



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.199 OF 2014

LUCAS NYAMBEGERA NYANGWESO PLAINTIFF

VERSUS

FRED NYAMOKERI 1ST DEFENDANT

PROFESSOR JOHN SOLANA AKAMA 2ND DEFENDANT

RULING

1. In his plaint dated 19th May 2014 and filed herein on 21st May 2014, the plaintiff has claimed that on or about 24th February 1990, he purchased a parcel of land known as **Plot No. 48^G Nubian village** (hereinafter referred to only as “**Plot No. 48^G**”) from one, Nelson Gichana Mabeya at a consideration of kshs. 200,000/=. The plaintiff has claimed further that he occupied Plot No. 48G quietly and peacefully until the year 2006 when he discovered that some people who were unknown to him had illegally, unlawfully and without his knowledge or consent purported to sub-divide Plot No. 48G into five (5) portions namely Y, U, V, W and X (hereinafter referred to **Plot Nos. “Y”, “U”, “V”, “W” and “X”** respectively). The plaintiff has claimed that on or about 11th June, 1998 the commissioner of lands allotted to him Plot No. “U” which has been given land reference number **Kisii Municipality/Block I/1022** (hereinafter referred to as “**Plot No. 1022**” after survey and that he is in the process of acquiring a lease and other title documents in relation thereto. The plaintiff has claimed that between the year 2006 and the month of November 2013, some unknown people and/or the 1st and 2nd defendants illegally, unlawfully and without the plaintiff’s knowledge purported to subdivide Plot No. U aforesaid into two (2) portions namely, Plot No. 478 and Plot No. 595. The plaintiff has claimed that the 1st defendant has now illegally laid a claim to Plot No. 595 while the 2nd defendant has laid a claim in a similar manner to Plot No. 478. The plaintiff has claimed that in the month of November, 2013, the 2nd defendant destroyed a fence that he had erected around Plot No. “U” and put up a new fence in the middle of the same parcel of land. The plaintiff has claimed further that between 1st May, 2014 and 15th May, 2014 the 1st defendant entered Plot No. “U” without the plaintiff’s permission or consent and commenced construction works thereon. The plaintiff has claimed that the claims that have been put forward by the defendants over Plot No. “U” are based on fake documents and as such are legally untenable.

2. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 19th May 2014 seeking a temporary injunction to restrain the defendants from entering into, trespassing on, developing, building, constructing and/or erecting any permanent buildings and/or structures of any type on, transferring, selling, mortgaging, charging and/or dealing in any manner whatsoever with Plot No. 1022 which, was formerly known as Plot No. “U” pending the hearing and determination of this suit. The

plaintiff's application was supported by the plaintiff's affidavit sworn on 19th May 2014 in which the plaintiff reiterated the contents of the plaint that I have highlighted at the beginning of this ruling. The plaintiff annexed to the said affidavit among others; a copy of an agreement for sale dated 24th February 1990 between the plaintiff and Nelson Gichana Mabeya in respect of Plot No. 48G, a copy of a letter dated 23rd March 2006 by the Land Officer, Kisii to the commissioner of lands confirming that the plaintiff is the owner of Plot No. 48G, a copy of a letter dated 29th March 2007 by the town clerk, Municipal Council of Kisii to the commissioner of lands confirming that the plaintiff is the owner of Plot No. 48G, a copy of a certificate of lease dated 18th November 2013 for LR No. Kisii Municipality/Block I/1012 (hereinafter referred to as "**Plot No. 1012**"), a copy of a letter of allotment dated 11th June 1998 for Plot No. "U", a copy of a letter dated 28th April 2014 by the National Land Commission to the Director of surveys regarding Plot No. 1022 and copies of photographs said to be of the activities being carried out on Plot No. "U". The plaintiff has contended that the activities being carried out by the defendants on Plot No. "U" aforesaid amounts to trespass and have infringed and/or interfered with the plaintiff's quiet and peaceful occupation of the said parcel of land.

3. The plaintiff's application was opposed by the defendants. The 1st defendant filed a replying affidavit sworn on 27th May 2014 in which he deposed that he is a stranger to the plaintiff's claim against him. The 1st defendant deposed that it is his wife who owns a parcel of land at Nubia area within Kisii Township and not himself contrary to the plaintiff's claims. The 1st defendant has contended that he has been wrongly sued as he owns neither Plot No. 478 nor Plot No. 595. On his part, the 2nd defendant opposed the plaintiff's application through grounds of opposition dated 24th June 2014 and replying affidavit sworn on 4th July 2014. In his grounds of opposition, the 2nd defendant termed the plaintiff's application as misconceived, incompetent, legally untenable and an abuse of the process of the court. The 2nd defendant contended that the plaintiff has not adduced any evidence to support his claim over Plot No. 1022 and as such he has not established a prima facie case against the defendants with a probability of success. In his replying affidavit the 2nd defendant contended that Plot No. 1022 claimed by the plaintiff herein is nonexistent and that Plot No. 478 in respect of which the plaintiff has accused the 2nd defendant of laying an illegal claim is owned by an entity known as Rondoni Investments that purchased the same from one, Prisca Kerubo Nyarieko. The 2nd defendant has contended that he is only a director of Rondoni Investments and as such he has been wrongly sued.

