



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL CASE NO. 202 OF 2014

ASHISH MANSUKHAL MAJITHIA

TIMIR PRABHUDAS MAJITHIA

MILID MANSUKHLAL MAJITHIA.....PLAINTIFFS/APPLICANTS

-VERSUS-

OSCAR MUMO NZANAH.....DEFENDANT/RESPONDENT

RULING

1. The Court is tasked to determine the application dated 1.8.2014. The application is premised on the provisions of Order 40 of Civil Procedure Rules and section 3A of the Civil Procedure Act. The application is seeking for orders ;

1) Spent

2) That the defendant/Respondent be restrained either by himself, his agents or carrying out any construction of any nature on the suit premises known as Land Reference Number 29853 and registered as Grant No. CR 60905 or dealing with the suit premises in any manner whatsoever pending the hearing and determination of the suit.

3) Spent

4) Costs of the application be provided for.

2. The application is supported by the grounds inter alia that the applicants are the registered proprietors of leasehold interest in the suit property therefore entitled to possession. Secondly that the defendant entered upon the suit property and started erecting a structure. The applicants annexed a copy of title deed as proof of ownership.

3. The application is opposed by the defendant's replying affidavit sworn on 28th August 2014. The Defendant deposes that he purchased land known as **UNS. BCR Plot Mariakani/Mitangoni** on 10.10.2004. That he was immediately put into possession. The defendant deposed that he began construction after obtaining approvals from the relevant authorities on 18.2.2010.

4. The application is also opposed by the four interested parties. The affidavit was sworn by Jackson

Ndoro on their behalf. The interested party deposes that the applicants' title is fraudulent. They admit selling the land to the defendant. To their knowledge, the land has never been adjudicated or demarcated. They urged the Court to dismiss the application.

5. On record there is also a pending application by parties seeking to join this suit as defendants. Parties agreed to dispose of this application first and argue the same by filing written submissions. The plaintiffs submitted that the defendant has not shown any document to prove his ownership of the land. They also submitted that a party cannot be allowed to flout the law only because he can pay damages. They cited the case of **Aikiman vs Muchoki (1984) KLR 353**.

6. The Defendant stated that he is a bonafide purchaser for good value without notice. The defendant also submitted that the applicant has not stated whether his title is a first registration. The defendant submits that the applicant has not established a prima facie case nor shown that the injury cannot be compensated by an award of damages. That if the injunction is granted, his building materials will go to waste. He cited the case of **Showind Industries vs Gaurdian Bank Ltd & Another (2002) E A 284** that states that injunctions are granted very sparingly and only in exceptional cases. It is their submission that the applicant has gone against the principles of equity by failing to explain how they acquired the suit property. He urged the Court to dismiss the application.

7. The interested parties filed their submissions which reiterated the facts as contained in their replying affidavit.

8. I have considered all the facts raised by the pleadings and the submissions. The applicants have annexed a copy of a title deed to buttress their claim over the land. As to whether that title was obtained fraudulently will be a matter to be determined during the full trial of the case. The defendant has also admitted that he is building on the suit property. He claims that he purchased the land. It is imperative that the suit property be preserved so as to determine who between the applicants and the defendant are entitled to use the land in dispute. These two issues lay out a prima case with probability of succeeding.

9. On irreparable loss, the applicants submitted that a party should not be allowed to flout the law merely because he can pay damages. The defendant on his part submits that he is in possession and has approved plans to commence development. Section 24 of the Land Registration Act confers absolute interest on a registered property while section 26 provides for procedure of question such registration. If possession is bestowed to the defendant to the exclusion of a registered proprietor without following due process would result in flouting the law.

10. In the instant case, it is not about irreparable loss but it is a question of upholding the rule of law and sanctity of title. Besides the consents annexed to the replying affidavit, the defendant did not annex any evidence of building materials deposited on the site or show how he was in physical possession of the suit property.

11. The case of Showind supra referred to by the defendant refers to interlocutory mandatory injunctions and not ordinary temporary injunctions. In conclusion, I am satisfied that the applicants have made out a prima facie case with a probability of succeeding and therefore deserve the orders sought. Consequently I do allow the said application in terms of prayer 2 with costs in the cause.

Ruling dated and delivered at Mombasa this 6th day of July 2016

A. OMOLLO

JUDGE