



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC SUIT NO. 1436 OF 2013

GEORGE NAKULO OSALLO.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA.....1ST DEFENDANT

JULIUS CHUMBI WAITIKI.....2RD DEFENDANT

LAND REGISTRAR, KAJIADO.....3RD DEFENDANT

RULING

The Plaintiff's Application

The application before the court is a Notice of Motion filed by the Plaintiff dated 13th December 2011, seeking orders of a temporary injunction to restrain the Defendants from evicting, attempting to evict, harassing, levying distress, asserting ownership, laying claim, trespassing into, encroaching on to, or in any other manner whatsoever interfering with his quiet use, occupation, possession and enjoyment of all that parcel of land known as Kajiado/Kaputiei-North/19734 (hereinafter “the suit property”), pending the hearing and determination of the suit.

The grounds for the application are stated in the application and supporting affidavit sworn by the Plaintiff on 13th December 2011. In summary, the Plaintiff claims that he is the registered proprietor of the suit property, having acquired it in 2005 and obtained registration in the year 2007. The Plaintiff states that he subsequently developed the suit property as his matrimonial home and occupied it in the month of October, 2009, and has lived there since with his family.

The Plaintiff further explained that on or about the 29th November, 2010, the 1st Defendant through Garam Investments Auctioneers, caused to be advertised for sale by public auction the property known as Kajiado/Kaputiei-North/3587 belonging to one Geoffrey Kyalo Muema. Further, that he was alerted of this advertisement by individuals who started coming into his home allegedly to view and inspect the premises before sale. He then realized that that Garam Auctioneers had photographs of his house as the storeyed building they had described in their advertisement aforesaid.

The Plaintiff averred that the suit property was hived off a larger portion of land being land Parcel Number Kajiado/Kaputiei-North/3585, which was subdivided into 3 portions being 19734, 19735 and

19736 and each separate portion eventually registered. He attached copies of the titles to Kajiado/Kaputei-North/3585 and its mutation, as well as copy of the title to the suit property and the said advertisement. The Plaintiff further averred that the land Parcel Number Kajiado/Kaputei-North/3587 is known to him and is about 30 metres away from the suit property, has an unfinished bungalow, and belonged to an individual known to him as Kyalo who worked with the 1st Defendant.

According to the Plaintiff, upon being shown the advertisement he immediately instructed his advocates to protect his interests, which they did by writing to Garam Investments Auctioneers and the 1st Defendant in letters dated 29th November 2010 and 6th December 2010 respectively, that highlighted the confusion created by the advertisement. Further, that the 1st Defendant responded by a letter dated 10th December 2010 in which it indicated that they had suspended the auction pending investigations. The Plaintiff attached copies of the said correspondence.

The Plaintiff stated that the 1st Defendant thereafter purported to re-advertise the property for sale sometimes in June 2011. He then sought an explanation but that no response was offered by the 1st Defendant. The Plaintiff thereafter got confirmation from the 3rd Defendant that he was the lawful owner of the suit property in a letter dated 10th June 2011, and proceeded to request the 3rd Defendant to place a restriction over the two subject lands, that is the suit property and the property that the 1st and 2nd Defendant were purporting to sell. He attached copies of the said correspondence.

However, that on 7th December 2011 the 2nd Defendant and his auctioneers forcefully gained entry into the suit property intending to evict the Plaintiff's wife and family from their home, and were repulsed by his family and the police. Further, that the said Defendant's auctioneers purported that they had come to levy distress for rent arrears of Kshs 240,000/=, and that the Plaintiff and his family were illegal tenants of the 2nd Defendant house. The Plaintiff annexed the instructions to levy distress by the 2nd Defendant dated 6th December 2011, and a notification of sale by his auctioneers dated 7th December 2011. The Plaintiff also states that he stands to suffer irreparable loss and harm and risks eviction from his own house and property unless temporary injunction orders are issued.

The Defendants' Response

The 1st Defendant opposed the Plaintiff's application in a replying affidavit sworn on 30th April 2012 by its Legal Counsel, Waweru Mathenge. The Deponent stated that the 1st Defendant advanced one Mr. Geodfrey Kyalo Muema a loan facility of Kshs.2,500,000/=, which amount were secured by a charge over the property title Number Kajiado/Kaputei-Noth/3587 dated the 28th May 2009 and duly registered in its favour. Further, that the said property was duly registered in the name of the Chargor, Mr. Godfrey Kyalo Muema. The deponent annexed copies of the said charge and of the title to the said property.

The deponent explained that the said chargor failed to meet his obligations, whereupon the 1st Defendant in accordance with the provision of the charge moved to realize the security by exercising the statutory power of sale. The said property Kajiado/Kaputei-North/3587 was subsequently sold by the 1st Defendant by public auction on the 28th June, 2011 to the highest bidder, being the 2nd Defendant herein, at the total sum of kshs.4,100,000/=. The deponent annexed copies of the memorandum of sale in favour of the 2nd Respondent and the transfer by chargee.

