



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT NO. 568 OF 2015

TINGA TRADERS LIMITED..... PLAINTIFF

VERSUS

PATROBAS OWINODEFENDANT

RULING

The plaintiff brought this suit against the defendant seeking; a declaration that the plaintiff is the legal and/or beneficial owner of all those parcels of land known as **LR No. Nairobi/ Block 82/7376 and LR No. Nairobi/ Block82/7377** (hereinafter referred to as “**the suit properties**”), a permanent injunction to restrain the defendant from sub-dividing, selling, alienating, excavating and/or trespassing on the suit properties and an order allowing the plaintiff to fence the suit properties under the supervision of the OCS Buruburu Police Station. Contemporaneous with the plaint, the plaintiff filed an application by way of Notice of Motion dated 23rd June 2015 under Order 39 rules 1 & 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. In the said application, the plaintiff has sought the following orders:-

1. That the defendant/respondent by himself, his servants, employees, agents and or representatives be forthwith restrained from howsoever trespassing, interfering, excavating, disposing of, alienating, subdividing or in any way erecting any structures and or beacons on the parcel of land known as Nairobi/Block 82/7376 and 7377 at Donholm phase 8 within Nairobi (the suit properties) pending the hearing and determination of the suit or any such further orders that the court may deem just and expedient to grant in the circumstances.
2. That the palintiff be allowed to fence the suit properties under the supervision of the OCS of Buruburu Police Station.
3. That the costs of this application be borne by the defendant.

The application was supported by the affidavit sworn on 23rd June 2015 by Benson O. Mosoti. Mr. Mosoti stated that he is one of the directors of the plaintiff company and that the plaintiff is the registered proprietor of the suit properties having purchased the same from Continental Developers Limited at a consideration of Kshs 1,000,000/-. He annexed to his affidavit, copies of leases dated 10th July 2008 and 21st October 2008 that was issued by the Commissioner of Lands to Continental Developers Limited in respect of the suit properties and copies of certificates of lease dated 24th June 2009 and 20th December

2010 that were issued to the plaintiff in respect of LR No. Nairobi Block 82/7376 and LR No. Nairobi Block 82/7377 respectively.

He stated further that after purchasing the suit properties which were undeveloped, the plaintiff fenced the same. He stated that on 16th June 2015, the defendant trespassed onto the suit properties and began excavating the same thereby blocking the plaintiff's access to the same. He stated that the defendant failed to stop trespassing and/ or interfering with the suit properties despite verbal protest from the plaintiff. He contended that the plaintiff had suffered grave interference, financial loss and damages which would continue unless the orders sought are granted. He contended further that the defendant had no right to interfere with the plaintiff's quiet possession of the suit properties and that a case with high chances of success had in the circumstances been established against the defendant.

The application was opposed by the defendant through his replying affidavit sworn on 13th July 2015. In his affidavit, the defendant deposed that he is the organizing secretary of an entity known as Sovesava Self Help group. The defendant deposed that the suit properties are owned by Sovesava Self Help Group (hereinafter referred to only as "**Sovesava**"). He deposed that Sovesava was allocated a parcel of land known as **LR No. Nairobi/Block 82/7333** (hereinafter referred to only as "**Plot No.7333**") on 21st June, 1998. He annexed as exhibit a copy of the letter of allotment dated 21st June, 1998 through which the said parcel of land was allocated to Sovesava by the Commissioner of Lands. The defendant denied that he had trespassed on the suit properties contending that he had entered thereon as of right being the secretary of Sovesava which is the bonafide proprietor of the same.

On the plaintiff's contention that it has purchased the suit property from Continental Developers Ltd., the defendant stated that Continental Developers Ltd. had been taken by various groups before the Ministry of Lands, Housing and Urban development and other government agencies on claims of trespass and fraudulent dealings in the area where the suit properties are situated. The defendant annexed to his affidavit as exhibits, copies of correspondence between the Ministry of Lands, Housing and Urban development, the National Land Commission and the Nairobi City County as evidence of fraudulent dealings in relation to Plot No. 7333. The defendant also exhibited a copy of a letter dated 25th June 2015 in which the National Land Commission had directed the Director of Surveys to cancel the survey in respect of Block 82/7813-7856 so that the same may revert to its original status being Block 82/7333-7375.

