



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL CASE NO 178 OF 2009

NDEFFO CO. LTD.....PLAINTIFF

VERSUS

KISHOR KUMAR DHANI VARSANI.....DEFENDANT

RULING

(Application for injunction; principles to be applied; applicant claiming that it formerly owned suit property and that defendant acquired it by fraud; no proof of such ownership; no prima facie case established; application dismissed)

1. This suit was commenced by way of plaint filed on 18 June 2009. The case of the plaintiff is that it is the owner of the land parcel Bahati/Kabatini Block 1/2806. It is averred that on or about 11 September 2002; the defendant illegally caused transfer of the said land to himself. Various particulars of fraud are pleaded including allegations of forgery of documents. It is further averred that the defendant caused a change in the Registry Index Map (RIM) to have the land increased in size from 7.891 hectares to 22.081 hectares. It is averred that owing to this, the plaintiff filed a suit Nakuru HCCC NO. 247 of 2002 against several persons including the defendant herein. It is further stated that the defendant has sub-divided the land parcel No. 2806 to create the land parcel No. 10586 measuring 17.3956 hectares. In this suit, the plaintiff wants the title of the defendant nullified and an order of eviction to remove the defendant from the suit property.

2. Nothing much seems to have happened in the matter since the suit was filed in 2009, until an application dated 10 March 2015, the subject of this ruling, was filed. The said application is for injunction brought pursuant to the provisions of Order 40 Rule 1. The plaintiff wants the defendant restrained from demolishing the dwelling houses erected by the plaintiff's shareholders in the land parcel Bahati/Kabatini Block1/10586 pending hearing and determination of this suit. The grounds upon which the application is based are that the plaintiff is the original owner of the suit property; that the plaintiff's shareholders are in occupation of the land; that the defendant was initially leased a portion of the property for quarrying purposes but later transferred a substantial portion of the land to himself; that the defendant has now commenced demolishing dwelling houses erected on the suit land by the plaintiff's shareholders; and that it would be in the interests of justice to have the defendant restrained from wasting the suit property.

3. The application is supported by the affidavit of Mr. Charles Rong'o Mbugua one of the directors of the plaintiff. He has averred that while this suit has been pending, the defendant has moved his tractors to the site with a view to demolishing their shareholders' dwellings. It is averred that the said shareholders have always been in occupation of the suit land. It is further deposed that the defendant was their tenant who

wanted to purchase a portion of the suit property but that he fraudulently caused a title deed to be issued to him hence this suit.

4. The defendant filed grounds of opposition through his advocates on record. Inter alia, it is stated that the plaintiff has not demonstrated any interest in the suit property.

5. Mr. Waiganjo for the plaintiff submitted that the defendant is wasting the land. He also asked me to look at two other matters being HCCC No. 247 of 2002 and HCCC No. 170 of 2009, which are related to this suit. Mr. Opondo for the defendant asked me to dismiss the application.

6. I have considered the application. For one to succeed in an application for injunction, one has to demonstrate a prima facie case with a probability of success and further demonstrate that he stands to suffer irreparable loss. If the court is in doubt, it will decide the application on a balance of convenience. These are the time tested principles laid down in the case of *Giella v Cassman Brown (1973) EA 358*.

7. The case of the plaintiff is that the suit land was initially its own and that it leased a portion of it to the defendant, but the defendant caused a title to be issued in its name. No proof of previous ownership of the suit land was annexed by the plaintiff and neither was any proof of any lease to the defendant. In fact, there is nothing before me which shows that the plaintiff has had, or has, any interest in the suit property. In the absence of a document to show that the plaintiff owned the suit property at some point, and that it leased the same to the defendant, I am afraid that the plaintiff has failed to furnish prima facie evidence of ownership of the suit property.

8. Neither have I been given any document to show how the property was transferred to the defendant and it follows that I have not been shown any evidence of fraudulent transactions. The plaintiff cannot shelter under the umbrella of other cases, which it has not even annexed, but has merely invited the court to look at. It was incumbent upon the applicant to table these in its affidavit. In essence, the plaintiff has failed to demonstrate a prima facie case with a probability of success.

9. Not being in doubt, I need not consider the balance of convenience. The upshot of the above is that this application is dismissed with costs.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 13rd Day of May 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr Cheruiyot holding brief for Mr Waiganjo for plaintiff/applicant.

Mr Kahigah holding brief for Mr Aim Yoni for defendant / respondent.

Court Assistant: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU