



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC SUIT NO. 1532 OF 2014

SAMUEL OBARE MIGOSI.....PLAINTIFF/APPLICANT

-VERSUS-

KENNEDY OBAE.....DEFENDANT/RESPONDENT

RULING

1. Before me is an application dated 9th December, 2014 for interim orders seeking to injunct the Defendant his servants and or employees or otherwise howsoever from entering selling and or interfering with LR No. Tassia-11-21190/111/108 pending hearing and determination of this suit.

2. The Plaintiff grounds his application on the fact that the Plaintiff purchased the suit property from the National Social Security Fund (“the NSSF”) through a tenant purchase scheme in 2001 at an agreed price of Kshs. 550,000/=. This amount together with accrued interest was fully paid by the Plaintiff as of 6th June, 2014. The Plaintiff contends that the Defendant without any colour of right in June 2014 trespassed unto the suit land and despite confirmations as well as interventions by the NSSF the Defendant has persisted with the trespass. In support of the application, the Plaintiff swore a detailed affidavit complete with documents to support the Plaintiff’s position that the brought the property from the NSSF and duly paid for it.

3. In response, the Defendant on the other hand contended that the suit property was owned by the Defendant. The Defendant stated that the Defendant paid the amount of Kshs. 550,000/=. The amount was paid to NSSF on 27th October, 2014. The Defendant further contended that the Defendant has been in occupation since 2002, with the knowledge of both the Plaintiff as well as the NSSF. Finally, the Defendant faulted the Plaintiff for failing to join the NSSF as a party to the instant proceedings and further that the title the subject matter in dispute cannot be discerned with certainty.

4. The parties, through counsel, made oral submissions. The Plaintiff besides reiterating the facts as out layed above also submitted that the Plaintiff had made out a prima facie case with chances of success as the Plaintiff was the recognized owner of the suit premises. The Plaintiff further submitted that if an injunction was not granted the plaintiff stood to suffer irreparably as the Defendant could tamper with the physical face of the suit property and even convey the same to a third party.

5. The Defendant's submissions were to the effect that the Plaintiff had failed to make out a prima facie case. Further the Defendant submitted that the Plaintiff's failure to join the NSSF to the suit as well as the application meant that the suit was fatally flawed. The Defendant also submitted that in the absence of clear title, the Plaintiff could not prove a prima facie case. For this later proposition the Defendant relied on the case of **Charles Ogejo Ochieng –v- Geoffrey Okumu CACA 181 of 1995 [1995] eKLR** and also the case of **Kimita –v- Wakibiru [1986] KLR 578**.

6. I have considered carefully the submissions by the parties as well as the facts as detailed in the affidavits sworn in support of and in opposition to the application. I must first point out that at this stage of the proceedings and faced with an interlocutory application for an injunction my duty is limited to ascertaining whether the Plaintiff has established a prima facie case with chances of success for the Plaintiff to be entitled to an injunction. I must also determine, in the event the Plaintiff establishes a prima facie case, whether in the absence of an injunction the Plaintiff stands to suffer irreparably and beyond compensation through an award of damages. Finally, if in doubt I must weigh the balance of convenience in granting or denying the injunctive orders sought.

7. Foremost, it is worth pointing out that the suit property is not registered. The subject matter herein consists of an unregistered parcel of land. It is claimed by the Plaintiff as well as by the Defendant. What is not in controversy between the two parties is that the title paramount is in the hands of the NSSF. To trace ownership in the case of unregistered title or land one needs to take a journey to the root of the title. This is done through the documents or deeds availed by any party which leads one through history to the title paramount.

8. The Plaintiff has availed documents pointing to ownership of the suit property. The documents consist of a plot identification certificate as well as receipts of payment to the title paramount namely the NSSF, of various sums of money. The payments led to letters by the title paramount confirming that the Plaintiff is the true owner of the suit property. The Defendant on the other hand has availed a letter written by the Defendant to the title paramount claiming ownership of the suit property. The Defendant has also availed a copy of a bank pay in slip for Kshs. 550,000/ allegedly paying the said sum to the NSSF under a tenant purchase scheme. It is to be noted that unlike in the case of the Plaintiff there is no confirmation of receipt of this amount of Kshs. 550,000/- by the NSSF. It is also to be noted that the amount of Kshs. 550,000/= was paid if at all, by the Defendant in October, 2014 after the dispute herein was already on going and indeed on the same day that the title paramount invited both parties to a meeting.

9. In my view, the Plaintiff on a prima facie basis stands in better stead as far as ownership to the unregistered suit property is concerned. Documents especially issued by the title paramount support the Plaintiffs' contention at this preliminary stage that the Plaintiff is the owner of the suit property. The document trail, which is the surest way of proving title to unregistered land, supports the Plaintiff's case. The confirmation by the NSSF goes a long way to supporting the Plaintiff's case. I consequently arrive at the conclusion that the Plaintiff has established a prima facie case with chances of success.

10. It was the Defendant's contention that the suit property has not been identified properly and thus on that basis the Plaintiff case fails. In my view and at this interlocutory stage the paper trail as well as the very constant reference to the suit property as LR No. 21190/111/108 certainly suffices to help identify the subject matter. There is certainly no confusion. All the parties including the title paramount are clear on the property in dispute. The property is sub plot No. 108 which has been or is to be formally excised from LR No. 21190. The provisions of **Order 4 Rule 3** of the **Civil Procedure Rules** have been complied with.

11. The Plaintiffs' suit was also contested by the Defendant on the basis of non-joinder of the NSSF. As

already pointed out the NSSF is the holder of the title paramount. As the suit property has not been formally transferred to and registered in favour of a third party, the NSSF still holds the same as the registered proprietor. The NSSF is consequently an interested party to these proceedings. It would be appropriate to have the NSSF participate in these proceeding but their participation, in my view, need not be in the form of a substantive party. Besides, I am also cognizant of the fact that **Order 1 Rule 9** of the **Civil Procedure Rules** is to the effect that a suit and for that matter an application need not be defeated by reason only of non-joinder or misjoinder of parties. The court must always seek to determine and resolve the dispute in so far as it concerns the parties actually before the court.

12. Having found the Plaintiff has a prima facie case, it would be appropriate to ascertain if the Plaintiff stands to suffer irreparably and beyond damages if an injunction is not granted. I have previously pointed out that the fact that a party can pay damages should never be a license to transgress on other parties rights and privileges: see **Mahesh Shah –v- Jetlak Foods Ltd ELC No. 1248 of 2014**. No party should be allowed to say that damages will suffice, so deny the other party his rights. That would be a recipe for chaos. In the instant case the subject matter is land and the transgression alleged is trespass. While the possibility of compensation in the form of damages is there, the suit property is unique in that the property is unregistered title. Title is in the form of paper documents. It may very well turn out that the property could be disposed of during the pendency of the suit to an unsuspecting innocent third party. It will then be beyond the reach of the Plaintiff. I do not believe that even monetary compensation would suffice in such circumstances.

13. In my view, an injunctive order would be the order that best lends itself to the present circumstances. I consequently allow the application in terms of prayer number three and order that pending the hearing and determination of this suit the Defendant by himself, his agents and or employees are restrained from entering, selling and or interfering howsoever with all that property known as Tassia-11-21190/111/108.

14. The Plaintiff will also have costs of the application.

15. Orders accordingly

Dated, signed and delivered at Nairobi this 23rd day of April, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant

..... for the Defendants/Respondent



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