



No. 172

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CASE NO. 72 OF 2013

RACHEL MORAA MOCHAMA PLAINTIFF

VERSUS

PAUL TIRIMBA MACHOGU DEFENDANT

RULING

1. The plaintiff brought this suit against the defendant on 20th February, 2013 seeking three reliefs namely; a declaration that the plaintiff is the owner of Plot No. B/13 Gekomu within Kisii Municipality (hereinafter referred to as “**the suit property**”), a mandatory injunction to compel the defendant to vacate, open and give free and full access to the plaintiff of the said property, a permanent injunction to restrain the defendant from entering into, locking up and/or in any manner or way interfering with the said property and general damages.
2. The plaintiff’s suit was brought on the grounds that; at all material times, the plaintiff was the owner of the suit property which comprises of shops and residential premises which the plaintiff had leased out to one, **John Omari Bichanga** (hereinafter referred to only as “**Omari**”) for a term of 5 years and 3 months with effect from 1st January, 2011. Omari in turn sublet the suit property to other tenants on terms that were agreed between Omari and the said tenants. The Plaintiff claimed that on 2nd February, 2013, the defendant with his agents, servants and/or persons acting on his behalf without any justifiable cause or excuse irregularly and unlawfully invaded the suit property and evicted the persons who were in occupation thereof claiming that he is the lawful owner thereof. The defendant thereafter took possession of the suit property and has since prevented the plaintiff from gaining access to the same as a result of which the plaintiff has suffered loss and damage.
3. Together with the plaint, the plaintiff filed an application under certificate of urgency by way of Notice of Motion dated 20th February, 2013. In the application, the plaintiff sought a temporary injunction to restrain the defendant from entering into, locking up and/or in any manner interfering with the suit property and a temporary mandatory injunction compelling the defendant to vacate, open up and/or give free and full access of the suit property to the plaintiff. The plaintiff’s application was supported by the plaintiff’s affidavit sworn on 20th February, 2013 in which the plaintiff reiterated the contents of the plaint that I have highlighted hereinabove.
4. In summary, the plaintiff stated in the said affidavit that, she purchased the suit property from one, Nehemiah Okemwa Okenye in the year 2006 at a consideration of Ksh. 3,200,000.00. On or about 1st day of December, 2010, the plaintiff let the suit property to Omari on terms and conditions that were set out in the tenancy agreement of the same date. Omari in turn sub-let the suit property to third parties. On or about 2nd February, 2013, the plaintiff was informed by Omari that the tenants that Omari had sub-let in the suit property had been evicted and that Omari had received a letter

addressed to the plaintiff by the defendant's advocates demanding that the plaintiff do vacate the suit property immediately or risk eviction. Similar letters had been addressed to the tenants who were in occupation of the suit property. The said letters had alleged that the plaintiff had trespassed on **LR. No. Nyaribari Chache/ B/ B/ Boburia/6353** (hereinafter referred to as "**Plot No. 6353**") owned by the defendant.

