



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII

CIVIL SUIT NO. 424 OF 2014

ELIONS KENYA LIMITED.....PLAINTIFF
VERSUS

1. KISII COUNTY GOVERNMENT

2. EXECUTIVE COMMITTEE MEMBER, LANDS

KISII COUNTY GOVERNMENT..... DEFENDANTS

RULING

The plaintiff brought this suit against the defendants on 3rd November, 2014 seeking; a declaration that the plaintiff is the registered and/or lawful owner of all that parcel of land known as LR No. Kisii Municipality/Block 111/249(hereinafter referred to as “the suit property”), a permanent injunction to restrain the defendants from entering upon, re-entering, trespassing onto, laying a claim to, building on, interfering with and/or in any other manner dealing with the suit property or any portion thereof in any manner whatsoever and, general damages for trespass.

The suit was brought on the grounds that the plaintiff is the registered owner of the suit property and that between 29th and 30th October, 2014, the defendants through their agents and/or employees entered the suit property without the plaintiff’s permission and demolished the barbed wire fence that the plaintiff had erected around the property together with the house and/or building which the plaintiff had put up thereon. The plaintiff averred that the defendant’s actions aforesaid amounted to trespass.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 3rd November 2014 seeking a temporary order of injunction restraining the defendants by themselves or through their agents, servants and/or anyone claiming under them from entering upon, re-entering, trespassing onto, laying a claim to, building on, interfering with and/or in any manner dealing with the suit property or any portion thereof pending the hearing and determination of this suit. The plaintiff also sought an order that the O.C.S Kisii Police Station do enforce and/or implement the order of injunction sought if granted.

The application was supported by the affidavit sworn on 3rd November 2014 by Elijah Amota Onsika, the plaintiff’s managing director. In the said affidavit, the plaintiff’s said director stated that the plaintiff is the registered and lawful proprietor of the suit property. In proof of the plaintiff’s ownership of the said property, he annexed among others, copies of a letter of allotment dated 1st January, 1993, a certificate of lease dated 12th September 2006 and a certificate of official search dated 26th March 2014.

He stated further that between 29th and 30th October, 2014, the defendants entered upon and/or trespassed onto the suit property and while thereon, destroyed and brought down a barbed wire fence which the

plaintiff had erected around the suit property. The defendants also demolished a building which was being occupied by the plaintiff's workers on the suit property and warned the plaintiff and its employees not to enter the suit property.

The plaintiff's said director stated further that as a result of the acts aforesaid, the defendants had effectively dispossessed the plaintiff of the suit property in that the plaintiff had been denied a right to use, occupy and enjoy the suit property which is registered in its name. He stated further that the activities of the defendants on the suit property were bound to alter the character of the suit property thereby exposing the plaintiff to irreparable loss. He contended that the plaintiff has established a prima facie case with overwhelming chances of success against the defendants which warrants the granting of the injunction sought. The plaintiff's said director swore a supplementary affidavit on 1st December 2014, in which he stated that the suit property was lawfully and legitimately allocated and registered in the name of the plaintiff and that due process of the law was followed in the acquisition of the property by the plaintiff.

The application was opposed by the defendants through a replying affidavit sworn on 19th November 2014 by Moses Onderi, the 1st defendant's executive committee member for lands, housing, physical planning and urban development and the 2nd defendant in the suit. In response to the application, the defendants contended that the suit property is public land and that from their records, there are no resolutions by the defunct Municipal Council of Kisii that authorized the allocation of the suit property to the plaintiff.

The defendants contended that the dispute over the ownership of the suit property had been referred to the National Land Commission and the Ethics and Anti-Corruption Commission for investigation and that the reports from the two commissions are awaited. The defendants contended further that the plaintiff had concealed the fact that the suit property is public land and that the same was hived off the compound of government house No. KSI/HOU/HG.2. The defendants contended that the irregular hiving of a portion of the compound of the said government house which is now comprised in the suit property has substantially reduced the space that was meant for the said government house and which space had been identified and set aside for the construction of Kisii County Governor's residence.

