



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AY NAIROBI

MILIMANI LAW COURTS

E.L.C NO. 59 OF 2016

ARTHUR WAMIT NJOROGEAPPLICANT/PLAINTIFF

=VERSUS=

BERNARD MEGOSI KERONGO.....1ST RESPONDENT/DEFENDANT

PATRICK OMARI NYAMWEYA.....2ND RESPONDENT/DEFENDANT

FRANCIS MWANZE.....3RD RESPONDENT/DEFENDANT

KYALO MAUNDU.....4TH RESPONDENT/DEFENDANT

ENID WEKESA.....5TH RESPONDENT/DEFENDANT

RULING

The matter for determination is the Notice of Motion dated **27th January 2016**, brought by the Plaintiff/Applicant **Arthur Wamiti Njoro** against the Defendants /Respondents. The application is brought under **Order 40 Rules 1,2,10 & 11, Order 51 Rule 1** of the **Civil Procedure Rules, Sections 1 A,1B and 3A** of the **Civil Procedure Act and Section 24** of the **Land Registration Act**.

The Orders sought are;-

1. Spent

2. Spent

3. That this Honourable Court be pleased to grant a permanent injunction restraining the Defendants jointly and severally by themselves through their agents ,servants and/or employees of ownership of the suit property known as L.R No.12712/258 to any person persons or in any manner interfering with the said property whatsoever pending the hearing and determination of the suit herein.

4. That this Honourable court be pleased to grant such other/further orders as it deems just.

The application is premised on the following grounds;-

a. The Plaintiff/Applicant herein is the registered owner of property known as L.R No.12715/258

situate in Syokimau and purchased the said parcel of land herein referred to as the suit property from Trust Agencies (Kenya) Limited in 1998.

b. The Defendants, their agents, servants and/or employees have attacked and assaulted the plaintiff's guards and employees whom he had stationed on the said property inflicting serious injuries to them.

c. That the Defendants herein are trespassing on his property and they have been embolden in their illegal acts of trespassing on his land due to inaction by the police to the extent that since December 2015 they have now started erecting a perimeter wall on the suit property with the intention of depriving the plaintiff of his property.

d. The application herein is extremely urgent as the defendants illegal action is breach of the plaintiffs constitutional right to access his property and will thereby cause him irreparable damages as the Defendants have used violence against the Plaintiff and his employees in denying him access to his property which may escalate and result to injuries and/or loss of life if this Honourable Court does not urgently intervene.

The application is also premised on the supporting affidavit of **Arthur Wamiti Njoro** , the Plaintiff/Applicant herein. The deponent averred that at all material times he has been the registered proprietor as Lessee from the Government of Kenya of all that parcel of land known as **L.R No. 12715/258** situate in **Syokimau, Machakos County** measuring **2.023 hectares** or thereabouts as per annexure "**AWN1**". Further that he purchased the said parcel of land from Trust Agencies (Kenya) Limited vide a Sale Agreement dated **9th October, 1998** executed in Nairobi and the said parcel of land was transferred to the Plaintiff on the **12th November 1998**, vide a transfer dated **9th October 1998**, as per annexure "**AWN2**". He also averred that he has enjoyed quiet and uninterrupted possession and use of the property as rightful legal owner and have faithfully paid all the applicable land rent and rates as the registered owner of the land as per annexure "**AWN3**".

It was his contention that on or about **April 2014** ,he noticed that some unidentified people had trespassed on the suit property without any color of right and on enquiry he was informed that they were known fraudsters who illegally invade parcels of land that do not belong to them in the said general area by intimidating the registered owners with threats of violence and use of hired thugs.

He also contended that in response in **May 2014** , he stationed security guards and installed a gate at the suit property to ward off the trespassers and also to safeguard his parcel of land but his employees and guards were attacked by unknown people who were part of the trespassers who claimed that the suit property belonged to them. The deponent also deposed that immediately he reported the incident to the police at **Mlolongo Police Station** under **O.B No.38/14/5** and also wrote to the Directorate of Criminal Investigation requesting them to investigate the matter, arrest the perpetrators of the attack on his employees and guards as they protected his proprietary interests as guaranteed by law as per annexure "**AWN5**".

He contended that police failed to act and evict the trespassers despite the National Land Commission writing and confirming to them through the **C I D Mlolongo Police Station**, that the suit property belonged to him as per annexure "**AWN 6**". Further that instead of the police and the Directorate of Criminal Investigations arresting the trespassers who had assaulted his employees and guards, they wrote back on the **12th August 2015**, and directed that he seeks an eviction order to enable the OCS of the local police station to execute the same as per annexure "**AWN7**". He further alleged that in furtherance of their illegal and unlawful conduct, the Defendants/Respondents have now started erecting a perimeter wall on the suit property with the intention of depriving him of his property as per annexure "**AWN8**".

It was his further contention that he would suffer the risk of losing his property through the illegal and unconscionable conduct of the Defendants/Respondents who do not want to abide by the law and who seek to deprive him of his property whereas he is the lawful registered owner of the suit property as confirmed by the Grant and also by the National Land Commission in their letter as per annexure

“**AWN9**”. Therefore it is in the interest of justice that the application herein be allowed as Defendants /Respondents conduct of wrongfully and illegally trespassing and/or converting the property is oppressive and unjustifiable when the Constitution of the Republic of Kenya guarantees him the right to own property and protects from arbitrary deprivation of his property and the Defendants/Respondents have no legal right to the same whatsoever.

The Respondents did not enter appearance nor file any response to this Instant Notice of Motion. The applicant filed his written submissions dated **14th September 2016**, and urged the court to allow his application. Applicant submitted that he is the registered proprietor of **LR No. 12715/258** and that the Respondents have trespassed on the said suit property and should be restrained by this Court. Applicant further relied on the case of **Aikmam Vs Muchoki (1984) KLR 353** where the Court of Appeal stated that;-

“ The condition of granting an injunction are;-

a. Probability of success

b. Irreparable herein which would not be adequately compensated by damages.

c. If in doubts then on a balance of convenience.

He also submitted that the above stated case of **Akman Vs Muchoki (supra)** the Court of Appeal also held that;-

“the court ought never to condone and allow to continue a flouting of the law. Those who flout the law by infringing the rightful title of others and brazenly admit it ought to be restrained by injunction Equity will not assist law breakers”.

The Court has considered the Instant Notice of Motion and the annexures thereto. The Court has also considered the relevant provisions of law and the written submissions. The Court has also taken account of the cited authorities. The applicant has sought for injunctive orders which are equitable reliefs granted at the discretion of the court. However, this discretion must be exercised judiciously.

Since the orders sought are injunctive in nature the court will be guided by the provisions of **Order 40 Rule 1** which state as follows.

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

The Court will also rely on the principles laid down in the case of **Giella Vs Casman Brown & Co.Ltd 1973 EA 358**. These conditions are:-

a) The applicant must establish that he has a prima facie case with probability of success.

b) That the applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.

c) When the court is in doubt, to decide the case on a balance of convenience.

From the available documents, the plaintiff herein is the registered owner of **LR No. 12715/258** in which he got registered on **12th November 1998** after purchasing the same from **Trust Agencies (Kenya Ltd)** as evident from annexures “**AWN2**”. There is evidence that the Plaintiff has been paying Land Rent to the Ministry of Lands as evident from annexure **AWN3**. From annexure **AWN6** a letter from National Land Commission to the CID Mlolongo Police Station confirmed that **LR No. 12715/258** is registered in the name of Plaintiff herein. The plaintiff therefore is the rightful owner of the suit property as there is no other evidence to the contrary.

From the photographic evidence **AWN8**, it is evident that some activities have been going on the suit property. The applicant alleges that it is the Defendants who have invaded his suit property and have even put up an advert that the plot is for sale. The defendants have not filed any response and therefore that allegation is uncontroverted. It is also evident that the Plaintiff has reported the case of trespass to CID Mlolongo Police Station vide a letter dated **12th August 2015**. The National Police Service advised the applicant to seek for eviction Orders from Courts and the Plaintiff consequently filed this case.

The Plaintiff being the registered owner of the suit property has his right protected under **Section 24(a)** and **25(1)** of the **Land Registration Act**.

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; and

25. (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

There is no evidence that the Plaintiff’s Certificate of Lease has been cancelled or impinged by any court of law. If the Defendants have trespassed on the suit property, then they have infringed on the plaintiff’s right and the plaintiff is therefore justified in coming to Court to seek for protection as provided by **Order 40 Rule 1**, of the **Civil Procedure Rules**.

Consequently, the Court finds that the Plaintiff’s Notice of Motion dated **27th January 2016**, is *merited* and *justified*. The same is allowed entirely in terms of prayer **No. 3** and the Officer Commanding Mlolongo Police Station (OCS) to enforce the above stated Order. Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this **16th** day of **December, 2016**

L.GACHERU

JUDGE

In the presence of :-

Mr Thuo for Plaintiff/Applicant

None attendance for the Defendant/Respondent

Hilda : Court Clerk

Court:

Ruling read in open Court in the presence of **Mr Thuo** for the Plaintiff/ Applicant and absence of the Defendants/Respondent.

L.GACHERU

JUDGE