5. The plaintiff carried out a search on Plot No. 6353 and noted that it was registered in the name of the defendant on 10th February, 2012. The plaintiff contended that if indeed the suit property is one and the same with Plot No. 6353 then the defendant purchased the same while the plaintiff was in possession and as such the defendant could have obtained possession from the plaintiff only through legal means after following the due process. The plaintiff contended that the defendant's forceful eviction of the plaintiff from the suit property was high handed, irregular and unlawful and the orders sought are appropriate in the circumstances to remedy the situation. The plaintiff annexed to her affidavit in support of the application, a copy of the Market Plot card No. 533 dated 13th April, 2006 for the suit property in her name, an agreement for sale dated 28th March, 2006 between the plaintiff and Nehemiah Okemwa (hereinafter referred to only as "**Okemwa**"), a copy of the tenancy agreement dated 1st December, 2010 between the plaintiff and Omari, a copy of a letter dated 14th January, 2013 addressed to the plaintiff by the defendant's advocates Kerosi Ondieki & Co. Advocates demanding that she vacates the suit property failure to which a suit would be filed against her, a copy of a letter from the defendant's said advocates addressed to the tenants who were in occupation of the suit property demanding that they vacate failure to which they risk being jailed and a copy of the register of Plot No. 6353.
6. The plaintiff's application was opposed by the defendant. Through a replying affidavit sworn on 26th February, 2013, the defendant urged the court to dismiss the plaintiff's application. The defendant contended that he bought Plot No. 6353 from one, **Lenah Moraa Oira** (hereinafter referred to only as "**Lenah**") on 20th January, 2012. Plot No. 6353 was a portion of what was formerly known as **LR. No. Nyaribari Chache/B/B/Boburia/2738** (hereinafter referred to as "**Plot No. 2738**") which was owned initially by Linah's father, one, **James Oira** (hereinafter referred to as "**Oira**"). Oira subdivided Plot No. 2738 in the year 1999 into two portions namely, Plot No. 6353 and Plot No. 6354 which is not the subject of this suit and caused Plot No. 6353 to be transferred to Lenah. Prior to the said sub-division, Oira had filed a case at the Chief Magistrate's Court at Kisii against among others Okemwa to restrain them from trespassing into Plot No. 2738. That was in **Kisii Chief Magistrate's Court, Civil Case No. 431 of 1997** (hereinafter referred to as "**the civil case**") in which case, judgment was delivered on 13th December, 2005 in favour of Oira.
7. The defendant contended that before he purchased the suit property, he did a search on the title of Plot No. 6353 which search confirmed that the same was registered in the name of Lenah as the proprietor thereof. The defendant contended that Okemwa having lost the civil case had no interest on Plot No. 2738 that he could have lawfully transferred to the plaintiff and that the plaintiff has no registrable claim over Plot No. 6353 either from the Municipality of Kisii or from Okemwa. The defendant also wondered how the plaintiff could have purchased the suit property from Okemwa while it was apparently allotted to her by the Kisii Municipality Council on 5th April, 1995. The defendant contended that he purchased Plot No. 6353 innocently for valuable consideration without any notice of any unregistered or adverse interest affecting its title. The defendant contended that as an innocent purchaser for value he has an indefeasible title of Plot No. 6353 which entitles him to keep out any trespassers thereto. The defendant contended that since acquiring Plot No. 6353 he has incurred substantial expenses in order to develop the same. The defendant contended further that having lawfully purchased Plot No. 6353 and taken possession thereof the balance of convenience would tilt in his favour.
8. Finally, the defendant contended that if the court is inclined to grant the orders sought by the plaintiff, the plaintiff should be ordered to deposit an amount of up to Ksh. 12.5 million as a security for damages and costs that the defendant is likely to incur as a result of injunction being granted.
9. On 27th May, 2013, the advocates for the parties agreed to argue the plaintiff's application by way of written submissions. The plaintiff's advocates filed their submissions on 11th June, 2013 while the defendant's advocates filed their submissions in reply on 1st July, 2013.

10. I have considered the plaintiff's application and the affidavit filed in opposition thereto by the defendant. I have also considered the written submissions filed by the advocates for both parties and the authorities cited in support of their respective submissions. This is the view I take of the matter. The Plaintiff has in his application sought both prohibitory and mandatory injunction at this interlocutory stage.
11. The principles applicable to applications of this nature are now well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for a temporary injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that, unless the order sought is granted, he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. For a temporary mandatory injunction, an applicant must establish more than a prima facie case. The granting of a temporary mandatory injunction effectively determines a case without the benefit of a trial. An applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial.
12. The likelihood of success here must be higher than that which is required for a prohibitory injunction. Such an applicant must also fulfill the usual conditions for granting the normal interlocutory injunction such as showing that he will suffer irreparable harm unless the orders sought are granted. In the case of **Shepherd Homes Ltd. –vs.- Sandham [1971] 1 ch.304**, that was cited by Ibrahim J. (as he then was) in the case of, **Kenya Hotels Ltd. vs. Kenya Commercial Bank Ltd. & Another** that was relied upon by the plaintiff in her submissions, **Meggary J.** had this to say on interlocutory mandatory injunctions;