The defendants annexed to the affidavit of Moses Onderi correspondence dated 3rd February 2014, 28th February 2014, 14th July 2014 and 11th August 2014 that were exchanged between the defendants and the Ministry of Lands, Housing and Urban Development and the National Land Commission. The defendants denied that they had destroyed the plaintiff's structures on the suit property and contended that the plaintiff has never carried out any development on the suit property. The defendants contended that neither the defunct Kisii Municipal Council nor the 1st defendant issued approvals for the structures which the plaintiff claims to have put up on the suit property.

When the application came up for hearing on 4th December 2014, the court directed at the request of the parties that the same be argued by way of written submissions. The plaintiff in its submissions dated 21st April 2015 contended that the suit property was at all material times trust land that was vested in the County Council of Gusii. The plaintiff submitted that the suit property was allocated to it by the Commissioner of Lands with the authority of the County Council of Gusii. The plaintiff submitted that registration of the suit property in its favour conferred upon it rights and interests over the suit property which were to be enjoyed to the exclusion of all and sundry including the defendants. In support of this submission, the plaintiff cited the provisions of sections 24, 25 and 26 of the Land registration Act, 2012.

The plaintiff submitted that the Commissioner of Lands had the power to allocate the suit property and that the allocation of the same to the plaintiff meant that the suit property was available for allocation. The plaintiff submitted that the defendants' contention that the suit property was allocated to it irregularly has no basis. The plaintiff contended that it was at all material times in possession of the suit property and that his occupation of the property gives it superior rights to the suit property in comparison to the defendants who have never been in occupation thereof.

The plaintiff submitted that it has established a *prima facie* case with overwhelming chances of success against the defendants. The plaintiff made reference to the cases of **Mrao vs. First American Bank & 2 others (2003) KLR 125** and **Ocean View Plaza Ltd vs. Attorney General KLR (E & L)1 475** in support of its submissions on the issue of a prima facie case. With respect to irreparable loss, the plaintiff submitted that as the registered proprietor of the suit property, it is entitled to exclusive possession thereof. The plaintiff submitted the defendants' activities on the suit property were interfering with the plaintiff's use and possession thereof. The plaintiff submitted further that the intended construction of the Governor's residence on the property if not stopped would deprive the plaintiff of the property. The plaintiff submitted that it would be constrained to incur huge expenses in restoring the suit property to its original status if the defendants' activities thereon are not stopped thereby sustaining irreparable loss.

The plaintiff submitted further that the defendant would not suffer any prejudice if the orders sought herein are granted. The plaintiff submitted that even if the defendants had any legitimate claims over the suit property, such claims could only be ventilated through a court process. The plaintiff submitted that if the defendants' acts of invading the suit property and taking the same by force are not restrained, the same would be tantamount to the court condoning criminal acts. For this submission, the plaintiff cited the cases of **Aikman vs. Muchoki (1984) KLR 353** and **George Orango Orago vs. George Liewa Jagalo & 3 others, Kisumu CA No. 62 of 2009.**

In their submissions in reply dated 24th June, 2015, the defendants reiterated the contents of Moses Onderi's replying affidavit that was filed herein on 19th November, 2014 in opposition to the plaintiff's application. The defendants submitted that due process was not followed in the allocation of the suit property to the plaintiff and as such the plaintiff's title to the suit property is irregular and illegal. The defendants submitted that the plaintiff's application has no merit and does not meet the threshold for granting injunctive remedies set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358.** The defendants also relied on the case of **Simon Abuki Omboto vs. Kisii County Government & another, Kisii ELC No. 400 of 2014.**

What I need to determine in the application before me is whether the plaintiff has met the conditions for granting a temporary injunction. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 others, Nairobi CA No. 77 of 2012** the court stated as follows;

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See, Kenya Commercial Finance Co. Ltd. vs. Afraha Education Society (2001)Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

On the material before me, I am satisfied that the plaintiff has established a prima facie case against the

defendants. The plaintiff has demonstrated with sufficient documentary evidence that it is the leasehold proprietor of the suit property. The defendant has not challenged in any material respect the evidence that has been placed before the court by the plaintiff in proof of its ownership of the suit property. Section 26(1) of the Land Registration Act, 2012 provides that a certificate of title 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 further, that such a title is not subject to challenge, except:-

- a. on the ground of fraud or misrepresentation to which the proprietor is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

Section 27(b) of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) under which the suit property was registered provides as follows;

“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 and expressed agreements, liabilities and incidents of the lease.”