The deponent also stated that he was aware that before the 1st Defendant exercised its statutory power of sale, it suspended the sale upon receipt of the Plaintiff's claim that his property was the one being sold. Further, that the 1st Defendant then instructed Thagishu & Associates, who are licensed land surveyors, to ascertain and re-confirm the true position of property Kajiado/Kaputei-North/3587 on the ground. The deponent stated that the said surveyors carried out their investigations and physically examined the two parcels of land namely Kajiado/Kaputei-North/3587 and the suit property, and forwarded their findings to the 1st Defendant.

Further, that the said surveyor established the ground location of property Kajiado/Kaputei-North/3587 as per the Registry Map Index as being the property occupied by the Plaintiff herein, who had actually constructed a storey building on this parcel of land, instead of his property. The deponent annexed a copy of the said report together with the Registry Index Map. The deponent averred that consequently, the Plaintiff had no right from the onset to occupy the property registered as Kajiado/Kaputei-North/3587, which property was transferred to the 2nd Defendant and his continued existence on the subject property is a trespass.

The 2nd Defendant's substantive response to the Plaintiff's Notice of Motion is in a replying affidavit he swore on 1st January 2012. He deponed that he is the registered owner of land parcel number Kajiado/Kaputei North/3587, which he bought at a public auction, and he annexed a copy of the title deed and copies of certificate of sale by Garam Investments Auctioneers. Further, that the said parcel of land was initially registered in the names of Geoffrey Kyalo Muema who had charged the property with the 1st Defendant, who in turn sold it in exercise of its statutory power of sale. The 2nd Defendant claimed that the said Geoffrey Kyalo Muema was colluding with the Plaintiff to deny him possession of the said property. He also stated that the land parcels Kajiado/Kaputei North/3587 and Kajiado/Kaputei/19734 are totally different and cannot be confused.

The Submissions

The parties were directed to file written submissions on the Plaintiffs' application. The Plaintiffs' counsel filed submissions dated 15th October 2012, wherein he reiterated the respective parties' cases, and relied on section 26 of the Land Registration Act and the decision in **Gitwany Investment Ltd vs Tajmal Ltd & 3 Others (2006) e KLR** to argue for the sanctity of the Plaintiff's title to the suit property, and that the 2nd Defendant cannot therefore acquire the said property.

The counsel also relied on various judicial decisions including **Russell Co Ltd vs Commercial Bank of Africa Ltd & Another, (1986) KLR 633** and **Kenya Hotels Limited vs Kenya Commercial Bank Ltd & Another, (2004) 1 KLR** to argue that he had demonstrated a *prima facie* case and would suffer irreparable damage, as he had shown that he has built a house on land that he legally acquired and registered, and that he and his family have been unable to continue living peacefully on the said land. Further, that the sale from the 1st to 2nd Defendant was not valid, as the statutory power of sale was exercised over the wrong parcel of land. Lastly, that the balance of convenience tilted in his favour as the Defendants should not benefit from their unlawful and fraudulent acts.

The 1st Defendant's counsel filed submissions dated 27th December 2012, wherein he argued that the contentious issues are whether the land parcel stands on the same solum as the suit property, the ownership of the two parcels of land, whether the suit property was charged to the 1st Defendant and whether the Plaintiff has met the elements for the grant of an injunction.

The counsel submitted that the two parcels of land namely Kajiado/Kaputei North/3587 and Kajiado/Kaputei/19734 are not similar as they have two distinct and separate titles, as shown by the surveyors' report and Registry Index Map that the 1st Defendant provided as evidence. Further, that an official search dated 8th December 2010 showed that one Geoffrey Kyalo Muema was the registered owner of land parcel Kajiado/Kaputei North/3587, subject to a charge to the 1st Defendant as allowed by section 28 of the repealed Registered Land Act. Furthermore, that the 1st Defendant had a right to exercise its statutory power of sale once the Chargor defaulted in paying his loan, and that the Plaintiff could not in the circumstances claim any overriding interest by virtue of his occupation of the said parcel of land.

The 1st Defendant's counsel cited various judicial authorities for the position that the Plaintiff having built on Kajiado/Kaputei North/3587 thinking that the same was his land was thereby a trespasser, including the decisions in **Gitwany Investment Ltd vs Tajmal Ltd & 3 Others (2006) e KLR** and **M'Ikiara M'mukunya & Another vs Gilbert Kabere Mbijiwe, Civil Appeal No. 13 of 1980**. Lastly it

was submitted that the Plaintiff has not shown a *prima facie* case as he is a trespasser and cannot obtain the orders of injunction sought as held in **Taj Super Power Cash & Carry Ltd vs Nairobi City Council & 2 Others, Civil Appeal No. 111 of 2002.**

Further, that the Plaintiff had also therefore not shown any infringement of his rights, and will not suffer any irreparable damage because he has no title to the said land. The 1st Defendant also submitted that it will be in a position to compensate the Plaintiff for any loss he may incur if he succeeds in his suit, and that from the foregoing the balance of convenience lies with the 1st and 2nd Defendants.