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

13. In the case of **Redland Bricks Ltd vs. Morris [1970] AC 652**, it was stated that jurisdiction to issue a mandatory injunction“ **is a jurisdiction to be exercised sparingly and with caution but in a proper case, unhesitatingly**”. In the Court of Appeal case of, **Jaj Super Power Cash and Carry Limited vs. Nairobi City Council & 2 others, Nairobi, Civil Appeal No. 11 of 2002 (unreported)**, the court observed that a mandatory injunction at an interlocutory stage.....**“merely serves to redress the status quo ante in deserving cases until the main dispute is determined.”** Applying the foregoing principles to this case, the question that I need to answer is whether the plaintiff has satisfied this court that she has unusually strong and clear case against the defendant that warrants the issuance of the prohibitory and mandatory interlocutory injunctions sought.
14. It is not disputed that the suit property and Plot No. 6353 are one and the same parcel of land on the ground. How the suit property changed to be Plot No. 6353 or vice versa is a matter for the trial court to determine. It is not disputed that the plaintiff was in occupation of the suit property at all material times until 2nd February, 2013 or thereabouts when the defendant by himself and/or through his agents forcefully evicted her and her tenants therefrom. It is not disputed that the defendant was aware of the plaintiff's interest in the suit property and that she was in occupation of the same and had let out the same to a tenant.
15. This fact is very clear from the letters that were addressed to the plaintiff and her tenants by the defendant's advocates, Kerosi Ondieki & Company Advocates on 14th January, 2013. The plaintiff has claimed that the suit property is a market plot that belongs to Kisii Municipal Council and that she purchased the suit property from Okemwa who had been allotted the same by the said Kisii Municipal Council at a consideration of Ksh. 3,200,000.00. The plaintiff has exhibited a Market Plot Card No. 533 that was issued by Kisii Municipal Council in her favour on 13th April, 2006 after she purchased the suit property from Okemwa on 28th March, 2006.