4. On 16th October 2014, I directed that the plaintiff's application be argued by way of written submissions. The plaintiff and the 2nd defendant filed their respective submissions on 7th November 2014 and 17th November 2014 respectively. The 1st defendant did not file his written submissions within the time that was fixed by the court. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavits and grounds of opposition filed by the defendants in opposition to the application. Finally, I have considered the written submissions by the advocates for the plaintiff and the 2nd defendant and the authorities cited in support thereof. The principles upon which the court proceeds while considering an application for a temporary injunction are now well settled. In the case of **Mr Rao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, the court of appeal held that the principles for granting an interlocutory injunction are that:-

- (a) **The applicant must show a prima facie case with a probability of success.**
- (b) **An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.**
- (c) **If the court is in doubt, it will decide the application on the balance of convenience.**

In the same case, the court defined a prima facie case as "**...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.”

5. In the application before me, the plaintiff has sought a temporary injunction to restrain the defendants from dealing in any manner whatsoever with Plot No. 1022 which was formerly known as Plot No. “U”. The plaintiff has contended that Plot No. “U” was allocated to him on 11th June 1998 by the commissioner of lands and that the said parcel of land has been surveyed and given land reference number 1022. The plaintiff has contended that the commissioner of lands is in the process of issuing him with a lease in respect of Plot No. 1022 after which he will be issued with a certificate of lease. The plaintiff has exhibited a copy of a letter of allotment dated 11th June 1998 and a copy of a letter addressed to the Director of Surveys by the National Land Commission dated 28th April 2014 requesting the Director of surveys to amend the registry index map in relation to Plot No. 1022. The plaintiff has also exhibited a copy of a survey plan for Plot No. 1022. The said survey plan was examined, approved and authenticated on 16th April 2014. The plaintiff has contended that after the allotment of Plot No. “U” to him as aforesaid and while he was waiting to be issued with a title in respect of the said parcel of land, the 1st and 2nd defendants together with other persons who are unknown to him caused Plot No. “U” to be subdivided into two portions namely, Plot No. 478 and Plot No. 595. The process of sub-dividing Plot No. “U” was carried out between the year 2006 and the month of November, 2013. The plaintiff has contended that the 1st defendant has since laid a claim to Plot No. 595 while the 2nd defendant has laid a claim to Plot No. 478.

6. The plaintiff has contended that the defendants have entered into Plot No. “U” without his permission and taken possession thereof. The 1st defendant has commenced construction of building on the alleged Plot No. 595 while the 2nd defendant has put up a fence around what is purported to be Plot No. 478. The plaintiff’s contention is that the defendants alleged titles over Plot No. 478 and 595 are fraudulent and illegal because the same have not been acquired in a lawful manner. In the circumstances, it is the plaintiff’s case that the entry by the defendants into Plot No. “U” in the guise that what they have entered into are Plot No. 478 and 595 is illegal and amounts to trespass on Plot No. “U” now Plot No. 1022. The defendants have both denied the plaintiff’s claim against them. The 1st defendant has claimed that he has been wrongly sued in that he is not the owner of Plot No. 595 which the plaintiff claims to have been created or curved from Plot No. “U”. The 1st defendant has contended that the said parcel of land is owned by his wife. The 1st defendant has denied the allegations of trespass leveled against him by the plaintiff. On his part, the 2nd defendant has claimed that Plot No. 478 which the plaintiff claims to have been created or curved from Plot No. “U” is registered in the name of an entity known as Rondoni Investment which the 2nd defendant has claimed to be a limited liability company. The 2nd defendant has contended that he is only a director of Rondoni Investment and as such he is not liable to be sued on behalf of the said company. The 2nd defendant has exhibited a certificate of lease in respect of Plot No. 478 issued in favour of Rondoni Investment and a certificate of official search on the title of the said parcel of land which shows that it was previously registered in the name of Prisca Kerubo Nyarieko before it was transferred to Rondoni Investment on 10th June 2014.