The 2nd Defendant's counsel filed submissions dated 15th November 2012 wherein he argued that this Court can only make an informed decision by either visiting the *locus in quo*, or having a report filed in court by the 3rd Defendant and the District Surveyor for Kajiado District regarding the issue whether the land parcels Kajiado/Kaputiei North/3587 and Kajiado/Kaputiei North/19734 lie on the same ground or are separate. He submitted that this will dispose of the suit and save on judicial time and costs. The counsel also argued that the 2nd Defendant is a *bona fide* purchaser without notice, and that the Plaintiff had not established a *prima facie* case.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the parties herein. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary orders of injunction. I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Plaintiff in the Plaint filed herein dated 13th December 2011 is seeking a permanent injunction against the Defendants restraining them from evicting him or interfering with his possession of the suit property, and declarations that the suit property does not lie within land parcel Kajiado/Kaputiei North/3587, and that any resurvey done affecting the boundaries of the suit property is null and void. He relies on his title to the suit property which he produced in evidence, and also on his occupation of the said property.

The 1st Defendant has on the other hand brought evidence to show that land parcel Kajiado/Kaputiei North/3587 and the suit property are two distinct and separate properties, and that the Plaintiff is actually in occupation of land parcel Kajiado/Kaputiei North/3587. The Plaintiff however disputes this finding and states that Kajiado/Kaputiei North/3587 is 30 metres away from the suit property.

The 1st Defendant also brought evidence of a title to Kajiado/Kaputiei North/3587 in the name one Geoffrey Kayo Muema, a charge in its favour over the said land by the said Geoffrey Kyalo Muema, and the transfer of the said land by the 1st Defendant as chargee upon exercise of power of sale to the 2nd Defendant. The 2nd Defendant in addition brought evidence of the title to the said land parcel that was subsequently issued to him.

It is therefore evident that what is contested is the location of land parcels Kajiado/Kaputiei North/3587 and Kajiado/Kaputiei North/19734, and as both the Plaintiff and 2nd Defendant have respective titles to the two properties, I find that I cannot make a finding that the Plaintiff has established a *prima facie* case. I also agree with the 2nd Defendant's submissions that this is an issue that can only be determined upon a survey of the location of the two parcels of land being conducted by the relevant authorities, and a report on the same being filed in court.

In the circumstances I will decide the Plaintiff's application on the basis of a balance of convenience, and note in this respect that the Plaintiff and his family live on the subject property. I therefore find for this reason that the balance of convenience tilts in the Plaintiff's favour. I however also note that if indeed the property occupied by the Plaintiff is found to be within land parcel Number Kajiado/Kaputiei-North/3587 then, the 2nd Defendant will suffer considerable prejudice, and it is therefore imperative that the confirmation as to the location of the said parcels of land is done expeditiously.

I accordingly orders as follows pursuant to the provisions of section 1A, 1B, 3A and 63(e) of the Civil Procedure Act:

1. That pending further orders, the *status quo* to be maintained by the parties herein for a period of six (6) months from the date of this ruling shall be as follows:
 - a. Both the Plaintiff and the 2nd Defendant by themselves or through their representatives, agents or servants are restrained from selling, transferring, leasing, charging or in any other manner alienating or disposing of the land parcels known as land parcels Kajiado/Kaputiei North/3587 and/or Kajiado/Kaputiei North/19734, and from undertaking any further construction and/or developments on the said land parcels.
 - b. The 1st and 2nd Defendants either by themselves or through their representatives, agents or servants are restrained from interfering with the possession and occupation by the Plaintiff of the land parcels known as land parcels Kajiado/Kaputiei North/3587 and/or Kajiado/Kaputiei North/19734, and from demolishing or in any manner interfering with the structures constructed thereon by the Plaintiff as at the date of this ruling.
2. The County Surveyor for Kajiado County shall undertake a survey and prepare and file a survey report in Court within 30 days of service of the orders herein. The survey and survey report shall establish among other issues the location and coordinates of the beacons of the land parcels Kajiado/Kaputiei North/3587 and/or Kajiado/Kaputiei North/19734, and the structures that are presently constructed or situated on the two parcels of land.
3. The Plaintiff and Defendants shall provide the County Surveyor for Kajiado County with the necessary title and/or ownership documents to the said parcels of land, and shall jointly bear the costs of the said survey and the preparation and filing of the said Surveyor's report in equal parts.
4. The Plaintiff shall serve a copy of this ruling and orders herein on the County Surveyor for Kajiado County within fourteen days of the date of this ruling, and shall follow-up on the preparation and filing in court of the said Surveyor's report. Upon default by the Plaintiff the *status quo* orders given hereinabove shall lapse.
5. The costs of the Plaintiff's Notice of Motion dated 13th December 2011 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____10th__ day of ____June____, 2014.

P. NYAMWEYA

JUDGE