The defendant contended that the suit herein and the application based thereon are premised on an illegality since the plaintiff's claim are in respect of non-existent parcels of land. The defendant contended that the motive behind this suit is to dispossess Sovesava of the parcel of that was allocated to it in 1998 and in respect of which it is awaiting the issuance of a title. The defendant contended in conclusion that that the plaintiff has not established the ingredients that were enunciated in the case of **Giella vs. Cassman Brown** for the grant of the orders sought.

The application was canvassed by way of written submissions. The plaintiff filed its submissions dated 7th August 2015 on 10th August, 2015 while the defendant filed his submissions dated 11th November, 2015 on the same date. In its submissions, the plaintiff argued that the purpose of the orders sought is to preserve the status quo pending the hearing and determination of the suit. The plaintiff submitted that it is in actual occupation of the suit properties. The plaintiff referred to Order 39 Rules 1 and 2 of the Civil Procedure Rules and submitted that the suit properties are in danger of being illegally occupied by the defendant. The plaintiff submitted further that it has established a prima facie case against the defendant in accordance with the decision in **Giella vs. Cassman Brown & Co Ltd (1973) E.A 358**. The plaintiff submitted that it as a bona fide purchaser of the suit properties for value and has a valid title to the same. The plaintiff contended that although the defendant has claimed that Sovesava was allocated Plot No. 7333, the defendant has failed to demonstrate that the said parcel of land had any relationship or connection with the suit properties which are owned by the plaintiff. The plaintiff submitted that the defendant did not place any evidence before the court to prove Sovesava's ownership of Plot No.7333. The plaintiff submitted that it has a cause of action with a probability of success. In this regard, the court was referred to among others the case of **Martha Wambui Muchiri vs. Kanard Miritu & 4 others**

[2006]eKLR

As concerns irreparable damage, the plaintiff submitted that since it is in actual occupation of the suit properties, it would be subjected to eviction and loss if the impending occupation and/or alienation of the suit properties by the defendant is not stopped. The plaintiff argued further that to acquire land in a densely populated area of Nairobi where the suit properties are situated is not easy and as such its possible loss if the orders sought are not granted cannot be compensated in damages.

The plaintiff submitted that the balance of convenience tilts in its favour since it is in occupation of the suit properties compared to the defendant who claims unsubstantiated legal right over the suit properties. The plaintiff submitted that no party would be prejudiced if the status quo is maintained. The court was referred to the case of **Mureithi vs. The city Council of Nairobi [1981]KLR 332** for the proposition that the power to grant or deny an injunction is at the Court's discretion. The plaintiff urged the court to exercise its discretion judiciously for the wider interests of justice.

With respect to the allegations contained in the defendant's affidavit, the plaintiff contended that no evidence has been produced by the defendant in support of his claim that Continental Developers Ltd. from which the plaintiff purchased the suit properties had been taken before the Ministry of Lands, Housing and Urban Development and other government agencies for trespass. The plaintiff submitted that the suit properties had not been mentioned in the defendant's exhibits and were not among the properties whose titles were revoked by the National Land Commission.

In their submissions in reply, the defendant's advocates reiterated the facts of the case as set out in the defendant's affidavit in opposition to the application herein, flagged out the issues arising for determination by the court and the principles on which the court exercises its discretion in applications for interlocutory injunction. In this regard the court was referred to the cases of **Giella vs. Cassman Brown (1973) EA 358**, **Johnson Githaiga D. Mugo vs. Jacob Kariuki Njoroge & another Nyeri [2015]eKLR**, **Kenya Commercial Finance Company vs. Afraha Education Society [2001] EA 86** and **Karen Bypass Estate Ltd vs. Print Avenue & Company Ltd. [2014]eKLR**.

The defendant submitted that the plaintiff has not established a prima facie case with a probability of success against the defendant. The defendant cited the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003) KLR 125** and submitted that for a prima facie case to be established, there must be evidence showing the infringement of a right and the probability of success of the case at the trial. The defendant submitted that the plaintiff did not place before the court a certificate of official search to prove its ownership of the suit properties. The defendant submitted that in the absence of evidence that the plaintiff is the owner of the suit properties, there is no prima facie case with a probability of success against the defendant. For this submission, the defendant cited the cases of **Issack Eden Gonjoko & 2 others vs. Town Council of Manderu & 2 others [2012]eKLR**, **David Gichuhi Mukunjura vs. Mwaniki Mbogo (2006)eKLR** and **Kazungu Nyau vs. Malindi Musketeers & 3 others (2014)eKLR**.

On irreparable damage, the defendant contended that having failed to establish a prima facie case, the court ought not consider the other principles for grant of interlocutory injunction. The defendant submitted in the alternative that the equitable remedy of injunction is only available where the applicant has demonstrated that it will suffer an injury which cannot be adequately compensated by an award of damages. The defendant argued that the value of the suit properties can easily be ascertained and monetary compensation paid to the plaintiff in the unlikely event of the plaintiff succeeds at the trial. The defendant submitted that the plaintiff has not demonstrated how it would suffer irreparably if the orders sought are not granted and further that since no developments have been carried out on the suit properties, there is nothing belonging to the plaintiff which this court can be called upon to preserve.

As to where the balance of convenience lay, the defendant submitted that the same tilts in favour of the defendant because plaintiff which has never been in occupation of the suit properties would suffer no inconvenience if the orders sought are not granted. The defendant submitted further that the plaintiff has approached the court with unclean hands since the certificates of lease upon which it has based its claim

were fraudulently obtained. Finally, the defendant submitted that the plaintiff has moved the court under the wrong provisions of the law thereby rendering its application fatally defective and liable for striking out. In support of this submission, the court was referred to the cases of **Joyce Liku Janda vs. Care International [2009] eKLR** and **Joel K. Yegon & 4 others vs. John Rotich & 4 others, Nairobi Misc. Application No. 995 of 2003.**

I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavit in reply that was filed by the defendant in opposition to the application. Finally, I have considered the detailed submissions that were filed by the parties' respective advocates and the cases that were cited in support thereof. What I need to determine at this stage is whether the plaintiff has established a prima facie case with a probability of success against the defendant and whether the plaintiff would suffer irreparable injury if the injunction sought is not granted. The plaintiff has claimed that it is the registered owner of the suit properties and that the defendant had trespassed on the said properties and threatened to evict it therefrom. In proof of its title over the suit properties, the plaintiff produced before the court, copies of certificates of lease issued in its name by the land registrar in respect of the suit properties.

In response, to the plaintiff's claim, the defendant did not deny the allegations of trespass levelled against him. He instead contended that he is the secretary of Sovesava which he claimed to be the bona fide proprietor of the suit properties having been allocated Plot No. 7333 on 21st June 1998. According to exhibit PA-8 to the defendant's replying affidavit, Plot No. 7333 is a subdivision of land parcel known as Block 82/6252. Block 82/6252 was subdivided in the year 2000 into 43 plots numbered Block 82/7333-7375. In the year 2002, the said 43 plots were amalgamated into one land parcel namely, Block 82/7812 and subdivided a fresh into 44 plots numbered 82/7813-7856. The defendant contended that the fresh subdivision was carried out with the intention of confusing the identities of the earlier plots.

The defendant also exhibited a copy of a letter dated 25th June, 2015(exhibit PA-10) from the National Land Commission addressed to the Director of Surveys where the alleged illegal amalgamation of the earlier parcels of land to form parcel 82/7812 and subsequent subdivision thereof was referred to and a request for cancelation and reversion to the original status made. The defendant has contended that the certificates of lease in respect of the suit properties which have been exhibited by the plaintiff in support of the present application were fraudulently acquired and that the suit properties do not exist.

