



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO.2 OF 2016

MUI ANNEX PROPERTIES LIMITED..... PLAINTIFF

VERSUS

STEPHEN KAMUNGE..... 1ST DEFENDANT

BEN MIGOSI..... 2ND DEFENDANT

ROBERT KAMANDE..... 3RD DEFENDANT

RULING

1. What is before me is the plaintiff's application brought by way of Notice of Motion dated 4th January 2015. In the application, the plaintiff has sought; a mandatory injunction to compel the defendants to vacate all that parcel of land known as **LR No. 209/12678(Grant No.I.R.68284)**(hereinafter referred to as "**the suit property**") pending the hearing and determination of this suit and a temporary injunction to restrain the defendants from entering onto, assuming possession, constructing on or continuing with the construction of temporary structures or any other structures on the suit property pending the hearing and determination of this suit.

2. The plaintiff's application is supported by the affidavit and further affidavit sworn by the plaintiff's director, Joel Njau Kihara. The application has been brought on the grounds that the plaintiff is the registered proprietor of the suit property having purchased the same on or about 10th September 2015 at a consideration of Kshs.35,000,000/=. The plaintiff has contended that on 23rd December 2015, the defendants destroyed part of the wall that had been erected around the suit property and gained entry therein with a group of people and started putting up temporary structures thereon. The plaintiff has contended that all its efforts to have the defendants vacate the suit property have not borne fruit. The plaintiff has contended that the defendants said activities are illegal and that unless the defendants are stopped from continuing with the said acts of trespass, the suit property would be subjected to waste. The plaintiff has contended further that the defendants have no legitimate claim over the suit property.

3. The plaintiff has annexed to its affidavit in support of the application among others, copies of Grant Number I.R 68284 in respect of LR.No.209/12678, a copy of the instrument of transfer of the suit property from Parbat Premji Patel and Naran Premji Patel to the plaintiff dated 10th September 2015 and copies of photographs showing the structures said to have been put up by the defendants on the suit property.

4. The plaintiff's application is opposed by the defendants. Through a replying affidavit sworn by the

3rd defendant on his own behalf and on behalf of the other two defendants on 4th March 2016, the defendants have denied all the allegations contained in the affidavit in support of the plaintiff's application. The defendants have contended that the suit property was reserved for a market to be used as such by the defendants and other members of the public. The defendants have contended that the title held by the plaintiff in respect of the suit property was acquired fraudulently.

5. The defendants have admitted that they have put up structures on the suit property some of which they use as residences and others for carrying out business. The defendants have contended that contrary to the plaintiff's contention that they entered the suit property on 23rd December 2015, they have been in occupation of the suit property since 1983. The defendants have contended that they have acquired title to the suit property by adverse possession and that they intend to lodge in court their adverse possession claim over the suit in due course. The defendants have contended that the plaintiff has not established a prima facie case and has also failed to demonstrate that it stands to suffer irreparable loss unless the orders sought are granted. The defendants have annexed to their affidavit in opposition to the application, photographs showing the structures they claim to have put up on the suit property and a copy of Part Development Plan reference No. 42/28/95/27A dated 15th June 1995.

6. On 10th March 2016, the parties agreed by consent to argue the plaintiff's application by way of written submissions. The plaintiff filed its submissions on 8th April 2016 while the defendants filed their submissions in reply on 17th May 2016. I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the defendants in opposition to the application and the respective written submissions by the advocates for the parties.

7. The plaintiff has sought both prohibitory and mandatory orders of injunction at this interlocutory stage. The principles upon which this court exercises its discretion on applications of this nature are now well settled. For a temporary prohibitory injunction to issue, the applicant must establish a prima facie case against the respondent and also demonstrate that unless the order is granted he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. See, the case of, **Giella vs. Cassman Brown & Co. Ltd [1973] E. A 358.**

8. With regard to a temporary mandatory injunction, the threshold to be met is higher. For a mandatory injunction to be issued at an interlocutory stage, the case must be one which is clear and the order shall not be granted in the absence of special circumstances. See, the case of **Locabail International Finance Ltd. vs. Agro-Export & Another [1986] 1 All E.R. 901** that has been cited by the plaintiff and the case of **Showwind Industries Ltd. vs. Guardian Bank Ltd. and Another [2002] 2 KLR 378** that has been cited by the defendants.

