



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1015 OF 2014

YASHWANT RAI VYAS.....PLAINTIFF

VERSUS

LEAH KARANGI.....1ST DEFENDANT

ISAAC SANE.....2ND DEFENDANT

BENJAMIN NYAMAI LAMA.....3RD DEFENDANT

JOSEPH MULINGE.....4TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 31st July 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from entering upon, remaining on, carrying out construction on or continuing in occupation of or in any way interfering with the Plaintiff's access to, use of and quiet possession of the parcel of land known as L.R. No. 28045 IRN 6324 Noonkopir Township/Kitengela/Kajiado (hereinafter referred to as the "suit property") pending the hearing and determination of this suit. The Plaintiff/Applicant also seeks for an order that the Defendants/Respondents do remove any dwelling or any other structures erected on the suit property failing which the same be removed by the Plaintiff/Applicant at the cost of the Defendants/Respondents pending the hearing and determination of the suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Yashwant Rai Vyas, sworn on 31st July 2014, in which he averred that he and his wife Savita Vyas are the registered owners of the suit property whose authorized user is commercial purposes. He annexed a copy of the Certificate of Title as well as land rates and ground rent clearance receipts. He also annexed copies of the Deed Plan and Beacon Certificate for the suit property. He added that he intends to undertake the construction of the Sai Education Community Development Academy on the suit property. He further averred that sometime in the year 2006, he visited the suit property with a view to commencing the said project only to find that the same had been encroached upon as well as subdivided by some persons who claimed that the plots had been allotted to them by the County Council. He added that the Defendants/Respondents had gone as far as erecting semi-permanent corrugated iron sheet dwelling houses and have also recently commenced construction of a brick perimeter wall on the suit property. He averred further that in a bid to secure vacant possession of the suit property, he lodged a

complaint to the Kitengela Police Station vide OB No. 61 of 10/7/2014 with a request for aid of the police to evict the Defendants/Respondents from the suit property. He further averred that the Defendants/Respondents have denied him and his agents free and unhindered access to the suit property and have continued to occupy the same with defiance. He concluded by stating that he is suffering irreparable injury as a result of the occupation of the Defendants/Respondents of the suit property.

The Application is contested. The 3rd Defendant, Benjamin Nyamai Lama filed his Replying Affidavit sworn on 5th December 2014 in which he averred that he is the registered owner of the piece of land known as L.R No. 3164/Res-Noonkopir T.C. situated in Kitengela off Namanga Road having purchased it from one Shadrack Sane which transfer was approved by Olkejuado County Council vide a transfer certificate dated 18th November 2011. He annexed a copy of the said transfer certificate. He also annexed a copy of a rates clearance certificate issued to him by the Olkejuado County Council. He added that he submitted a Development Plan to the County Physical Department of Kajiado County on 3rd March 2014 which was approved on 11th June 2014. He confirmed that he has been making all the requisite payments including the rent and rates as per the terms of the transfer. He added that on that basis, he is in lawful occupation of his parcel of land and has a right to quiet possession thereof. He stated that the Defendants/Respondents are strangers to the Plaintiff/Applicant's claim of ownership of the suit property and that the Plaintiff's claim of encroachment and illegal occupation of the same is unfounded and in bad faith. He further averred that the suit property is distinct and separate from his parcel of land being Plot No. 3164/Res-Noonkopir Trading Centre. He added that the Plaintiff/Applicant is unsure of which parcel of land he claims and is based on wild allegations not supported by any title documents. He also stated that the title documents presented by the Plaintiff/Applicant are suspicious and obtained through fraud.

In response thereto, the Plaintiff/Applicant filed his Supplementary Affidavit sworn on 18th February 2015 in which he averred that pursuant to section 26 of the Land Registration Act read together with sections 24 and 25 he is the registered proprietor of the suit property with all the rights and privileges belonging or appurtenant thereto. He added that on their part, the Defendants have failed to prove ownership of the said parcels of land by failing to provide the requisite cadastral map to show where land parcel no. 3164/Res-Noonkopir Trading Centre is located. He added that the Defendants/Respondents have not produced any title document as proof of ownership and as such cannot claim ownership of the land. He further stated that the allegation of fraud in the way he acquired title documents over the suit property are unsubstantiated and lack material particulars.

The Plaintiff filed his written submissions.

The issue I must determine is whether to grant to the Plaintiff/Applicant the temporary injunction he seeks. In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”

Has the Plaintiff/Applicant demonstrated that he has a genuine and arguable case? In laying a claim over the suit property, the Plaintiff/Applicant has produced all his documents of ownership. Specifically, the Plaintiff/Applicant produced his Certificate of Title in respect of the suit property which shows that he together with his wife Savita Vyas are indeed the joint owners of the suit property. The law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1) of the Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... 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.”**

The Defendants/Respondents on the other hand have urged that the parcel of land they occupy and the suit property are distinct and separate parcels of land. They have claimed ownership of the parcel of land they occupy and have produced what they called a transfer certificate issued by the Olkejuado County Council. They did not produce any certificate of title in respect thereof. The position of the Defendants/Respondents cannot be equated with that of the Plaintiff/Applicant. The Plaintiff/Applicant as the holder of a Certificate of Title over the suit property occupies a superior position in that this court is duty bound to find, on a prima facie basis, that he is indeed the absolute and indefeasible owner of the suit property. The coordinates of the suit property are ascertainable from the Deed Plan and Beacon Certificate produced by the Plaintiff/Applicant. The claim by the Defendants/Respondents that the Plaintiff/Applicant obtained the title documents through fraud has no material particular and is unsupported by any evidence. In light of this, this court finds that the Plaintiff/Applicant has proved, on a prima facie basis, that he is indeed the duly registered proprietor of the suit property and is entitled to all the rights appurtenant thereto, which include exclusive possession of the suit property. In light of this, I find that the Plaintiff/Applicant has proved that he has a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

Further, land is unique and no one parcel can be equated in value to another. Though the value of the suit property can be ascertained, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's rights.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 8TH

DAY OF APRIL 2016.

MARY M. GITUMBI

JUDGE