



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 751 OF 2015

ESTHER WAMBUI KAMAUPLAINTIFF

VERSUS

JOSEPH KAMAU GACHECHA.....1ST DEFENDANT

ESTHER NJOKI IRUNGU.....2ND DEFENDANT

WAKIBUI HELP GROUP INVESTMENT.....3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 31st July 2015 in which the Plaintiff/Applicant seeks orders of temporary injunction restraining the Defendants/Respondents from trespassing upon, selling, alienating, encroaching and/or in any manner whatsoever interfering with the parcel of land known as 9V located at Ruiru Murera measuring approximately 40 by 60 feet (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit, that the Defendants/Respondents be evicted from the suit property and further that the Officer Commanding Ruiru Police Station do assist in enforcing this order.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff/Applicant, Esther Wambui Kamau, sworn on 31st July 2015 in which she averred that she is the proprietor of the suit property having purchased the same from the 2nd Defendant/Respondent at a cost of Kshs. 450,000/- vide a Sale Agreement dated 25th June 2013. She added that the payment was effected in the offices of the 3rd Defendant/Respondent where she paid Kshs. 20,000/- to the 3rd Defendant/Respondent being transfer fees. She further averred that she was issued with a Certificate number 1953 in her name and she commenced developing the same. She further averred that subsequently, the 1st Defendant/Respondent entered into the suit property claiming ownership of the same, fenced it and started depositing building materials thereon. She averred that she reported this incident to the CID Ruiru whereupon she was advised by the police that this is a civil matter and she had to obtain a court order from the court. She added that she has not entered into any lease with the 1st Defendant/Respondent and he entered into the suit property without her authority, permission, consent, approval or knowledge and this amounts to trespass.

The Application is contested. The 1st Defendant/Respondent, Joseph Kimani Gatheca, filed his Replying

Affidavit sworn on 9th September 2015 in which he averred that on 13th January 2007, he entered into a sale agreement with one Margaret Ngendo Wambaki for the purchase of a parcel of land known as Ruiru/Ruiru East Block 2/909. He averred that the court issued a Confirmation of Grant and the said parcel of land devolved to Margaret Ngendo Wambaki. He annexed a copy of the Certificate of Confirmation of Grant dated 3rd February 2006. He further averred that he is therefore the current registered owner of that parcel of land since November 2009. He annexed a copy of the Green Card in support of that assertion. He further averred that it is this parcel of land that the Plaintiff and other people have invaded, subdivided into small parcels one of which is the suit property. He added that being the holder of the title to that land, the Plaintiff is a trespasser on the suit property. He stated further that he has not sold a portion of his land to the Plaintiff or to any other person. He added that there is another suit before this court being **ELC No. 1040 of 2012** brought against him by various other people who have invaded his parcel of land. He stated further that he has severally approached the Plaintiff/Applicant among other occupants to vacate his land but they have refused. He requested the court to order the Plaintiff/Applicant and the other occupants to vacate his land.

The Plaintiff/Applicant and the 1st Defendant/Respondent filed their respective written submissions.

The issue arising for my determination is whether or not to issue the temporary injunction and eviction order sought after 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 warn 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 adopt the position that the suit property is a part of the parcel of land known as Ruiru/Ruiru East Block 2/909. This position was put forward by the 1st Defendant/Respondent but was not challenged by the Plaintiff/Applicant by way of a further affidavit or otherwise. I will therefore take this to be the factual position on the ground. That being the case, the Plaintiff/Applicant’s claim of ownership to the suit property has been challenged by the superior claim of ownership thereof by the 1st Defendant/Respondent who produced a copy of the green card for Ruiru/Ruiru East Block 2/909 showing that he was issued with a title deed to that land on 2nd December 2009. The law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1)** of the **Land Registration Act**

provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The Plaintiff/Applicant has not in any way challenged the validity of the 1st Defendant/Respondent’s title document to the suit property on the grounds cited above or otherwise. In the circumstances, I find no difficulty in finding, albeit on a preliminary basis, that the suit property belongs to the 1st Defendant/Respondent and the Plaintiff/Applicant has no valid claim thereto. Therefore, the Plaintiff/Applicant has failed to demonstrate that she has a prima facie case with high chances of success in the main trial.

Since the Plaintiff/Applicant has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

Also, in the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the Court of Appeal had this to say:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

In light of the foregoing, I hereby dismiss this Application. Each party shall bear their own costs.

DELIVERED AND SIGNED IN NAIROBI THIS 19TH DAY OF AUGUST 2016.

MARY M. GITUMBI

JUDGE