



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT ELDORET

ELC NO. 33 OF 2017

MARGARET MARY NANYAMA.....PLAINTIFF

VERSUS

VIPUL RATILAL DODHIA LODHAI.....1ST DEFENDANT

DIPAKBEN VIPUL DODHIA.....2ND DEFENDANT

RULING

INTRODUCTION

This ruling is in respect of an application brought by way of Notice of Motion dated 25th January, 2017 by the Plaintiff/applicants who sought for the following orders:

1. That this application be certified urgent and its service be dispensed with in the first instance.
2. That a temporary do issue restraining the defendant, his servants, agents and/or assigns in anyway dealing and/or interfering with the Plaintiffs quiet possession, use, and/or enjoyment and to stop unlawful interfering, ploughing, planting, transferring, sub dividing, wasting and/or to do any act that is inconsistent with the Plaintiff's right as the registered owner of the Land Parcel namely Eldoret/Municipality/Block 23 (King'ong'o)/801 pending the hearing and determination of this application inter parties.
3. That a permanent injunction do issue restraining the Defendant, his servants, agents and/or assigns from in anyway dealing and/or interfering with the Plaintiff's quiet possession, use and/or enjoyment and to stop unlawful interfering, ploughing, planting, transferring, sub dividing, wasting, and/or to do any act that is inconsistent with the Plaintiff's right as the registered owner of the Land Parcel namely Eldoret/Municipality/Block 23 (King'ong'o)/801 pending the hearing and determination of the main suit.
4. That costs be provided for.

The court granted restraining orders against the Uasin Gishu County Land Registrar from dealing with the suit land at an interlocutory stage. The Counsels thereafter agreed to canvas the application by way of written submissions which were filed and a ruling date given.

PLAINTIFF/APPLICANT'S COUNSEL'S SUBMISSIONS

Counsel relied on the grounds as set out on the face of the Notice of Motion together with the annexed

Supporting Affidavit sworn on 25.01.2017 by the Plaintiff/Applicant and a further affidavit sworn on 10.04.2017 by one Edith Nasike and annexures attached thereto. Counsel also stated that it is not disputed that the Plaintiff/Applicant has always and is still in occupation of the suit parcel.

It was further submitted by counsel that it was until February 2017 when the Defendant/Respondent without any lawful justification unsuccessfully sought to forcefully trespass and/or encroach into the suit parcel prompting the Plaintiff to move this court for equitable reliefs as the plaintiff has neither offered her parcel of land for sale to the Defendant/Respondent nor entered into a sale of land agreement with the Defendant at any given time.

The plaintiff averred in her affidavit that she is now aged 77 years and that she has never been to the offices of the Defendants Advocates (M/S Kidiavai & Co Advocates) to execute any transfer documents in respect of the suit property herein. That the Defendants who are of Asian origin are strangers to her save for depositions made by one Edith Nasike.

Counsel further submitted that that the affidavit by Edith Nasike Wandati dated 10.04.2017 clearly shows how the 1st Defendant hoodwinked Edith Nasike Wandati to surrender the title documents of the Plaintiff/Applicant as security for the loan that was to be advanced to her by KWFT This shows that there exists a relationship between the 1st Defendant (Vipul Dodhia) and the daughter of the Plaintiff/Applicant and culminating to the transfer of Title Deed from the Plaintiff to the Defendants which was tainted with a lot of illegalities.

Counsel submitted that why had the defendant not taken immediate possession upon execution of the purported agreement. Plaintiff had alleged that the defendant could have acquired the documents in respect of the suit parcel by forgery, misrepresentation, undue influence, or fraud hence the whole Conveyancing process is vitiated by the aforesaid factors.

Counsel relied on several cases namely Mohamed Akbarali Esmail =vs= Corrugated Sheets Limited (2015) eKLR where the court held that:

...the validity of the Plaintiffs title can only be challenged on those grounds at trial...in the meantime, status quo prevailing should be maintained to await the trial. The defendant will have to keep off the suit property considering that the Plaintiff is in possession of the title documents which has not been declared a nullity yet. '

The other case that was cited was the case of Nelson Omolo Achola George Omondi Ajwain (2013) eKLR where Okong'o J held that;

'This court is also satisfied that the Plaintiff stands to suffer irreparable harm unless the orders sought are granted The Plaintiff as the proprietor of the suit property has a right to access, occupy and use the suit property. Failure to grant the orders sought would be tantamount to keeping the Plaintiff off the suit property which would cause irreparable harm to the Plaintiff. Due to the foregoing, I am convinced that the Plaintiff has made out a case for a temporary prohibitory injunction and that he Plaintiff's application is for granting in that regard. '

That the court further held in the case of Wilson Tanui Barno vs Jennifer Kositany (2015) eKLR that:-

'there needs to be decorum at the end of the day, what is required of the court is to make a final determination of the rights of the parties in matter...for avoidance of doubt, in so far as issues on injunction are concerned , the order issued on the 5.02.2013 should stand until the conclusion of the matter. The defendant has to keep off the suit land until the final determination of the suit.