7. The 2nd defendant has contended that Plot No. 1022 (formerly Plot No. “U”) which is the basis of this suit and the present application is non-existent. In his submission, the plaintiff has contended that the 1st defendant is dishonest and is guilty of concealment of material facts. The plaintiff has submitted that it is the 1st defendant who had entered into Plot No. 1022 and started carrying out construction works thereon. The plaintiff has submitted that the 1st defendant has an interest in Plot No. 595 and as such he should not be allowed to hide behind academic or technical arguments. With regard to the stand taken by the 2nd defendant, the plaintiff submitted that the documents submitted to court by the 2nd defendant in support of his defence are illegal, contradictory, inconsistent and fraudulent. The plaintiff has contended that Rondoni Investment is a business name and not a limited liability company. The plaintiff submitted that as a business name, Rondoni Investment has no capacity to own a property in its name. The plaintiff submitted further that the said Rondoni Investment was registered as proprietor of Plot No. 478 after the filing of this suit which means that it did not own the said parcel of land when the cause of action herein

arose.

8. The plaintiff has also pointed out the inconsistency between the certificate of lease and certificate of official search exhibited by the 2nd defendant with regard to the measurement of Plot No. 478 and the date when the said parcel of land was registered in the name of Rondoni Investment. To be able to establish a prima facie case, the plaintiff had the onus of establishing the existence of Plot No. 1022 and his ownership rights over the same. The plaintiff also had a duty to establish that Plot Nos. 478 and 595 were created from or carved out of Plot No. 1022 or Plot No. “U” and that the creation of the said parcels of land was illegal and fraudulent. Finally, the plaintiff had a duty of connecting the defendants before the court to the two parcels of land namely, Plot No. 478 and Plot No. 595 and their alleged illegal and fraudulent creation.

9. As I have stated above, the only relevant material that the plaintiff has placed before the court in proof of his ownership of Plot No. 1022 are the letters of allotment dated 11th June 1998, the letter by the National land Commission dated 28th April 2014 and the survey plan that was examined, approved and authenticated on 16th April 2014. I am of the opinion that these documents cannot confer title over Plot No. 1022 upon the plaintiff. Once the plaintiff was issued with the letter of allotment dated 11th June 1998, the plaintiff had to meet the conditions that are set out thereunder after which a lease was to be issued and signed by the plaintiff and the commissioner of lands. It is upon the registration of this lease that the plaintiff could be issued with a certificate of lease in testimony of his ownership of the leasehold interest in Plot No. 1022. In the Court of Appeal, **Civil Application No. Nai. 60 of 1997, Dr. Joseph N. K ArapNg’ok –vs- Justice Moiwo Ole Keiwua & 4 Others (unreported)**, the court stated that, **“It is trite that such title to landed property can only come into existence after issuance of letters of allotment, meeting conditions stated in such letter and actual issuance thereafter of title documents pursuant to the provisions in the Act under which the property is held”**. It is not in dispute that the plaintiff has not been issued with a lease in respect of the suit property. The plaintiff has stated in his affidavit in support of the application herein and in his submissions that the process of issuing him with a lease and a certificate of lease is on course.

10. In the absence of a duly executed and registered lease, I am not satisfied on a prima facie basis that the plaintiff is the owner of Plot No. 1022. Although the plaintiff has claimed that Plot No. 478 and 595 were created illegally and unlawfully, the plaintiff has placed no evidence in support of his allegations and the defendants’ involvement in the same. I have no evidence before me that Plot No. 478 and Plot No. 595 were created from Plot No. 1022 that was formerly known as Plot No. “U” that had been allocated to the plaintiff. I have no evidence as to when the two plots were created more particularly whether the same came about after or before the allotment of Plot No. “U” to the plaintiff. The plaintiff has also not satisfied me that the defendants are the owners of Plot No. 478 and 595 and that the activities being complained of are being undertaken by them. The plaintiff has not contested the 1st defendant’s claim that he is not the owner of Plot No. 595. The 1st defendant has contended that the said property is owned by his wife. The plaintiff has not placed before the court a certificate of official search on the title of the said property to disapprove the 1st defendant’s contention. The 2nd defendant has also contended that he is not the owner of Plot No. 478. The 2nd defendant has placed material before the court to show that the said parcel of land is owned by an entity known as Rondoni Investment. The 2nd defendant has contended that this entity is a limited liability company in which he is only a director. Although the plaintiff has contested the corporate status of Rondoni Investment, he has placed before the court no evidence in support of his contention that the entity is a business name and not a limited liability company. A simple search at the registry of companies would have laid the issue conclusively to rest.

11. For the forgoing reasons, I am not satisfied that the plaintiff has established a prima facie case against the defendants. The plaintiff has failed to establish the existence of Plot No. 1022, his title over the same and the defendants’ trespass thereon. That being my finding, I am not obliged to consider whether the plaintiff would suffer irreparable injury if the orders sought are not granted. The upshot of the foregoing is that the plaintiff’s application dated 19th May 2014 has no merit. The same is accordingly dismissed with cost to the defendants.

Delivered, signed and dated at KISII this 13th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Mose L. h/b for Mr. Oyugi for the plaintiff

N/A for the 1st defendant

Mr. Bigogo h/b for Mr. Oguttu for the 2nd defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE