



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 90 OF 2020

STUART GERALD CULLINAN HERD.....PLAINTIFF

VERSUS

ERIC AGOLLA LUGALIA.....DEFENDANT

CHIEF LAND REGISTRAR.....INTERESTED PARTY

RULING

What is coming up for ruling is a Notice of Motion application dated 4th June 2020 by the Plaintiff (hereinafter referred to as “the Applicant”) and a Notice of Motion application dated 18th June 2020 by the Defendant (hereinafter referred to as “the Respondent”). In his application, the Applicant has sought the following orders;

- a) That pending the hearing and determination of the suit, the Court be pleased to grant a temporary order of injunction restraining the Defendant (Respondent) whether by himself or through his servants, agents, employees, assigns or anybody claiming under him, pursuant to his instructions or whatsoever from entering, encroaching, trespassing, remaining on, using, damaging, wasting away and or in any way dealing or interfering in any manner with the Applicant’s peaceful, quiet possession, enjoyment and use of the property known as L.R No. 1160/308 situated on Bogani Road, Karen in Nairobi (hereinafter referred to as “the suit property”).
- b) That the Officer in Charge of Karen Police Station to ensure the maintenance of law and order in the enforcement of the above court orders.
- c) That costs of the application be in the cause.

The Applicant’s application was brought on the following main grounds;

- 1) The Applicant is and was at all material times the registered owner of the suit property.
- 2) From the time the Applicant acquired the suit property, the Applicant has been in quiet, uninterrupted and peaceful physical possession thereof.
- 3) On 17th May 2020, the Respondent without any colour of right or proof of ownership attempted to trespass on the suit property but was repulsed.
- 4) On 27th May 2020, the Respondent invaded the suit property in the company of police officers from Hardy Police Station and arrested the Applicant’s security guards who were later released unconditionally upon the Applicant’s production of his Certificate of Title.

- 5) Despite existence of official searches dated 7th May 2020 and 29th May 2020 showing the Applicant as the registered owner of the suit property, the Respondent threatened and intended to invade/trespass on the suit property.
- 6) The Applicant was apprehensive that unless the application was heard and the orders sought granted, the Respondent would unless restrained by the Court invade the suit property and render the current suit nugatory.

The Application was supported by the affidavit and supplementary affidavit sworn by the Applicant. In his affidavit sworn on 3rd June 2020, the Applicant stated that he conducted historical due diligence on the suit property before purchasing it. He stated that the suit property was first registered in the name of CMC Holdings Limited. CMC Holdings Limited sold the property to one, Cheryl Jean Sonnichesen deceased who became the registered owner of the suit property on 9th May 2006. The deceased lived on the suit property until her death. On 23rd April 2019, the Applicant acquired the suit property from one, Linda Benvenuto who was the administratrix of the estate of Cheryl Jean Sonnichesen who was also living on the suit property after Cheryl Jean Sonnichesen's death.

On 17th May 2020, his security guards informed him that an unidentified person had sought ingress onto the suit property. The Applicant called his business partner Mr. Satyan Patel (Mr. Patel) who went to the suit property in the company of police officers. They met the Respondent who claimed to be the owner of the suit property but did not produce any title documents to substantiate the claim. On 27th May 2020, the Applicant's security guards were arrested but unconditionally released after Mr. Patel showed the police officers a copy of the Applicant's Certificate of Title for the suit property. On 29th May 2020 and 30th May 2020, Mr. Patel lodged a complaint against the Respondent at Karen Police Station and at the DCI Headquarters - Land Fraud Department respectively.

In his supplementary affidavit filed on 7th July 2020, the Applicant stated that the Respondent was relying on illegal ownership documents. He contended that by a letter dated 25th June 2020, the Chief Land Registrar confirmed to his advocates that the search dated 4th July 2019 (which is part of the annexures to the Applicant's supporting affidavit) was genuine while the transfer, title and other documents annexed to the Respondent's replying affidavit were not genuine and did not form part of the Chief Land Registrar's records. Additionally, the Applicant's advocate contacted Sonye Ondari Advocate who purportedly executed the transfer between the Respondent and the purported seller of the suit property to the Respondent, Jonathan Kipkemboi Toroitich. The said advocate denied his signature on the said transfer as well as the purported address of his office and rubber stamp. The said advocate stated that neither the Respondent nor the said Jonathan Toroitich were known to him. Additionally, the said advocate stated that he could not have executed the said transfer in Nairobi as he practices in Kisii. The said advocate recorded a statement with the DCI - Land Fraud Department. The Applicant stated further that officers from the Lands Office who purportedly issued the Respondent with a Search Certificate dated 24th March 2015 and a letter dated 22nd May 2020 recorded statements denying their signatures thereon and also denying issuing the same. The Applicant also contended that the letter dated 22nd May 2020 that is part of the Respondent's exhibits was suspicious as it did not disclose the signatory's employment number.

