



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

LAND CASE NO. 194 OF 2015

SULEIMAN M. MWINYIHAJIPLAINTIFF

VERSUS

OMAR SALIM MWABEI

VINCENT KARHAYU DEFENDANTS

RULING

[1] The application dated 20th August, 2015 filed by the Plaintiff/Applicant is premised under the provisions of the law cited in the heading. In the application, the applicant seeks the following orders;

(a) Spent

(b) THAT on about 28th October, 2013, 1st the Defendant invaded the suit land and claimed to be his and purported to sell the same to 2nd Defendant/Respondent.

(c) THAT the matter was referred to the Local Administration to wit the District Officer, Longo Division and Chief Mtongwe area, who advised the Defendant's to desist from interfering with suit land.

(d) THAT Defendants/Respondents have continued occupying the suit and even allowed 2nd Defendant/Respondent to start construction on the said suit land.

(e) THAT the Defendants/Respondents have no right or justification in exercising any propriety right over the parcel of land known as Plot No. 826/Bububu Squatter Settlement Scheme.

(f) THAT it is just, fair and equitable in the circumstances of the case.

[2] The application is supported by the grounds on its face and the affidavit sworn by the applicant. In the affidavit, the applicant deposes that he was allotted plot No. 826/Bububu Settlement Scheme on 31st January, 2002 as per the letter annexed.

That on 28th October 2013, the 1st defendant invaded this plot purporting he owns it and sold the same to the 2nd defendant. The applicant reported the case to the local administration who told the defendants to stop but the defendant's ignored. Subsequently the 2nd defendant began constructing a house on the suit plot without the applicant's consent. This is what made him file this case.

[3] The application is opposed by the replying affidavits sworn by each of the defendants. The 1st defendant deposes that he sold to the 2nd defendant a portion of his land located in “**Bububu B**” which land is unsurveyed. He deposes that the applicant resides in Ngombeni, Kwale County and is not a resident of the Bububu settlement scheme. The 1st defendant deposed further that the letter of allotment given to the applicant does disclose whether the plot is located in Bububu “**A**” or “**B**”. He denied the Plaintiffs claim.

[4] The 2nd defendant deposed that he is a stranger that the applicant was allotted plot No. 826/Bububu Settlement Scheme. In paragraph 5, he deposes that the plot sold to him is not in Bububu Settlement Scheme and it has not been surveyed. He deposed that he is a bona fide purchaser for value of the suitland. However in paragraph 10, he deposes that the land sold to him is Bububu “**B**”. It is his case that the applicant’s prayers in the motion are unavailable and ungrantable and should be dismissed.

[5] The parties filed written submissions which I have read and considered. On the face of the prayers sought in the motion, prayer (6) cannot be granted until the evidence has been taken from both parties. I will only consider prayer (b), (d) and (e). Prayer (b) is seeking interim orders of injunction pending determination of this application. Thus it was to secure the suit property pending the application being heard and concluded. It is therefore spent at this stage when I am making this ruling.

[6] In prayer (d) the applicant has sought mandatory orders of injunction seeking to evict the defendants and or their agents from the suit premises. In the pleadings of both parties, the 1st defendant and the applicant are both claiming the plot. The 1st defendant avers that this plot is situated at Bububu “**B**” which is unsurveyed. The 1st defendant also deposed there is Bububu “**A**” and “**B**” and that Bububu “**A**” is already surveyed. The 1st defendant therefore claims Bububu B plot as of right.

[7] In the applicant’s letter annexed it did not specify whether the plot allotted is in Bububu “**A**” or “**B**”. In the submissions the advocate stated the applicant’s plot is in Bububu “**B**”. However evidence cannot be deduced through submissions. The applicants own document and pleading did not bring out this fact. It is only through evidence that this Court can ascertain whether there is Bububu A and B or there is only one Bububu Settlement Scheme. Because of the uncertainty, this Court cannot grant the orders of mandatory injunction in the circumstances of this case. Prayer (d) is thus declined.

[8] The only remaining prayer is for this Court to issue such orders as deems fit. The applicant had sought temporary orders in terms of prayer (b) except it failed to include that the prayers be granted pending determination of the suit. The applicant has shown that he has a stake in the suit plot. The 2nd defendant has also not denied that he is undertaking some construction on a plot in Bububu B settlement scheme. In these circumstances, I am satisfied that a prima facie case has been established. It is imperative to preserve the suit property pending determination of this suit.

[9] Consequently the orders this Court deems fit in the circumstances and which I hereby grant is that an order do issue restraining either of the parties from developing, and or undertaking any construction and or parting with possession or in any manner dealing with plot No. 826 whether in Bububu A or B Settlement Scheme until the suit is determined. I Order that each party do bear their respective Costs of the suit.

DELIVERED, DATED and SIGNED at MOMBASA this 29th day of June, 2016.

A. OMOLLO

JUDGE

In the presence of:-

..... for the Plaintiff

..... for the Defendants

.....Court Assistant