



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CIVIL SUIT NO. 12 OF 2015

SAMWEL OMWERI MARANGA..... PLAINTIFF

VERSUS

MATOKE MABIRIA1ST DEFENDANT

MANUEL KIEMA MABIRIA.....2ND DEFENDANT

MOMANYI MATOKE.....3RD DEFENDANT

OMBUI MATOKE.....4TH DEFENDANT

DANIEL KIEMA.....5TH DEFENDANT

JACOB KIEMA.....6TH DEFENDANT

MOSIOMA OMURWA.....7TH DEFENDANT

RULING

What is before me is the plaintiff's Notice of Motion application dated 16th February 2015 brought under Order 40 rules 1 and 2 of the Civil Procedure Rules and section 3A, 1A and 1B of the Civil Procedure Act. The plaintiff is seeking among others the following orders:-

- a. That the respondents by themselves, their agents or servants be restrained from cutting down tea bushes on land parcels number Central Kitutu/Mwabundusi/2090 and 2089(herein after referred to as "the suit properties") until this suit is heard and determined.
- b. That the court be pleased to order an immediate assessment of the already cut down tea bushes on the suit properties and establish the loss which the respondents should be compelled to pay to the plaintiff.
- c. That the costs of the application be provided for.

The application was supported by the affidavit sworn by the plaintiff on 16th February 2015 as well as a further affidavit sworn on 1st July 2015. The plaintiff stated that he is the registered owner of the suit properties which he purchased in the years 1989 and 1990 from Samwel Mose Mabiria and Matoke Mabiria. The plaintiff annexed to his supporting affidavits copies of the title deeds dated 20th April 2013 issued in his name in respect to the suit properties. The plaintiff also annexed copies of the agreement for sale dated 19th December 1989 which he claims to have entered into with Samuel Mose Mabiria in respect of a portion of land parcel No. Central Kitutu/Mwabundusi/175(hereinafter referred to as Plot No.

175) and a further agreement for sale entered into between him and Matoke Mabiria dated 3rd December 1990 in respect of another portion of Plot No. 175.

The plaintiff stated that on 27th December 2014, the defendants trespassed upon the suit properties and chased away his workers who were plucking tea bushes thereon and proceeded to cut down about 300 tea bushes without any reasonable cause. He annexed as exhibits, photographs showing the said destruction of tea bushes.

The plaintiff's application was opposed by the defendants through a replying affidavit sworn by the 6th defendant on 7th April 2015. In his affidavit, the 6th defendant stated that at all material times the land parcel known as Central Kitutu/Mwabundusi/175 (Plot No. 175) was their ancestral land and the same was registered in the name of his father one, Emanuel Kiema Mabiria. He stated that on 15th July 2010, Plot No. 175 was subdivided into two portions namely, Central Kitutu/ Mwabundusi/1591 and 1592(Plot No.1591 and Plot No.1592).

He stated that of the two subdivisions, his father, Emanuel Kiema, was registered as proprietor of Plot No.1591 measuring 2.98 as evidenced by a copy of the title deed and certificate of official search dated 28th July 2010 and 13th March 2014 respectively which he annexed to his affidavit as exhibits. He stated that he was shocked that the plaintiff had filed this suit claiming that he was the registered proprietor of the suit properties purportedly created from the Plot No. 175 aforesaid. The 6th defendant deposed further that the plaintiff's titles over the suit properties are forgeries and that a report had been made to the police to investigate the same and take appropriate action against the plaintiff. He annexed to his affidavit a copy of an order dated 12th February 2015 from the Divisional C.I.D Office, Kisii ordering the Chief of Getare Location to arrest the plaintiff and present him before the C.I.D at Kisii. The 6th defendant also annexed to his affidavit a copy of a statement that was made on 17th February 2015 by Kisii County Land Registrar to the effect that that the plaintiff's titles are forgeries and are not backed by records held at the land registry.

When the application came up for hearing on 20th April 2015, the parties were directed to argue the same by way of written submissions. The plaintiff in submissions dated 1st July 2015 argued that a prima facie case with probability of success had been established. The plaintiff submitted that he had established ownership of the suit properties through copies of the title deeds that he had exhibited in his affidavits. The plaintiff submitted that the defendants had occasioned him injury by cutting down his tea bushes and the court was urged to preserve the remaining tea bushes pending the hearing and determination of the suit. The plaintiff submitted further that the balance of convenience tilts in favour of granting the injunction sought to restrain the defendants from cutting down the remaining tea bushes. The plaintiff cited among others, the cases of **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358** and **Mrao vs. First American Bank of Kenya Ltd & 2 others (2003) KLR 125**, in support of his submissions. The plaintiff submitted that he had demonstrated that he had purchased the suit properties and that the defendants had put him in possession of the same. He submitted that he had carried out substantial developments on the said parcels of land with the knowledge of the defendants.

The plaintiff submitted that he would suffer irreparable loss that cannot be compensated by way of damages if the orders sought are not granted since he had been in possession of the suit properties. The plaintiff submitted that he who comes to equity must come with clean hands. He contended that the defendants had concealed material information to the court in a bid to dispossess him of the suit properties.

The defendants in their submissions dated 26th June 2015 reiterated the contents of the 6th defendant's affidavit in reply to the plaintiff's application. The defendants submitted that Plot No. 175 having been subdivided in the year 2010 into two portions namely Plot No. 1591 and Plot No.1592, there was no way the same parcel of land could have been sub-divided again in the year 2013 to give rise to the suit properties purportedly registered in the name of the plaintiff. The defendants submitted that the plaintiff is facing criminal charges touching on the validity of the titles that he holds over the suit properties. The

defendants submitted that the plaintiff has failed to meet the threshold for granting interlocutory injunction.

I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the defendants replying affidavit that was filed in opposition to the application. On the material before me, I am in agreement with the defendants that the plaintiff has not met the threshold for granting interlocutory injunction. The plaintiff has claimed that he is the registered owner of the suit properties which are subdivisions of Plot No.175. According to the documents submitted to the court by the plaintiff, the plaintiff acquired the suit properties in the year 2013 following the subdivision of Plot No.175. The defendants have contended that the plaintiff's titles over the suit properties are forgeries. They have placed evidence before the court showing that Plot No.175 was not in existence in the year 2013 the same having been subdivided in the year 2010 to give rise to Plot No. 1591 and Plot No.1592. The defendants have contended that the plaintiff's act of forgery was reported to the police and a charge has been preferred against the plaintiff. The defendants placed before the court a copy of a statement made to the police by the land registrar Kisii County in which the said registrar termed the plaintiff's titles as forgeries. The plaintiff did not respond to these serious allegations against him. In the face of these uncontroverted allegations against the plaintiff with regard to the manner in which he acquired the titles the subject of this suit, I am not persuaded that the plaintiff has established a prima facie case against the defendants.

That being my view of the matter, it is not necessary for me to consider the other conditions that have to be met before interlocutory injunction can be granted. The conditions for granting interlocutory injunction are sequential and must be applied as separate, distinct and logical hurdles which the applicant must surmount. If the applicant fails to meet the first condition, there is no need to consider the rest. See Nguruman Ltd vs. Jan Bonde Nielsen & 2 others Nairobi CA No. 77 of 2012 and Kenya Commercial Finance Company Ltd vs. Afraha Education Society (2001)1 E.A. 86.

The upshot of the forgoing is that the plaintiff's application dated 16th February, 2015 is not for granting. The same is accordingly dismissed with costs to the defendants.

Signed at Nairobi this..... day of.....2016.

S.OKONG'O

JUDGE

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

J.M.MUTUNGI

JUDGE

In the presence of

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

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