of justice.

v. The costs of the application be in the cause.

The application is based on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Martin Kilonzo Wambua**, the Plaintiff/Applicant herein. The grounds in support are:-

a) That the plaintiff purchased two plots being Plot No.V 11760 and Plot No. V 4151 issued by Embakasi Ranching company Limited and was issued with Certificate of Plot Ownership

Number 019870 and 008670 issued by the 2nd Defendant dated 20th April 2011 and 8th July 2005 respectively.

b) That the Plaintiff has been enjoying the quiet possession of the suit property until recently when the 1st Defendant/Respondent in the company of some hirelings invaded the suit property and demolished the structures erected thereon by the Plaintiff/Applicant.

c) That the action of the 1st Defendant/Applicant is illegal and therefore the Honourable Court should intervene and issue appropriate orders.

d) That the 1st Defendant/Respondent has threatened to invade the suit property and cause more damage if not restrained by the Honourable Court.

The Plaintiff/Applicant's case is that he purchased the two plots in issue being **V 11760** and **V 4151** from the 2nd Defendant and has been in peaceful occupation **from 20th April 2011 and 8th July 2005 respectively**. It was his contention that the 1st Defendant/Respondent has without colour of right, invaded the suit property and has maliciously demolished the Plaintiff/Applicant's house which he was constructing on the suit property. He contended that the Defendant/Respondent's action is illegal as he has always been in possession of the suit property. Further that despite demand and Notice of Intention to Sue, the 1st Defendant/Respondent has refused and/or neglected to make good the Plaintiff/Applicant's claim and therefore this suit and application. He urged the Court to allow his claim.

The application is opposed by the 1st Defendant/Respondent only. However, the **2nd Defendant/Respondent**, even after being *served* with **Summons to Enter Appearance**, the **Plaint** and **Instant Application** as is evident from the **Affidavit of Service** sworn on **28th January 2015**, by **John Kweyu, Court Process Server**, **did not enter appearance nor file Replying Affidavit** to the **Notice of Motion**. The application is therefore not opposed by the 2nd Defendant/Respondent hereon.

However, the 1st Defendant/Respondent, **James Njuma Matini** filed his **Replying Affidavit** dated **6th April 2016**, and denied all the averments made by the Plaintiff/Applicant. He averred that the suit property are not **V 11760** and **V 4151** as described by the Plaintiff/Applicant but **Plot no.P 1647** and **P 1648** which are registered in his name. He alleged that he **purchased** the two shares from one **John Njoroge Nguru** in **1988** for **Kshs.28,000/=**. The said **John Njoroge Nguru** was a member of the 2nd Defendant and he was issued with **Membership Share Certificate** after he signed the **Sale Agreement**. It was his case that being armed with the said Membership Share Certificate and the Sale Agreement, he went to the offices of the 2nd Defendant/Respondent where the two shares were transferred to the 1st Defendant/Respondent and he was issued with **Membership Share Certificate No.11311**. He contended that later the two shares were converted to plots and he was allocated **Plot No.P 1647** and **P 1648** which plots were adjacent to each other and he was shown the physical position of the said plots by the 2nd Defendant/Respondent's **Surveyor**, one **Mr. Muchiri** who is **now deceased**. He also contended that he paid all the requisite fees and was issued with beacon certificate by the 2nd Defendant. He alleged that he continued to occupy and use the two plots by carrying on farming activities without any interference.

However, the Plaintiff/Applicant invaded his two plots sometimes in the **year 2011**, but as the **2nd Defendant/Respondent's Surveyor**, one **Mr. Kamau** confirmed that indeed the two plots belong to the (him) 1st Defendant/Respondent. He contended that with that confirmation from the 2nd Defendant/Respondent, he pulled down the structures which had been put up by the Plaintiff/Applicant on the suit property. However, the Plaintiff/Applicant reported the matter to Ruai Police Station and later the matter was referred to Provincial CID Headquarters where the Directorate of CID after investigations recommended that a Government surveyor with the collaboration of the 2nd Defendant/Respondent do visit the site and ascertain who was the rightful owner of the suit property. The said report was marked **JNM 7**.

The Plaintiff/Applicant herein filed a further affidavit dated **28th April 2016** and averred that **Plots No.1647 and 1648** which the 1st Defendant/ Respondent claims are owned by him are quite different from the Plaintiff/Applicant's **Plots No. V 11760 and V 4151**. He reiterated that he is the registered owner of the two **Plots V 11760 and V 4151** and the Defendants should be restrained accordingly.

The application was canvassed by way of Written Submissions which this Court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. The Court will make the following findings;

There is no doubt that the application herein is premised under Order 40 of the Civil Procedure Rules which grants the Court discretion to issue temporary orders of injunction in cases where the property in dispute is in danger of being wasted, damaged, alienated or removed before the suit is heard and determined. Therefore it is evident that injunctive orders are issued when the suit property is in danger from the action of the Defendant/Respondent and the said order is issued to prevent any future intended action.

Further, it is trite that an injunction order is an equitable relief which is granted at the discretion of the Court. The said discretion must be exercised judicially. See the case of **David Kamau Gakuru..Vs..National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001**, where the Court held that:-

“It is trite law that the granting of an injunction is an exercise of judicial discretion and an Appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially”.

The Court has therefore been called to exercise the judicial discretion in determining whether to grant or not to grant the orders sought by the Plaintiff/Applicant herein. In determining whether to grant the said orders, the Court will be guided by the well settled principles for grant of such order as was held in the case of ***Giella... Vs...Cassman Brown 1973 EA 358***. These conditions are:-

- a) The Applicant must establish that he has a prima facie case with probability of success.***
- b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c) When the Court is in doubt, to decide the case on a balance of convenience.***

Further, while considering the available evidence, the Court will also caution itself that it is not required to make conclusive and definite findings of facts and law based on affidavit evidence. However, it is only supposed to determine whether the Plaintiff/Applicant is deserving of the sought orders based on the required standards. See the case of **Edwin Kamau Muriu..Vs..Barclays Bank of Kenya Ltd, Nairobi High Court, Civil Case No.1118 of 2002**, where the Court held that:-

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria---“

The Court will now sieve through the available evidence to determine whether the Plaintiff/Applicant is deserving of the orders sought. There is no doubt that the Plaintiff/Applicant herein is in possession of documents from ***Embakasi Ranching Company Ltd*** (2nd Defendant herein) showing that he owns **Plots No.V 11760 and Plot No. V4151** issued by the said ***Embakasi Ranching Company Ltd***. There is also no doubt that the 1st Defendant/Respondent, ***Njuma Matini James***, is also in possession of ownership documents from ***Embakasi Ranching Company***, 2nd Defendant/Respondent showing that he owns **Plots No. P 1647 and P 1648**. There is also no doubt that both the Plaintiff/Applicant and the 1st Defendant/Respondent claim that they were shown the physical position of their respective plots by

officials from **Embakasi Ranching Company**. From the averments made by the Plaintiff/Applicant and the 1st Defendant/Respondent, the physical position of their respective plots is the suit property. Therefore the Plaintiff/Applicant and the 1st Defendant/Respondent are claiming the same parcel of land on the ground though they have different registration documents showing different numbers. The Plaintiff has alleged that after purchase of the suit property, he has been in peaceful occupation and possession of the same until the **year 2011**, when he attempted to put up a structure and the 1st Defendant demolished the same with the use of his hired goons.

The 1st Defendant/Respondent on his part denied that the Plaintiff/Applicant has been in occupation of the suit land. He instead averred that he had been in peaceful possession of the suit land and using it for farming activities until the **year 2011**, when Plaintiff/Applicant invaded the same and put up a structure on it. However after confirming from the 2nd Defendant that the suit property belongs to him, he demolished the Plaintiff/Applicant's structure.

From the above analysis of facts and evidence, it is clear that there is a dispute as to who is indeed the genuine owner of the suit property. The issue in dispute is the ownership of the suit property. This dispute of ownership of the suit property can only be resolved through calling of evidence especially evidence from the 2nd Defendant and the Government Surveyor to confirm whether the plots as described by the Plaintiff/Applicant are the same plots described by the 1st Defendant/Respondent and if so who among the two is the *bonafide* owner. Alternatively, if the said plots are different, then the Government Surveyor would point out their respective physical position on the ground. The dispute at hand therefore cannot be resolved by affidavit evidence. The Court finds that at this juncture it cannot hold with certainty as to who really owns the suit property without the evidence of the 2nd Defendant/ Respondent who unfortunately did not file a Replying Affidavit.

The Court therefore finds that the Plaintiff/Applicant has not established that he has a *prima facie* case with probability of success. *Prima facie* was described in the case of **Mrao ..Vs.. First American Bank of Kenya Ltd & Others (2003) KLR** to mean;

“A case in 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”.

Taking into account the description of *prima-facie* case in the ***Mrao Case (supra)*** the Court arrives at a conclusion that the Plaintiff/Applicant herein has not established the same and therefore has failed to established the first condition for grant of injunctive order as provided in the ***Giella's case***.

Having found that the Plaintiff/Applicant has failed to establish a *prima-facie* case, then the Court finds no reason to consider the other conditions as these conditions are sequential. See the case of **Kenya Commercial Finance Company Limited..Vs.. Afraha Education Society & Others, Civil Appeal No.142 of 1999(2001)1EA 86**, where the Court held that:-

“The judge should address himself sequentially on the conditions for granting an application for injunction instead of proceeding straightaway to address himself on the third condition because where the Applicant has no registered interest in the land comprised in the title's dispute and therefore has not demonstrated that it has a *prima facie* case with probability of success, no interlocutory injunction would be available”

However, there is no doubt that there is a dispute as to who is the real owner of the suit property. The Court finds that with the existence of such doubt, the best alternative would be an order for preservation of the suit property. The Court finds that the suit property would best be preserved by an order barring or restraining any of the party herein from dealing with the suit property in whatever manner until the main suit herein is heard and determined. The Court will rely of the case of **Virginia Edith Wambui..Vs..Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987)eKLR**, where the Court held that:-

“The general principle which has been applied by this Court is that where there are serious conflicts of facts, the trial Court should maintain the status quo until the dispute has been decided on a trial”.

Having now carefully considered the ***Notice of Motion*** dated ***28th May 2014***, the Court finds that the Plaintiff/Applicant was unable to establish the conditions for grant of injunctive orders and the said application is dismissed in terms of ***prayer no.III***.

However, it succeeds in terms of ***prayer No.IV*** and the Court directs that the suit property herein which is either ***Plots No. V11760 and V 4151*** as per the Plaintiff/Applicant or ***P 1647 and P 1648*** as per the Defendant’s claim be preserved by restraining the parties herein that is the Plaintiff/Applicant and the 1st Defendant/Respondent from dealing with the said suit property in whatever manner until the suit is heard and determined.

Further, the Court directs the parties herein to expeditiously prepare the suit for hearing and final determination by ***complying with Order 11*** within the next ***45 days*** from the date of this Ruling and then ***set the matter down for Pre-trial Conference*** so that the ownership dispute can be resolved at once.

It is so ordered.

Dated, signed and delivered at NAIROBI this 11th day of August, 2017.

L. GACHERU

JUDGE

11/8/2017

In the presence of

No appearance for Plaintiff/Applicant

Mr. Wandati for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Kajuju - Court Clerk

L. GACHERU

JUDGE

11/8/2017