16. The plaintiff has contended and demonstrated that she has been in possession of the suit property since she acquired the same from Okemwa in the year 2006. The defendant has contended that Okemwa had no interest in the suit property that he could pass to the plaintiff having lost the civil case. I have noted a number of things in the judgment that was made in the civil case that the defendant has put reliance on for his contention that Okemwa could not pass a good title to the plaintiff. First, that judgment concerned Plot No. 2738. It neither concerned the suit property nor Plot No. 6353 which are the subject of this suit. I do appreciate the fact that Plot No. 6353 is a sub-division of Plot No. 2738. This however does not make the two parcels of land one and the same. It should also be noted that the said Plot No. 2738 was sub-divided to give rise to Plot No. 6353 and Plot No. 6354 while the civil case was still pending determination. That means that as at the time the decision that the defendant has put reliance was made on 13th December, 2005, Plot No. 2738 with respect to which the court had declared among others, Okemwa as trespassers and issued an injunction restraining them from having any dealing therewith was not in existence.
17. Secondly, Oira's case against Okemwa in the civil case from the summary that is given in the said judgment was that Okemwa was his neighbor and that Okemwa had engaged a contractor to put up a building on Okemwa's parcel of land and that the said contractor had in the process of carrying out Okemwa's said instructions built a foundation for a storey building that encroached on Oira's then Plot No. 2738. The details of Okemwa's parcel of land on which the storey building was being put up that neighbored Oira's Plot No. 2738 is not clear from the said judgment but there is all probability that the storey building that is referred to in the civil case judgment is the one in dispute in this case. The case against Okemwa in the civil case was not about the title of the property on which Okemwa was putting up the storey building but the encroachment of the said building onto Oira's Plot No. 2738.
18. It is not therefore correct to argue as the defendant has done herein that the issue as to the validity of Okemwa's interest in the suit property had been determined in the civil case and that the judgment in that case stripped Okemwa of any title over the suit property. The defendant has argued further that he is an innocent purchaser of the suit property for value without notice of the plaintiff's interest therein. The defendant was registered as the proprietor of Plot No. 6353 on 10th February, 2012. As I have stated above, as at that date, the plaintiff was in possession of the suit property having purchased the same from Okemwa in the year 2006. The defendant must be deemed to have been aware of the plaintiff's occupation going by the contents of the agreement for sale that the defendant entered into with Lenah. It follows that the defendant acquired his title to Plot No. 6353 while the plaintiff was in possession thereof.
19. Although the plaintiff's interest in the suit property was not registered and as such the 1st defendant couldn't have had notice thereof as alleged, in my view, the plaintiff's occupation and possession of the suit property created an overriding interest to which the suit property was subject to. The defendant who acquired Plot No. 6353 with the Plaintiff in occupation did so subject to the plaintiff's right of occupation even if it is assumed for argument sake that the plaintiff had no other interest on the suit property. This is in accordance with section 30 (g) of the Registered Land Act, Cap. 300 Laws of Kenya (now repealed) under which Plot No. 6353 is registered.
20. The defendant has argued further that as a registered proprietor of the suit property, he was entitled to keep out any trespassers therefrom. In my view what the defendant engaged in amounted to taking the law into his hands. It is for the court to declare the plaintiff and her tenants as trespassers on the suit property or on Plot No. 6353. The defendant had no right to declare the plaintiff as a trespasser on the Plot No. 6353 and to proceed to forcefully evict her therefrom.
21. I am satisfied from the foregoing that the plaintiff has established a prima facie case against the defendant with a probability of success. I am also persuaded that unless the orders sought are granted, the plaintiff stands to suffer irreparable harm. The plaintiff purchased the suit property as she claims at a sum of Ksh. 3,200,000.00. She had rented it out to tenants who were paying her rents. The said tenants were forcefully thrown out by the defendant without following the due process. The plaintiff who has been dispossessed of the suit property in such a manner would no doubt suffer irreparable harm unless an injunction is granted to restore the status quo that was prevailing prior to the unlawful eviction.
22. As was held in the case of **Aikman-vs-Muchoki [1984] KLR 353**, the defendant herein cannot be allowed by the court to keep what he has unlawfully taken from the plaintiff. It would only be fair that the parties do revert to the status quo that was prevailing before the defendant's forceful

eviction of the plaintiff. This is what a mandatory injunction is supposed to achieve. In the case of **Kamau Mucuha-vs- The Ripples Ltd. (Civil Application No. Nai. 186 of 1992) (unreported)**, Justice Cockar, JA stated that, “ **A party, as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.....**” . In the case of **Jaj Superpower Cash and Carry Ltd. –vs- Nairobi City Council & 2 others, Court of Appeal at Nairobi, Civil Appeal No.111 of 2002(unreported)**, the Court of Appeal said this at page 10, “**.....a wrong doer cannot keep what he has taken because he can pay for it.**”

23.I have said enough to show that the plaintiff’s application dated 20th February, 2013 is for granting. I have considered the defendant’s plea that the plaintiff be ordered to deposit security for damages. I have come to the conclusion that no basis has been laid for such order. Taking into account the manner in which the plaintiff was evicted from the suit property, it would be inequitable to impose such a condition upon the plaintiff. The plaintiff’s application dated 20th February, 2013 is hereby allowed in terms of prayers (d) and (e) thereof. The plaintiff shall have the costs of the application.

Delivered, dated and signed at KISII this 29th day of November, 2013.

S. OKONG’O

JUDGE

In the presence of:

Mr. Soire for the plaintiff

N/A for the defendant

Mobisa Court clerk

S. OKONG’O

JUDGE