



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

ENVIRONMENT AND LAND CASE NO. 83 OF 2012

TOM L. WANAMBISI.....PLAINTIFF

VERSUS.

DICKSON W. BABANDEGE.....1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION.....2ND DEFENDANT

PAUL M. OKECH T/A PAMBO INVESTMENTS.....3RD DEFENDANT

RULING.

[1] The applicant brought this application under order 40 Rule 1, 2 and 3 of the Civil Procedure rules 2010 and he prays for restraining orders against the Plaintiff by himself, his agents, workers and servants from entering, occupying, trespassing and in any manner interfering with the 1st defendant's use, occupation and access to parcel No. Ndivisi/Makuselwa/89 pending the hearing and determination of this suit. The application is grounded on the fact that the applicant is the registered owner of Ndivisi/Makuselwa/89. The applicant bought this piece of land in a Public Auction on 16/4/2010 and had the land transferred to himself on 11th January, 2011. The applicant depones that after he bought the land he entered on the same but has been unable to properly use the land since the Plaintiff who owns a neighbouring parcel of land Ndivisi/Makuselwa/90 keeps on re-entering the land and interfering with the respondents use of the same.

[2] The respondent/plaintiff does not dispute that the applicant is the registered owner of Ndivisi/Makuselwa/89 but he alleges that the applicant was registered as the owner fraudulently, since he alleges that there was no Public Auction held at Kitale as alleged. He however states in his plaint that the applicant entered the suit land on 29/12/2010 and started to plough and demolished workers residences and destroyed property. He states that his loss is 5,203,550 which he claims from the defendants.

[3] The applicant has attached all relevant documents leading to ownership of the said land to wit Certificate of Search, Advertisement for Auction by Pambo Auctioneers on 26/3/2010, fore closure notice by the AFC, Notice of sale by Pambo Auctioneers dated 4/2/2010, Notice to the respondent to redeem his property within 45 days by paying Kshs.684,100 (as at 31/3/2010) owed to Agricultural Finance Corporation, the Memorandum of sale to the applicant dated 20/4/2010 and title deed of Ndivisi/Makuselwa/89 in the name of the applicant dated 11th January, 2011.

Under **Sec. 26** of the Land Act Registration Act provides as follows;

Sec. 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.*

[4] As things stand now and until this case is heard on merit the owner of the land is the applicant. The respondent had earlier filed an application dated 25/10/2012 for injunction against the applicant herein. Justice A. Omollo in her ruling dismissing the Plaintiff's application on 29/8/2013 at page 3 line 8 stated;

“This court has noted from the documents filed that the sale took place on 16th April, 2010. The suit properly was thereafter transferred to the 1st defendant on 11th January, 2011. According to him, the first defendant moved on the suit property on 29th December, 2010. He is seeking to stop/injunct what took place years back.”

This ruling was not appealed from.

[5] There is no doubt that the person who has been on the Land is the applicant. The balance of convenience truly favours the applicant. The respondent has an adjoining land comprising 11.25 acres. It is not like he is going to be evicted by this order. The parties are advised to fast track the suit so that the pending issues can be determined.

The end result is that the application is allowed costs shall abide with the outcome of the case. It is so ordered.

Ruling Notices duly served and are in Court file. Ruling read in Open Court.

Dated at Bungoma this 3rd day of October, 2017.

S. MUKUNYA

JUDGE.

In the presence of:

Court Assistants: Joy/Chemutai

Parties: Absent