



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 482 OF 2014

ABEDNEGO BOSIRE ONDIEKI PLAINTIFF

VERSUS

LUCY ONGERI 1ST DEFENDANT

THOMAS ONDIEKI ONGERI 2ND DEFENDANT

RULING

1. By the Notice of Motion application dated 8th December 2014 the plaintiff prays that:

“The Honourable court be pleased to grant an order of temporary injunction restraining the defendants/respondents either by themselves, agents, servants and/or anyone claiming under the defendants/respondents, from entering into, trespassing onto, building structures, cultivating, interfering with and/or in any other manner, whatsoever dealing with the suit property, that is LR No. West Kitutu/Bogeka/4420 and/or any portion thereof, pending the hearing and determination of this suit.”

2. The plaintiff has set out the grounds in support of the application on the body of the application. Interalia the plaintiff/applicant asserts he is the registered owner of **LR No. West Kitutu/Bogeka/4420** (hereinafter referred to as “the suit property”) and that as such registered owner he is entitled to exclusive use and possession but avers that the defendants on or about 30th November 2014 forcibly entered onto the suit property and the 1st defendant occupied a structure standing on the suit property which the plaintiff purchased together with the land. The plaintiff further states the defendants have commenced to cultivate on the suit property without any consent and/or authority of the plaintiff. The plaintiff states that he purchased the suit property from the defendants’ mother and avers that due process was adhered to in getting the suit property transferred to him.

3. The plaintiff further relies on the supporting affidavit sworn on 8th December 2016 and the supplementary affidavit sworn on 27th May 2016. The plaintiff has annexed to his supporting affidavit an abstract of title and copy of the title deed marked “**ABO 1 (a) and (b)**” respectively which both indicate the plaintiff is the registered owner of the suit land. A copy of a certificate of official search dated 28th November 2014 confirms the plaintiff was registered and issued with a title deed on 14th March 2013 and 27th May 2013 respectively.

4. The 2nd defendant swore a replying affidavit on 10th March 2015 in opposition to the plaintiff’s application for injunction. The 2nd defendant in the affidavit depones that land parcel **West Kitutu/Bogeka/3584** registered in the name of Mary Kemunto Ongeru now deceased was their ancestral

land. The 2nd defendant admits his mother who was the registered owner of land parcel **West Kitutu/Bogeka/3584** sold a portion thereof measuring 78ft by 80ft by 80ft by 35ft to the plaintiff as per the annexed copy of the agreement marked “**T002**”. The 2nd defendant however asserts that the suit land **West Kitutu/Bogeka/4420** did not emanate from land parcel **West Kitutu/Bogeka/3584** but from land parcel **West Kitutu/Bogeka/3705** whose owner he states has not been made a party to these proceedings. The 2nd defendant avers that her deceased mother never owned land parcel **West Kitutu/Bogeka/3705** and that she was not a party to the subdivision that resulted in subtitles **4419** and **4420**. The 2nd defendant in the premises contends the plaintiff does not hold a valid title to land parcel **4420** and is thus not entitled to an order of injunction.

5. The plaintiff filed the supplementary affidavit sworn on 27th May 2016 in response to the 2nd defendant’s replying affidavit with leave of the court. The plaintiff by the supplementary affidavit has annexed a copy of the sale agreement dated 13th April 2011 marked “**AB01**” where Mary Kemunto Onger (deceased) sold him a portion of land parcel **West Kitutu/Bogeka/ 3584** measuring approximately 78ft by 80ft by 40ft by 35ft. The plaintiff explained that land parcel **West Kitutu/Bogeka/3584** had hitherto been subdivided into parcels **West Kitutu/Bogeka/3705** and **3706** as per the mutation form annexed and marked “**ABO2**” which is shown to have been registered on 19th October 2009. The mutation form shows Mary Kemunto Onger (deceased) to be the person who sought the subdivision. Further the plaintiff has annexed a mutation form in respect of the subdivision of land parcel **West Kitutu/Bogeka/3705** marked “**AB03**” which indicates the parcel was subdivided into two portions being **parcel No. 4419** and **4420** on the application of the deceased. This mutation is shown to have been registered on 6th February 2013. The plaintiff further states that following the subdivision, the deceased sought and obtained the consent of the land control board to transfer **land parcel 4420** to the plaintiff and the transfer to the plaintiff was eventually registered and the plaintiff issued with a title deed.

6. The plaintiff further avers that the 2nd defendant’s replying affidavit is misleading when the 2nd defendant states his deceased mother was not the owner of land parcel **West Kitutu/Bogeka/3705** when the records and documents clearly show she was. The plaintiff states that the 2nd defendant in fact acknowledged the plaintiff’s ownership of the suit property in that after the 2nd defendant’s mother died before they had relocated from the suit property, the 2nd defendant pleaded with the plaintiff to allow the 2nd defendant’s mother to be buried on the suit property which culminated with the agreement dated 3rd June 2013 annexed as “**ABO6**” being entered into between the plaintiff and the 2nd defendant.

7. The 2nd defendant filed a further affidavit sworn on 6th September 2016 vide which he annexed a purported agreement for sale dated 25th July 2013 marked “**T001**” whereby the 2nd defendant agreed with the plaintiff to purchase a portion measuring 75ft by 40ft of the suit property from the plaintiff. According to the 2nd defendant this agreement of 25th July 2013 superceded the agreement for burial of his mother dated 3rd June 2013. The 2nd defendant contends that the plaintiff has not been candid and forthright in approaching the court as he has deliberately concealed material facts which should disentitle him to grant of the equitable remedy of injunction. The 2nd defendant states that the plaintiff failed to make disclosure that he had sold a portion of the suit land to the 2nd defendant as per the agreement of 25th July 2013 and that the 2nd defendant was in occupation with the permission and authority of the plaintiff.

8. The parties argued the application dated 8th December 2014 by way of written submissions. The plaintiff’s written submissions dated 27th May 2016 were filed on 31st May 2016 while the defendants submissions dated 6th September 2016 were filed on 8th September 2016. I have reviewed and considered the parties written submissions and the authorities cited by the parties and the issue for the court to determine is whether the plaintiff/ applicant has satisfied the principles and/or conditions upon which an interlocutory injunction may be granted. The case of **Giella –vs- Cassman Brown & Co. Ltd [1973] EA 358** established the threshold for grant of injunctions at the interlocutory stage. Spry, J. at page 360 stated that:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

9. In the instant case there is no dispute that Mary Kemunto Ongeri (deceased) who is the mother of the defendants was the registered owner of land parcel **West Kitutu/Bogeka/3584**. The parties further admit the agreement dated 13th April 2011 by which the deceased sold to the plaintiff a portion of the said land measuring 78ft by 80ft by 40ft by 35ft. the issue of contention by the defendants is that the parcel **West Kitutu/Bogeka/4420** which was eventually transferred and registered in the name of the plaintiff did not come out of land parcel **West Kitutu/Bogeka/3584** but out of **parcel 3705** which did not belong to the deceased. The court has examined the annexures attached to plaintiff’s supplementary affidavit and it is evident parcel 3584 was subdivided into parcel numbers **3705** and **3706** as per the mutation form dated 14th July 2009 and registered on 19th October 2009. The plaintiff states that the portion he was buying from the deceased was comprised in parcel **3705** and that it was the latter parcel that the deceased subdivided into parcels **4419** and **4420** as per the mutation form registered on 6th February 2013. The annexures further show the deceased applied for the consent of the land control board for the transfer of parcel **West Kitutu/Bogeka/4420** to the plaintiff which was duly granted vide the letter of consent dated 7th March 2013. The plaintiff was subsequently registered as owner of **parcel 4420** and issued with a title deed on 27th May 2013. The abstract of title and copy of the official search confirm this status in regard to land **parcel 4420**.

10. On the basis of the evidence furnished to the court, I am satisfied that prima facie the plaintiff is the registered owner of the suit property following purchase from Mary Kemunto Ongeri (deceased). Section 24 (a) of the Land Registration Act, 2012 vests absolute rights of ownership on the registered owner and provides thus:-

24(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

Section 26 (1) of the Act provides that the certificate of title is conclusive evidence of proprietorship and shall be taken by all courts as prima facie evidence of ownership and that the registered proprietor of the land is the absolute and indefeasible owner and the title of that proprietor can only be challenged on account of:-

**(a) On the ground of fraud or misrepresentation to which the person is proved to be a party;
or**

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

11. I am not satisfied that the defendants have demonstrated the plaintiff was party to any fraud or misrepresentation in acquiring the title to the suit land. Indeed the defendants have not alleged any fraud on the part of the plaintiff and no particulars of fraud have been pleaded against the plaintiff. The 2nd defendant alleges that there was a sale agreement dated 25th July 2013 where the plaintiff agreed to sell him a portion of the suit land. This is an acknowledgement on the part of the 2nd defendant that the plaintiff was the owner of the suit land otherwise he could not have agreed to buy the land from the plaintiff if the land still belonged to his mother. Even if the agreement was to be admitted the same has become null and void by operation of the law having regard to Sections 6 and 8 of the **Land Control Act**, Cap 302 Laws of Kenya which has clear provisions respecting the obtaining of the Land Control Board’s consent in regard to all controlled transactions. The alleged agreement by the 2nd defendant would qualify as controlled transaction under Section 6 (1) of the Land Control Act and consent of the Land

Control Board would have been required to be sought and obtained within six (6) months of the date of the agreement.

12. From what I have stated hereinabove, I am satisfied the plaintiff has demonstrated a prima facie case with a probability of success to warrant the court to grant an interlocutory injunction. The plaintiff as the registered proprietor of the suit property is entitled to exclusive use of the suit property and the activities of the defendants complained of by the plaintiff would be an infringement on his rights and the rule of law will not permit that. The statement of defence pleaded by the defendants has not challenged the plaintiff's title to the suit property and no counterclaim has been pleaded in support of any claim the defendants might have against the plaintiff.

13. In consequence, I find the plaintiff's application dated 8th December 2014 to have merit and I accordingly grant an interim injunction in terms of prayer (3) of the Notice of Motion. I award the cost of the application to the plaintiff.

14. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 25th day of November, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ochwangi for the plaintiff

Mr. Nyawencha for Omwoyo for the 1st and 2nd defendants

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE