



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 1162 OF 2014

JOHN FORO NJENGA.....PLAINTIFF

VERSUS

FRANCIS KAMANDE WANJIKU.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 29th August 2014 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendant/Respondent from entering, encroaching, dealing or in any other way interfering with the Plaintiff's occupation and possession of the property known as Plot No. 174 in L.R. No. 8469/4 Umagara Wiyonere, Kasarani (hereinafter referred to as the "suit property") pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, John Foro Njenga, sworn on 29th August 2014 in which he averred that he is the owner of the suit property, having purchased it from Umagara Wiyonere Company in the year 1985. He annexed a copy of his Plot Ownership Certificate dated 17th May 1985 as proof of this assertion. He further averred that he also paid Kshs. 5,510/- and Kshs. 1,500/- to the said Company being the cost for survey, planning, city commission and others. He annexed the various receipts to this effect. He then averred that since purchase, he has been in quiet possession of the suit property up until 18th July 2014 when he received a phone call from his son informing him that somebody was building on the suit property. He averred that he reported the matter to the area Chief, Mr. Kingori with whom he visited the site and found workers who were uncooperative. He further averred that he visited the head office of Umagara Wiyonere and found one of the directors by the name S.G. Maina who after checking their documents and records confirmed that the suit property was is and has never changed hands or been interfered with. He further averred that he reported the matter to the CID Headquarters who further confirmed his ownership of the suit property. It was his further assertion that according to the said Company's register, the Defendant/Respondent owns Plot No. 755 and not the suit property upon which he is building. On those grounds, he sought for this Application to be allowed.

The Application is contested. The Defendant/Respondent, Francis Kamande Wanjiku, filed his Replying Affidavit sworn on 16th September 2014 in which he averred that it is not true that he is in occupation of the suit property. It was his averment that he is in occupation of Plot No. 755 which he bought from one Stephen Njuguna Kamau, the previous owner thereof vide a Sale of Agreement dated 9th October 2013, a copy of which he annexed. It was his further averment that following that purchase, he paid the transfer

fees to Umagara Wiyonere Company Ltd and annexed a copy of the receipt he was issued. He further averred that he was given a map of the area which he annexed. He further averred that he immediately took possession of Plot No. 755 where he has constructed a building which cost him Kshs. 7 million. He annexed photos of the building. He denied that the Plaintiff/Applicant had been in quiet possession of the plot. He denied being on the suit property and requested this court to dismiss this Application with costs.

In response thereto, the Plaintiff/Applicant filed his further Supporting Affidavit sworn on 14th November 2014 in which he averred that the location where the Defendant/Respondent is constructing is not Plot No. 755 but the suit property according to Umagara Wiyonere Company Ltd. It was his further averment that he had procured a copy of the area map from the said company which confirmed that the location in which the Defendant/Respondent has constructed the building is the suit property and not Plot No. 755.

The issue that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiff/Applicant. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant 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.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must point out to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

With that background laid down, I turn to assessing whether or not the Plaintiff/Applicant has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial. This turns on whether he has demonstrated his ownership of the suit property. As proof of his ownership of the suit property, the Plaintiff/Applicant annexed a copy of his Plot Ownership Certificate dated 17th May 1985 issued by Umagara Wiyonere Company Ltd. He also annexed various receipts issued by the same company as evidence of payment of various outgoings in respect to the suit property. The Defendant/Respondent denies of any knowledge or occupation of the suit property, stating that he owns a different plot known as Plot No. 755. The Defendant/Respondent asserted that the location he is in occupation of is not the suit property but Plot No. 755. The Defendant/Respondent did not annex any ownership certificate from Umagara Wiyonere Company Ltd but did produce an extract of the register from this company to show that his plot is different from the suit property. At this stage of the proceedings, it is not possible to ascertain whether the land where the Defendant/Respondent has constructed is the suit property or Plot No. 755. Further, though both parties claim to have transacted with Umagara Wiyonere Company Ltd,

this company is not a party to this suit and is therefore not able to shed any light in this dispute. In the circumstances, this court rules that it is not in a position to make a positive determination at this interlocutory stage as to whom, as between the Plaintiff and the Defendant owns the suit property. This is an issue that will only be determined with finality once the suit is heard. To that extent therefore, this Application is dismissed but this court orders the parties herein to maintain the status quo presently prevailing on the suit property pending the hearing and determination of this suit.

It is so ordered.

DELIVERED, SIGNED AND DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE