



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 434 OF 2016

JOAN JEPTOO NGENO.....PLAINTIFF/APPLICANT

-VERSUS-

STEPHEN MUTHOKA JAMES.....1ST DEFENDANT

LAND REGISTRAR MOMBASA.....2ND DEFENDANT

RULING

1. In the motion brought under Order 40 of Civil Procedure Rules dated 22nd March 2016, the plaintiff/applicant sought for ;

3) *“An order of injunction to issue restraining the 1st Defendant either by himself, servants or agents or anyone claiming title or acting on his behalf from taking possession, occupying, continuing to occupy, alienating selling or doing any act on L. R No MS/MN/BLOCK 2/264 pending the hearing and determination of the suit*

4) *That an order be issued restraining the Registrar from dealing on the title with respect to any applications lodged by the 1st Defendant to transfer, charge or otherwise deal with the property known as MSAMN/BLOCK 2/264 pending the full hearing and determination of this suit.*

2. The application is supported by the grounds inter alia that the applicant is the registered owner of the suit plot. Secondly that the 1st defendant has obtained another title with respect to said parcel of land and is likely to take possession. The applicant also swore an affidavit in support of the motion. She deposed that she has been in possession of the suit land since 2003, paying annual land rates.

3. The applicant deposed that she sent her son in February 2016 to pay the annual land rates only to be notified that the land belonged to someone else. She deposes that demand rates for year 2016 indicated the property is now in the name of the 1st defendant. The applicant pleads that the 1st defendant does not have any right over the suit property and if he is not stopped in his actions the applicant's Constitutional rights over the suit property will be infringed.

4. The 1st defendant filed a replying affidavit to oppose the motion. In paragraph 3 he deposed that he purchased the suit property through his wife Mwana Hamisi Ali Magendo for Kshs 2.5 Million on 4.2.16. He continued that upon payment of the purchase price, the applicant surrendered to them the title documents and executed transfer forms which he presented to the Land Registrar for registration. He

deposes that while he is in occupation, the applicant filed this suit. He thus accuses the applicant of coming to Court with unclean hands and urged the Court to dismiss the orders sought.

5. The advocates rendered oral submissions on 22nd June 2016. Ms Kogweno submitted that the applicant discovered the title for the suit property is in the name of 1st defendant similar to rates demand notes. The applicant fears the land may be transferred to someone else yet she has the original title deed. She denied doing any transaction with the 1st respondent. She urged that if the orders are not granted, she may suffer irreparable loss.

6. Ms Mutiso for the 1st Respondent submitted that the replying affidavit has detailed how the 1st Respondent acquired title to the suit land. He also submitted that the 1st Respondent was put in possession by the applicant. That the applicant has come to Court with unclean hands and does not merit the orders sought.

7. The criteria for granting injunctions are well established i.e that the applicant must show that ;

i) he has a prima facie case with a probability of succeeding

ii) Will suffer irreparable damage that cannot be compensated by way of damages

iii) Balance of convenience tilts in her favour

8. This Court is tasked with determining whether the applicant has proved any of the principles above to merit the grant of the orders sought. In the replying affidavit, the 1st defendant deposed that the property was sold by the applicant for Kshs 2.5 Million. That the whole amount was paid in full and the applicant surrendered the title and transfer documents which they presented to the lands office for registration. The applicant also deposed that the land was in her name till last year (2015) and this year she discovered the title now read the 1st defendant's name.

9. The applicant did not file further affidavit to deny that there was a sale between her and the 1st defendant's wife. She also did not deny that she put the 1st defendant into possession. Although the plaintiff has alleged fraud in her plaint, the averment that there was a sale transaction ought to have been controverted. The absence of that denial creates a doubt in this Court's mind whether the applicant has a prima facie case with a probability of succeeding.

10. Secondly, it appears from the pleading that the land is in vacant possession. The records both at the lands office, and county government (annexure JJN 3) indicate the registration of the land has been done in favour of the 1st defendant making prayer 4 not available to be granted. On the limb of irreparable loss, a value of Kshs 2.5 Million has been attached to the land. The applicant did not lay any basis why the loss if any she would suffer is irreparable taking into consideration that the pleadings have ascertained the value of the property.

11. The applicant has not demonstrated either by her pleadings or submissions that indeed she has a prima facie case with a probability of succeeding. However so that this case is not rendered an academic exercise, I will allow prayer 3 of the motion partially i.e that the 1st Defendant is restrained from selling and/or disposing of the suit land MSA/MN/Block 2/264 pending the determination of this suit. The cost of the application is awarded to the Defendants.

Ruling dated and Signed at Mombasa this 30th day of August 2016

A. OMOLLO

JUDGE

Delivered at Mombasa this 30th day of August 2016 by

P.J.O OTIENO

JUDGE