Section 28 of the Registered Land Act, aforesaid, provides that;

“ The rights of a proprietor , whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor , together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever, but subject;-

- a. ***to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***
- b. ***unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.....”***

The defendants' case is that the plaintiff's title to the suit property was irregularly and illegally acquired. The defendant has contended that a portion of the suit property was hived off the compound of Government House No. KSI/HOU/HG2. The defendant has contended further that the allocation of the suit property to the plaintiff was not approved by the defunct Municipal Council of Kisii. The defendant has not placed any material before the court in proof of these allegations. In any event, I don't think that the mere fact that the suit property was illegally acquired entitles the defendant to forcefully take over the same. I am of the view that due process must be followed in determining the legality or otherwise of a title to land. The defendant who claims to have referred the issue regarding the legality of the plaintiff's title to the National Land Commission should have waited for the determination by the said commission instead of taking the law into their own hands. I am in agreement with the decision of Majanja J. in the case of **Evelyn College of Design Ltd vs. Director of Children's Department & another (2013) eKLR**, where he stated as follows:-

“I would once again emphasise that a finding of “unlawful acquisition” referred to in Article 40(6) of the Constitution must be through a legally established process and not by forceful occupation of property by State institutions or by preventing a person from enjoying the incidences of ownership of the property. Thus, it was held in the case of Adan Abdirahani Hassan and 2 Others v The Registrar of Titles and Others Nairobi Petition No. 7 of 2012 [2013]eKLR that,“ Even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, which view they were entitled to hold being the custodians of public land, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect of the suit property. In view of what I have stated, it is clear that even where property is said to be illegally acquired; it cannot be

dispossessed without due process. Such dispossession cannot be effected by preventing the petitioner from enjoying the incidents of ownership of the land. Since the issue in this case concerns due process, I have exercised circumspection in commenting on the veracity or otherwise of the claims of illegal acquisition because, the State has the right to assert this position in the proper forum.

I am of the opinion that until the plaintiff's title to the suit property is found to have been illegally acquired by a court of law or other body such as the National Land Commission, the plaintiff is entitled to protection of its rights in the suit property set out in section 26(1) of the Land Registration Act, 2012 and Sections 27(b) and 28 of the Registered Land Act aforesaid the protection of which rights is guaranteed under Article 40 of the Constitution of Kenya.

On whether, the plaintiff stands to suffer irreparable injury if the orders sought are not granted, I am satisfied that that would be the case. In his affidavit in opposition to the application herein, Moses Onderi stated that the defendants are planning to construct the residence of the Governor of Kisii County on the suit property. If the proposed project is undertaken on the suit property, the plaintiff would be completely dispossessed thereof. This means that if the plaintiff is denied the injunction sought herein, it would be dispossessed of the suit property and it will no doubt suffer irreparable injury. In the case of **George Orango Orago vs. George Liewa Jagalo & 3 others, Kisumu CA No. 62 of 2009**, the Court of Appeal stated as follows:-

"The appellant was in possession. Prima facie he is the owner of the land and until his title to it is set aside, there would be no proper basis for dispossessing him of the land. The denial of injunction has the effect of dispossessing the appellant of his land."

For the foregoing reasons, I am satisfied that the plaintiff has satisfied the conditions for granting interlocutory injunction. The plaintiff has established a *prima facie* case with a probability of success against the defendants and has also demonstrated that it stands to suffer irreparable injury if the injunction sought is not granted.

The upshot of the foregoing is that the plaintiff's application dated 3rd November, 2014 is well founded. The same is allowed in terms of prayer 3 thereof provided that the injunction granted shall last for a period of ten (10) months only from the date hereof or until the determination of the suit whichever comes earlier. The costs of the application shall be in the cause.

Signed at Nairobi this.....Day of2016

S. OKONG'O

JUDGE

Delivered, Dated and Signed at Kisii this **8th** day of **April** 2016

J.M.MUTUNGI

JUDGE

In the presence of

.....**for the Plaintiff**

.....**for the Defendants**