9. Applying the foregoing principles to the case before me, I am satisfied that the plaintiff has made out a case warranting the grant of both prohibitory and mandatory injunction. There is no dispute that the plaintiff is the registered proprietor of the suit property. Under section 24 of the Land Registration Act, 2012, the registration of the plaintiff as the proprietor of the suit property vests upon it absolute ownership of the said property together with all rights and privileges associated with such ownership.

10. Under section 25 of the said Act, the plaintiff's rights over the suit property are indefeasible except as provided under the Act. Section 25 (1) of the Land Registration Act, 2012 provides as follows:-

(1) The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject:

(2) To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register; and

(3) To such liabilities rights and interests as effect the same and are declared by section by section 28 not to require noting in the register unless the contrary is expressed in the register.

11. Section 26(1) of the Land Registration Act, 2012 provides that a certificate of title issued by the land registrar upon registration or to a purchaser of land upon transfer shall be taken as prima facie evidence that the person named in such certificate is the absolute and indefeasible owner of the land in respect to which the certificate has been issued and such certificate shall not be liable to challenge except on the ground of fraud or misrepresentation to which the holder is proved to be a party or where the certificate has been acquired illegally, un-procedurally or through corrupt scheme.

12. The defendants have contended that the suit property was reserved for a market and that the plaintiff's title to the same is tainted by fraud. Apart from the Part Development Plan which is annexed to the defendants' affidavit in reply which shows that a portion of land in Nairobi South was proposed to be to be a market while the other portion was proposed to be a commercial plot, there is no evidence that the suit property is situated on the said portion of land that was reserved for a public market. I also wonder how the defendants could have put up residential premises on a market. This contention is also inconsistent with the defendants' claim that they have acquired the suit property by adverse possession. On the defendants' adverse possession claim, no evidence has been placed before the court in proof of the same. The structures shown in the photographs annexed to the defendants' replying affidavit do not appear to me to have been put up in the year 1983. The photographs annexed to the plaintiff's affidavit in support of the application shows clearly that the structures complained of by the plaintiff were put up recently. I have also noted from the Grant annexed to the plaintiff's affidavit that the suit property came into being on 30th January 1996 when the said Grant was registered. It is not clear to me how the defendants could have occupied the property from 1983 when it was not in existence.

13. The defendants have also failed to adduce any evidence in proof of their allegation that the plaintiff's title to the suit property is tainted with fraud. The standard of proof of fraud is above a mere balance of probability as was observed by the court in the case of **Koinange & 13 others vs. Koinange**[1996] KLR 23 and a mere allegation that the plaintiff's title was obtained fraudulently does not meet this high threshold. In the case of **Kampala Bottlers Ltd –vs- Damanico (U) Ltd East Africa Law Reports [1990-1994] E. A 141 (SCU)**, the Supreme Court of Uganda held that:-

“To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters”.

14. The plaintiff having proved that it is the registered owner of the suit property and there being no evidence that it acquired the suit property corruptly, irregularly or by fraud, I am persuaded on a prima facie basis that the plaintiff is the lawful owner of the suit property. The defendants have not demonstrated any valid claim over the suit property. The defendants have not come out clearly as to the basis of their claim over the suit property. On one hand, they have claimed that the suit property was reserved for a public market. On the other hand, they have claimed that they have acquired the suit property by adverse possession. As I have stated above, there is no evidence in support of the adverse possession claim. There is also no evidence that the suit property was reserved for a market. The defendants having entered and occupied the suit property without any valid claim or any other lawful excuse, they are trespassers on the said property. In the case of **Shariff Abdi Hassan vs. Nadhif Jama Adan [2006] eKLR**, it was stated that:-

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However where it is prima facie established as per the standard spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to property”.

15. I am satisfied that the plaintiff has established a strong and clear case with overwhelming chances of success at the trial that the defendants are wrongfully in occupation of the suit property. I am also satisfied that the plaintiff would suffer irreparable harm unless the orders sought are granted. I am convinced therefore that this is an appropriate case to grant both prohibitory and mandatory injunction at interlocutory stage. In conclusion, I find merit in the plaintiff's Notice of Motion application dated 4th January 2016. The same is allowed in terms of prayers 3, 4 and 5 thereof. The defendants shall comply with the orders issued in terms of prayer 3 of the application within 30 days from the date hereof in the event that the defendants or any of them is still in occupation of the suit property. The plaintiff shall have the costs of the application.

Delivered and signed at Nairobi this 4th day of November, 2016

S. OKONG'O

JUDGE

In the presence of:-

Mr. Njogu h/b for Khayega for the Plaintiff

Mr. Benji h/b for Kabue for the Defendants

Kajuju Court Assistant