



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
THE ENVIRONMENT AND LAND COURT
ELC CASE NO. 921 OF 2012

SAMWEL NJEHIA GITAU.....PLAINTIFF/APPLICANT

VERSES

JOYCE WANJIKU.....DEFENDANT/RESPONDENT

RULING

The application for determination before this court is the Notice of Motion dated 27th November 2012 brought under Order 40 Rule 2 of the Civil Procedure Rules seeking for orders that a temporary injunction be issued by this court restraining the defendant by himself, her servants, agents or otherwise from entering or occupying the plaintiff's property known as Ruiru/Mugutha/Block 1/ T. 2517 pending the hearing and determination of this suit. The applicant is also seeking costs of this application.

This application is premised on the grounds set out in the application and the supporting affidavit of the applicant herein deposed on the even date stating that he is the registered proprietor of the suit property known as Ruiru/Mugutha/Block1/T.2517 per the title deed. He avers that he purchased the said property from one Mary Njeri Chege through a sale agreement. He stated that sometime in September 2012 while on routine inspection of his property he noticed a number of tree seedlings planted and on inquiry he was informed that it was planted by the defendant who alleged to be the owner of the property. He added that he tried to contact the defendant who has stated that she would enter the property and cultivate it. Therefore in view of the courage the defendant's courage to enter his property in September 2012 and plant tree seedlings he is apprehensive that she might repeat the trespass in his absence unless restrained by this court.

This application is opposed. Joyce Wanjiku the defendant averred that she was the owner and has been in continuous possession and use of the suit land having purchased it from one Alice Wambui in 2004 vide an agreement date 8th January 2003 ad that the plaintiff has never been in occupation of the suit property at any time prior to this suit. She averred that the purchase was facilitated through a company known as Nyakinywa Investment Company Limited ,a company concerned with the empowerment of women economically particularly by according them an opportunity to own land. She averred that after purchase of the suit land she was issued with Certificate Number 7867 signifying that she was the rightful owner of the plot described as " ¼ acre plot allocated under the ballot number 2517"and was given the approval by the company to proses her title. That sometime in 2010 she discovered that the plaintiff was also claiming ownership to the suit property arguing that he had purchased the same from one Mary Njeri Chege. She further avers that both parties herein were summoned by the investment company to produce documents supporting their respective claims. She added that she produced a sale agreement, a clearance letter and her ballot paper while the plaintiff produced a title deed. She believes that neither the plaintiff nor Mary Njeri Chege had any connection with Nyakinywa Investment Company Limited. It is her averment that

she reported the matter to Ruiru Police Station where both the plaintiff, Mary Njeri Chege, Alice Wambui Mburu and the defendant were summoned. She also followed up the matter with the Chief Land Registrar who wrote to the Thika District Land Registrar inquiring on the circumstances in which the plaintiff was issued with title. She believes that the plaintiff's title was forged or obtained by fraud on the part of either Mary Njeri Chege or the plaintiff in collusion with other officers in the Ministry of Lands. That the Chief Land Registrar advised the District Land Registrar to summon the plaintiff and Mary Njeri Chege to retrieve their transfer documents. She believes that the plaintiff fraudulently, illegally and unlawfully registered the suit property in his own name with the sole intention of dispossessing her the suit property as the plaintiff has never been a member of Nyakinyua Investment Company Limited and believes that the plaintiff colluded with Mary Njeri Chege in registering a transfer in favour of the plaintiff and causing a transfer to be registered in the plaintiff's favour without the proper consent of Nyakinywa Investment Limited. She states that she has been in continuous and uninterrupted use and possession of the suit property from 2003 when she purchased it from Alice Wambui Mburu.

The parties herein consented to canvass the instant Notice of Motion by way of written submissions. I have now carefully considered the filed written submissions, the pleadings generally and the relevant laws and I make the following findings:-

The Plaintiff has sought for an injunctive relief from this Court. The granting of a temporary injunction is a matter within the discretion of the court and that discretion must be exercised judicially. The applicant also has a duty to establish the various legal principles upon which the injunction is granted. In deciding whether or not to grant an injunction, this court is guided by the consideration that unless the injunction is granted, the damage so occasioned is such that the applicant would not be adequately compensated by an award of damages. Secondly, the Applicant must show that his case has a probability of success. Thirdly, if the court is in doubt it will decide the application on the balance of probability.

Section 63 (c) of the Civil Procedure Act gives this Honourable Court power to grant orders of a temporary injunction in all cases in which it appears to it to be just and convenient to do so to restrain any person from doing acts. The grant of a temporary injunction is invariably in the discretion of the Court. The general considerations for the granting of a temporary injunction under Order 40 r. (2) CPR are that;

“(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

The applicant having come to court to seek for an equitable relief, he needs to establish that he deserves the order he is seeking. In the instant application, has the applicant established the laid down principles for grant of a temporary injunction? The Plaintiff has demonstrated that he is the registered owner of the suit property by annexing a copy of the title deed to the suit property having purchased the same from one Mary Njeri Chege. He has also annexed a sale agreement. I find that he has a prima facie case by virtue of **section 26 (1) of the Land Registration Act** which states that , ***“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***

(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.”

On the other hand the defendant has furnished a copy of a sale agreement, a clearance certificate from Nyakinyua Investment Limited and Plot Ownership number but she has not annexed a title deed of the said suit land on the ground that the plaintiff procured the suit property through fraud and that was the reason why she has not been able to acquire her title deed.

The other cardinal consideration is whether in fact the applicant would suffer irreparable injury or damage by the refusal to grant the application. If the answer is in the affirmative, then Court ought to grant the order. (**See: Giella v. Cassman Brown & Co. [1973] E.A 358**). By irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be a substantial or material one that is; one that cannot be adequately atoned for in damages. The applicant has not demonstrated to this court how he will suffer irreparable damage should the court decline to grant the injunction as prayed. The defendant has in her affidavit stated that she has been in use and occupation of the suit land for the last seven years and other than cultivating the suit land, she has planted trees and a fence. This is a fact the plaintiff has not commented on in objection or otherwise. In fact the plaintiff in his affidavit stated that he was informed by the neighbours that there was an occupant in the suit land in 2010 while he was on a routine inspection of the suit land. This shows that he has not been in occupation of the suit property. On irreparable damages, I find very instructive the words of Lord Diplock in the case of **American Cyanamid –vs- Ethicon [1975] 1ALL E.R. 504**. He states that, “**The governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted...**” It is my considered opinion the applicant can be compensated in terms of damages should the court find that he was indeed the legal owner of the suit land after the court has had the opportunity of hearing this suit on its merits.

It is trite law that if the Court is in doubt on any of the above two principles, it will decide the application on the balance of convenience. The term balance of convenience literally means that if the risk of doing an injustice is going to make the applicant suffer then probably the balance of convenience is favourable to him the Court would most likely be inclined to grant to him the application for a temporary injunction. The "balance of harms" refers to the threatened injury to the party seeking the injunction as compared to the harm that the other party may suffer from the injunction. The Court will consider where the "balance of convenience" lies, that is, the respective inconvenience or loss to each party if the order is granted or not. The Applicant did not submit on the balance of convenience but the defendant submitted that the balance of convenience lies with the maintenance of status quo .

The defendant has stated that has been in occupation of the suit land for the last seven years. The applicant in his application is seeking to restrain the defendant from entering or occupying his property. If that is the case, the court cannot injunct what has already happened. I will be guided by the findings in case of **Mavoloni company Ltd vs Standard Chartered Estate Management Ltd, Civil Appeal No. 266 of 1997** where the court held that “**an injunction cannot be granted once the event intended to be injuncted has been overtaken by events.**” Similar findings were held in the case of **Esso Kenya Ltd Vs Mark Makwata Kiya, Civil Appeal No. 69 of 1991** where it was stated “**an injunction cannot issue to restrain an event that has taken place.**” The court cannot restrain what has already happened. If indeed the Defendant is already in occupation of the suit property, then the balance of convenience tilts in her favour.

In the end, I am of the view that granting the prayer sought would have the effect evicting the respondent leading her to suffer. Even the balance of convenience militates against it. It may be that at the end of the day, the applicant plaintiff may win. But if they do so, it should be with regard to someone who has a home rather than that one who is rendered a destitute.

Consequently the court dismisses the Applicant’s Notice of Motion dated 27th November 2012 with costs to the Defendant. The parties should endeavour to set down the main suit for hearing so that the issues in

dispute can be resolved on merit.

It is so ordered.

Dated, signed and delivered this **23rd** **day of May , 2014**

L.GACHERU

JUDGE