The Applicant casted doubt on the Respondent's argument that he purchased the suit property from Jonathan Toroitich on 17th March 2015 and that the said Jonathan Toroitich had been the registered owner of the property since 26th October, 2010. The Applicant contended that the suit property had been occupied by Cheryl Jean Sonnichesen (hereinafter referred to as "the deceased") since 9th May 2006 when she was registered as proprietor until her death on 25th October 2015. He stated that Linda Benvenuto who was the administratrix of the estate of the deceased took possession of the suit property immediately after the deceased's death and lived there until December 2018 when she gave the Applicant possession. The Applicant stated that Linda Benvenuto told him that neither she nor the deceased were aware of any transfer of the suit property to the said Jonathan Toroitich or to the Respondent. The Applicant stated that this position was confirmed by Dr. Willy Mutunga, a friend and lawyer for the deceased who had acted for the deceased in the purchase of the suit property.

The Applicant contended that there was no reasonable explanation as to how the Respondent and the said Jonathan Toroitich could have been the registered proprietors of the suit property during the deceased's lifetime and occupancy as well as Linda Benvenuto's occupancy without any licence or tenancy agreement allowing such occupancy. Further, the Respondent did not claim that there was trespass on the suit property even though the deceased's requiem mass was conducted on the suit property in full public glare.

The Respondent's case:

The Respondent filed a replying affidavit on 19th June 2020 in which he stated as follows: The Applicant was misleading the court as to the ownership of the suit property. The Respondent was the registered owner of the suit property having bought the same in

2015. He had been renting out the suit property to different tenants until June 2019 when the suit property fell vacant. At all material times he had security guards on the suit property. When Covid-19 hit Kenya, two of his guards were outside of Nairobi and could not travel to the suit property because of the cessation of movement orders. On or around 15th May 2020, he visited the suit property and found different guards manning the gate. They threatened to harm him. On 17th May 2020 he visited the suit property again and was roughed up by the said guards. The agents/representatives of the Applicant soon arrived and claimed that the Applicant was the owner of the suit property. They however failed to produce ownership documents.

The Respondent contended that the Applicant's ownership documents are fraudulent. He contended that he made a complaint to the DCI Regional Office who wrote a letter to the Registrar of Lands to confirm ownership of the suit property. The Registrar of Lands wrote back to the DCI on 22nd May 2020 confirming that he (Respondent) was the legal registered owner of the suit property. He stated that the searches relied on by the Applicant when scrutinized show different deed plan numbers making them fraudulent. He contended further, that a copy of the title document relied upon by the Applicant was not a copy of the original title but a copy normally kept at the Lands Registry as it had markings and writings on the face of it.

In conclusion he contended that the Applicant concealed material information such as transfer documents. The Respondent urged the court to dismiss the application as granting the same would lead to a miscarriage of justice.

The Respondent filed a further affidavit on 3rd November 2020 in which he reiterated the contents of his replying affidavit the contents of which I have highlighted above. He maintained that the documents presented to court by the Applicant were fraudulent. The Respondent contended that the Applicant should not be granted an injunction as he has not come to equity with clean hands.

The Respondent's Application:

Together with his replying affidavit, the Respondent filed a Notice of Motion application dated 18th June 2020 seeking the setting aside and/or variation of the interim ex parte orders that the court had granted to the Applicant on 5th June 2020. The application was brought on the grounds that the court was misled into granting the said orders. The Respondent contended that the Applicant misrepresented to the court that he was the owner of the suit property and that he was in possession thereof. The Applicant contended that he was the registered owner of the suit property and that he was at all material times in possession thereof. The Respondent reiterated the contents of his affidavit and further affidavit in reply to the Applicant's application in support of his application.

The Applicant opposed the application through a replying affidavit sworn on 30th July, 2020 in which he reiterated the contents of his affidavit and supplementary affidavit in support of his application.

The submissions:

The court ordered that the two applications be heard together by way of written submissions. The Applicant filed his submissions on 7th July 2020 while the Respondent did not file submissions. The Applicant argued that the application satisfied the legal and evidential threshold for grant of an injunction set out in the cases of Giella v Cassman Brown Co. Ltd. [1973] E.A. 358 and Board of Governors Afraha High School & another v Kenya Commercial Bank [2004] eKLR. The Applicant submitted that he had established a prima facie case with a probability of success against the Respondent. The Applicant argued that he had established that he was the legal owner of the suit property and that the Respondent's claim to the suit property was tainted by fraud, forgery and illegalities. The Applicant cited Tinga Traders Limited v Patrobas Owino [2016] eKLR, Taib Ali Taib v Ahmed Fuad Amir & 6 others [2014] eKLR, George Desmond Kweyama v Francis Mburu Kimani & Another [2020] eKLR and submitted that the Respondent's title was likely to be declared a nullity. On the issue whether the Applicant would suffer irreparable harm if the injunction was not granted, the Applicant relied on the cases of Tinga Traders Limited (Supra) and Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 others [2008] eKLR and submitted that since the Applicant had established a bona fide title, denial of an injunction would cause loss that could not be compensated by an award of damages. Additionally, the Applicant argued that damages would not be an adequate remedy if the Respondent trespassed onto his property and evicted him. On the third limb of the conditions set out in Giella v Cassman Brown (Supra), the Applicant relied on the case of Tinga Traders Limited (supra) and submitted that the balance of convenience would tilt in favour of the Applicant against the Respondent who was trying to further illegalities.

Determination:

As I have mentioned earlier, I have two applications before me. The first application is by the Applicant in which he is seeking an injunction which if granted would confirm the interim ex parte orders of injunction that were granted on 5th June 2020. On the other hand, the Respondent is seeking an order discharging the said interim orders of injunction that were granted on 5th June 2020. What this means is that if I grant the Applicant's application, the Respondent's application will stand dismissed while if the Applicant's application fails, the Respondent's application would succeed.

The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In Giella v Cassman Brown & Co. Ltd. (supra), it was held that:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, the Plaintiff must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the Plaintiff might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

In Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

I am satisfied that the Applicant has established a prima facie case with a probability of success against the Respondent. Since there are two titles for the suit property one held by the Applicant and the other by the Respondent I am not able at this stage to determine which of the titles is genuine and which one is fraudulent. From the material before me however, I find it more probable that the Applicant is the lawful owner of the suit property. The Land Registry has confirmed that the documents evidencing title held by the Applicant in respect of the suit property are genuine. The Applicant has placed sufficient evidence showing that the Respondent has never been in occupation of the suit property and that it was the Respondent who attempted to trespass on the suit property.

In my view the Respondent did not answer the issues raised in the Applicant's supplementary affidavit satisfactorily in his further affidavit. The Respondent did not respond to the Applicant's claim that Sonye Ondari Advocate who purportedly witnessed the transfer of the suit property by Jonathan Toroitich to the Respondent had denied witnessing the document. The Respondent did not also respond to the Applicant's claim that the transfer, title and certificates of searches held by the Respondent were disowned by the Land Registry. The Respondent also failed to demonstrate that he was at any time in possession of the suit property. The Respondent did not also respond to the claim that the instrument of transfer that was allegedly executed in his favour by Jonathan Toroitich was after investigations by the police found to be a forgery and that the same was the subject of an ongoing criminal case. I am satisfied that the Applicant has established an arguable case against the Respondent.

I am also satisfied that the Applicant is likely to suffer irreparable harm if the injunction sought is not granted. The Respondent has a parallel title whose validity has been brought into question. If the orders sought are not granted, the Respondent may sell the suit property thereby putting the same beyond the reach of the Applicant.

Due to the foregoing, I am satisfied that the Applicant has satisfied the conditions for grant of the orders of injunction sought. I wish to add that even if I was not satisfied that the Applicant has a prima facie case against the Respondent, I would have still issued an order for the maintenance of the existing status quo on the suit property pending the hearing of the suit. The property has two titles. There are accusations and counter accusations by the parties regarding the validity of each other's titles. Each is accusing the other of fraud. The issues raised cannot be determined by the court on affidavit evidence. In Ougo and Another v Otieno [1997] KLR 364, it was held that:

“the general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until

the dispute has been decided at the trial.”

The upshot of the foregoing is that the Applicant’s application dated 4th June 2020 has merit and is for granting. On the other hand, the Respondent’s application dated 18th June 2020 fails and is for dismissal.

Conclusion:

In conclusion, the Applicant’s Notice of Motion application dated 4th June 2020 is allowed in terms of prayers 4 and 5 thereof. I further order that pending the hearing and determination of this suit or further orders by the court, there shall be an order of inhibition inhibiting the registration of any other or further dealings with all that parcel of land known as L.R No. 1160/308, Title No. 99256. The Respondent’s Notice of Motion application dated 18th June 2020 is dismissed. The costs of the two applications shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF DECEMBER 2021

S. OKONG’O

JUDGE

RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM IN THE PRESENCE OF:

MR. LITORO FOR THE PLAINTIFF

MR. LANGAT FOR THE DEFENDANT

N/A FOR THE INTERESTED PARTY

MS. C. NYOKABI-COURT ASSISTANT



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