



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELC NO 687 OF 2014

JOSPHAT NG'ANG'A KINYANJUI.....PLAINTIFF/APPLICANT

VERSUS

RAPHAEL KINYANJUI.....DEFENDANT/RESPONDENT

RULING

The application before this court for determination is the Notice of Motion dated 30th May 2014 brought under ***Order 40 Rule 1,2,3 and 4 ,Order 5 Rule 17 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act*** seeking for orders that a temporary injunction do issue restraining the defendant/Respondent by himself, his agents, employees and/or servants from trespassing on, developing, building, constructing and/or whatsoever dealing or interfering with the plaintiff's quiet possession of land parcel No ***Ndaragu/Gacharage/1443*** pending the hearing and determination of this suit.

The application is premised on the grounds stated on the face of the application and the supporting affidavit of the applicant stating that the defendant is his brother and having contributed to buy the suit property in 1976 agreed to register it in the defendant's name therefore the title is in his name. That the defendant later refused to transfer the half share of the suit property to the plaintiff who prompted them to seek advice from the elders and later at the Land Dispute Tribunal. A verdict was given by the Land Dispute Tribunal but was quashed by the High Court in Misc No 975 of 2007. The defendant did not however serve the plaintiff with pleadings and the matter proceeded ex-parte without the knowledge of the plaintiff. A consent was recorded by the defendant and the Attorney General and later the defendant served him a demand letter asking him to vacate the suit property within six months. He avers that the eviction will be a detriment to him and his family and he would suffer prejudice if the orders sought are not granted.

The application was opposed by the defendant who filed a replying affidavit on 15th July 2014, stating that the suit property is registered in his names and a title deed was issued on 4th March 1994. That the allegation that the plaintiff bought the suit property jointly with the defendant was not true for the reasons that there was no evidence tendered by the plaintiff. He further averred that the boundaries were settled by the court in Misc No 795 of 2007 in a court order dated 10th August 2011, and by virtue of the said Order the cause of action did lapse and as such the same issues cannot be ventilated in another suit like this suit. That the orders sought cannot be executed against the owner of the suit property therefore it should be dismissed.

I have considered the affidavits; written submissions and the authorities relied upon by the parties herein. The issue for this court's consideration is whether the plaintiff has proved his case to warrant the

orders sought. **Section 63 of the Civil Procedure Act** gives this court the discretion to grant an injunction in all cases in which it appears to the court to be just and convenient to do so to restrain any person from doing certain acts. The general procedural considerations for the grant of temporary injunctions under **Order 40 r. (1) Civil Procedure Rule** are to the effect that;

“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 consideration upon which courts are usually persuaded in granting an injunction is whether in fact the applicant has shown that he has a prima facie case with a probability of success and would suffer irreparable injury or damage. If the answer is in the affirmative, then court ought to grant the order. **See Giella-vs-Cassman Brown & Co. [1973] E.A 358.** Irreparable damage must mean that the injury or damage is so substantial and a material one such that it cannot be atoned for in damages. It should, however, be noted that even in some cases where damages are sought as a remedy in the main suit, the plaintiff could still demonstrate irreparable loss, damage or injury in some given cases in an application, and it does not operate as a bar to an order of temporary injunction being granted. In the event court is in doubt as to the above factors, then it ought to decide the matter by weighing doubts against certainties of the risks of doing injustice otherwise known as the balance of convenience.

The evidence before me is that the plaintiff alleges that he jointly purchased the suit property together with the defendant and had the title registered in the defendant’s name. However the defendant has refused to transfer the plaintiff’s portion to the plaintiff and that the defendant has in his affidavit refuted the plaintiff’s claim alleging that he solely purchased the suit property. The defendant has however not annexed any evidence to buttress his allegations. The plaintiff has genuinely shown that he has tried to settle this issue through other avenues but has failed for the reasons that the avenues had no jurisdiction to deal with the matter. The Defendant has pleaded that the matter is *resjudicata* having been determined by the High Court in Misc No 795 of 2007. However he has not shown evidence that the this suit dealt with the subject matter on merit.

After carefully examining the evidence of the parties, I am satisfied that ownership issues and proprietary rights of the parties over the suit land raise serious questions that require a hearing on merit. Therefore, it is sufficient to observe at this stage that if the actions of the defendant is unrestrained and the plaintiff ultimately succeeds, it would place him at an awkward position where he would no longer have the suit land in the same status as it was before seeking the said orders.

The defendant has raised the issue as to his ownership of the suit land by virtue of registration and this fact was also buttressed by the plaintiff who stated that the defendant’s name was registered in the title even though they both owned the suit property. Based on that, the defendant has argued that the balance of convenience lies more with him than the plaintiff. My finding is that ownership issues lie in the subject of the head suit, and to pronounce on them at an interlocutory stage would be to forestall the outcome of the main suit.

There is ample material upon which to conclude reasonably that the plaintiff would suffer inconvenience if the court does not grant the injunction sought in event that he is finally adjudged the co-owner of the suit property and his reason for coming to court would have been rendered worthless

because what is crucial ultimately is does the plaintiff co-own this land with the defendant? On the other hand, if the suit is finally decides in the defendant's favour, he would not have suffered more injustice he would instead benefit from the final order which would remove all doubts as to his ownership of the suit property.

The upshot of the foregoing is that the court will therefore grant prayer No 3 of the Notice of Motion dated 30th may 2014. Costs shall be in the cause.

It is so ordered.

Dated, Signed and delivered this 20th day of March 2015

L. GACHERU

JUDGE

In the Presence of:-

None attendance for Plaintiff/Applicant though notified.

None attendance for Defendant/Respondent

Hilda: Court Clerk

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the absence of the Counsels though notified of the Ruling date.

L. GACHERU

JUDGE