Counsel also submitted on the principles for grant of injunctions as per the Geilla —vs- Casman Brown & Co. Ltd (1979) EA 358 case which put forth the threshold in issuing injunctive orders as follows:-

a. That the applicant established a prima facie case with a probability of success.

b. That the applicant demonstrates that it will suffer imminent irreparable harm if the injunction is not granted

c. The harm the applicant is likely to suffer cannot be compensated by way of damages.

Counsel therefore urged the court to grant the orders as sought as to preserve the subject matter so as to enable this honorable court arrive at a just decision in determining the lawful owner based on merits.

DEFENDANTS COUNSEL'S SUBMISSIONS

Counsel submitted that the Notice of motion application dated 25/01/ 2017 is totally defective, misconceived vexations, scandalous, frivolous, lacks merit, an afterthought and an abuse of the due process of the court and the same ought to be struck out with costs. He stated that vide a sale agreement dated 29/07/2010, between the applicant and the respondents the applicant willingly and voluntarily sold to the defendant all of that land know as LAND TITTLE NO;ELDORET MUNICIPALITY/BLOCK 23(KINGONGO) 801 measuring approximately 0.112 hectares together with all the developments therein comprising of a 2 bedroom permanent house at an agreed consideration of kshs1,400,00/= only and which amount was paid in full on execution thereof and the applicant appended her signature to that effect.

Counsel further submitted that the applicant executed all the relevant completion documents including the form of transfer, the application for land control board, a copy of I.D & PIN certificate, passport size photos and thereafter consent to transfer was duly granted. He stated that from the foregoing it was obvious that the applicant's sole intention as demonstrated in her pleading is to unjustly enrich herself by playing racial cards against the respondents. He submitted that the respondents are bonafide purchasers of the suit land for value and if the orders sought are granted then the respondents stand to suffer substantial& irreparable injury.

Counsel stated that the applicant has come before this court with unclean hands with a view of frustrating & embarrassing the respondents since if at all there was any element of fraud as alleged by the applicant then she had and still has the liberty to lodge a complaint with the department of C.I.D to have appropriate charges preferred against the respondents but which is yet to be done in this particular case.

Counsel also relied on the Giella case on the principles of grant of injunctions and that the applicant had not met the threshold.

ANALYSIS AND DETERMINATION

This is a case that is seeking for the court's discretion to grant temporary injunction pending the hearing and determination. The principles that guide the court in such application are well settled and I need not belabor much. My main task is to answer the question whether the plaintiff has met the threshold for grant of injunction. This is a case where the plaintiff claims that she has never entered into a sale agreement with the defendant for the sale of the suit property. The plaintiff even avers that she has never been to the Advocates office who purportedly witnessed the transaction. The agreement was allegedly entered into in 2010 more than 7 years and the defendant was to take immediate possession upon payment of the purchase price and upon execution of the agreement.

It is not in dispute that the plaintiff is the one in possession and that the defendant has never taken possession and no explanation has been rendered for this. It is also not in dispute that the defendants tried unsuccessfully to take possession in February 2017 necessitating the filing of this suit. The plaintiff applicant also annexed a copy of a title deed in her name showing that she was the registered owner of the suit land before it was transferred to the defendants. She alleges fraud and misrepresentation. Section 24, 25, 26 of the Registration of Land Act 2012 provides

24. Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

The law provides that issuance of a title to an individual is prima facie evidence of absolute proprietorship except in the circumstances listed under section 26 below:

26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

Having said that, it is evident from the averments that the transfer and registration of the suit land to the defendants is disputed on the ground of fraud and misrepresentation. It would be in the interest of justice to preserve the title until this matter is heard and determined. I find that the plaintiff/applicant has established a prima facie case to warrant the grant of a temporary injunction. The earlier order restraining the Uasin Gishu County Land Registrar is also in force pending the hearing and determination of this suit.

The upshot is that the plaintiff's application dated 25th January 2017 succeeds costs in the cause.

Parties to comply with order 11 of the Civil Procedure Rules within 30 days.

Mention on 14th November 2017.

It is so ordered.

Dated and delivered at Eldoret on this 28th day of September, 2017.

M. ODENY

JUDGE

Read in open court in the presence of:

Miss Kibichy for Plaintiff/Applicant

Koech: Court Assistant