From the material on record, Sovesava through which the defendant has laid a claim to the suit properties was allocated a parcel of land known as Nairobi/Block 82/7333(Plot No.7333) on 21st June, 1998. It is not clear how this came to be because, according to defendant's exhibits PA-8 and PA-10 which I have referred to above, LR No. Nairobi/Block 82/7333(Plot No.7333) came into existence in the year 2000 following the subdivision on Block82/6252 into 43 plots. I wonder how the Sovesava could have been allocated the said parcel of land before it came into existence. I have also noted that 21st June, 1998 which is the purported date when Sovesava was allocated the said parcel of land fell on a **Sunday** when government offices are normally closed for business. How did this happen? Curiously again, I have noted that although Sovesava is alleged to have been allocated Plot No.7333 in 1998, according to the letter of allotment, it was supposed to pay rent from 1.7.98 to 31.12.05! Furthermore, Sovesava seems not to have paid the stand premium in the sum of Ksh. 950,000/- which was payable within 30 days from 21st June, 1998 by 16th January, 2006 (refer to the defendant's annexure PA-4). From what I have set out above, the validity of Sovesava's purported letter of allotment which was issued on a Sunday is questionable. Of more importance to the case before me however is that, I am unable to see any nexus between the suit properties (LR No.Nairobi/Block 82/7376 and 7377) which are said to be owned by the plaintiff and Sovesava's LR.No. Nairobi/Block 82/7333(Plot No.7333). From the material on record, the suit properties are distinct from Plot No. 7333. I cannot therefore see the interest if any, which the defendant has in the suit properties.

From the defendant's exhibits PA-8 and PA-10, it is clear that the plaintiff's titles over the suit properties are not among title numbers Nairobi/Block 82/7333-7375 whose amalgamation and subsequent subdivision into Nairobi/Block 82/7813-7856 were found to have been fraudulent. I find no basis

therefore for the allegations of fraud that have been levelled against the plaintiff by the defendant. The standard of proof for fraud is above a mere balance of probability as was observed by the court in the case of **Koinange & 13 others vs. Koinange**[1996] KLR 23 and a mere allegation that the plaintiff's title was obtained fraudulently does not meet this high threshold.

I am satisfied that the plaintiff has established a prima facie case against the defendant with a probability of success. The plaintiff has proved on a prima facie basis that it is the registered owner of the suit properties. The defendant on the other hand has not demonstrated the interest if any which he has on the suit properties. In the absence of any interest having been demonstrated by the defendant in the suit properties, the defendant's entry on the said properties without the consent of the plaintiff amounts to trespass.

On whether the plaintiff stands to suffer irreparable injury if the injunction sought is not granted, I am again persuaded that that would be the case. The plaintiff submitted that it was in actual possession of the suit properties before the defendant entered thereon as started excavating the same and blocking its access to the properties. I am persuaded by the decision in the case of **Lanyavu Gardens Limited . vs. Wilson Munguti Mbithi & 2 others, Machakos HCCC 337 of 2011** where the court held that a litigant who prima facie, demonstrates that he holds a *bona fide* title to a parcel of land, deserves the presumption that denial of injunction would result in irreparable harm where there is nothing on record to suggest that the title is invalid.

In the case of **George Orango Orago vs. George Liewa Jagalo & others, Kisumu CA No. 62 of 2009**, the Court of Appeal stated that where it is proved that a person before the court is in possession of land, and has title to the land, there would be no proper basis for dispossessing him of that land and that a denial of injunction in such circumstances would cause such a person such loss that may not be adequately compensated by an award of damages.

I am of the view that even if the application was determined on a balance of convenience, the same would tilt in favour of the plaintiff who is in possession and whose title to the suit properties has not been cancelled. Before concluding this ruling, I wish to comment on the defendant's contention that the plaintiff's application before the court is defective null and void for invoking the repealed provisions of the law. I am in agreement with the defendant that the provisions of the Civil Procedure Rules which were invoked by the plaintiff were repealed by the Civil Procedure Rules, 2010. This in my view does not render the plaintiff's application incompetent. This court is now enjoined under Article 159 of the Constitution of Kenya, 2010 to administer justice without undue regard to procedural technicalities. The defendant has not satisfied me that he has suffered any prejudice or injustice as a result of the wrong provisions of the law that were cited by the plaintiff. The objection is purely technical in nature and this court would disregard the same for the sake of doing substantive justice. The two cases that were cited by the defendant in support of the said technical objection are no longer good law.

The upshot of the foregoing is that the plaintiff's application dated 23rd June 2015 has merit. The same is allowed in terms of prayer 3 thereof. I am not inclined to grant prayer 4 at this stage. The plaintiff shall have the costs of the application.

Delivered, Dated and Signed at Nairobi this 29th Day of January, 2016

S. OKONG'O

JUDGE

In the presence of

NA. for the Plaintiff

Ms. Maina holding brief for Makhoha for the Defendant