



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIROMENT AND LAND CASE NO. 238 OF 2012

IBRAHIM MUDE HUSSEINPLAINTIFF

VERSUS

JOHN WILLIAM NAMASAKA.....DEFENDANT

R U L I N G

1. This application is dated 17th December, 2012 and seeks orders:-

1) That Court certify matter urgent and dispense with service.

2) That Court do restrain the Defendant/Respondent, his agents servants or anybody claiming through him from entering, developing, trespassing or whatsoever constructing or interfering with Isiolo Township Block 1 /318 until further orders of the court or until suit herein is heard and determined.

3) That court do make any other orders for ends of justice.

4) That costs be provided for.

2. The application is supported by the Affidavit of IBRAHIM MUDE HUSSEIN, the applicant , and has the following grounds:-

(a) The Plaintiff /Applicant is the lawful allottee and holder of lease of Isiolo Township Block 1/318.

(b) The Defendant /Respondent has without any colour of right trespassed into the subject herein and started construction of permanent building and he is now on the ground floor.

(c) The continued Development is in violation of Applicant's constitutional right to property and will occasion him irreparable loss and damage as he will not be able to develop the same.

3. The parties have canvassed the application by way of Written Submissions.

4. From the pleadings and the apposite submissions, the Plaintiffs case is that he is the allottee of a plot at Isiolo numbered Isiolo Township Block 1/ 338. It is said that he paid the required survey fees and was issued with a lease for which he had a certificate of lease. He further says that he had a consent for the lease and a clearance certificate and had paid the required dues for the same. He also avers that he had paid a sum of Kshs. 149,000/= as rates.

5. The Plaintiff states that the respondent had moved into his plot and started construction of a permanent building. He avers that should the activities of the Defendant not be stopped through the issuance of an Injunctive Order, he stood to suffer irreparable damage not compensable by damages.
6. The Plaintiff says that he has established a prima facie case and that the balance of convenience tilts in his favour.
7. The Plaintiff has proffered the case of Rosemary Wanjiku Versus Martin W. Kinyanjui -Nairobi HCCC NO. 1676 of 1999, in support of his assertions.
8. The Defendant has opposed the application. He asserts that his plot is PDP. No. ISL/117/88/115 measuring 0.375 Ha on which he has erected a building and has been occupying since the year 2007.
9. The defendant takes issue with the authenticity of the documents produced by the Plaintiff in support of his ownership of the suit plot. He says that the letter of allotment is dated 1st October, 1992 and is in respect of an unsurveyed land whereas the land rates payment is paid in a lump of Kshs. 149,000/= in the year 2012, 20 years later.
10. The defendant argues that the letter of allotment is highly suspicious as it does not indicate a PDP number.
11. The defendant points out that the acreage given in the letter of allotment is 0.099 ha whereas the acreage given in the lease is 0.063 Ha.
12. The Defendant argues that this discrepancy read together with all the other contradictions in the Plaintiff's documents invites credible doubts concerning the integrity of the Plaintiffs documents.
13. The defendant states that he applied for the plot to the County Council of Isiolo in 1997 and the plot was allocated to him in 1998. The allocation was approved vide apposite minutes and a letter of no objection was written to the Commissioner of Lands who issued him with a letter of allotment for his plot measuring 0.375 ha.
14. The Defendant states that he has been paying the required land rates and as proof thereof he has annexed a bundle of documents.
15. The defendant submits that he submitted a building plan which was approved following which he commenced construction and completed the 1st floor in the year 2007 and rented the Building out to one JECINTA WANGECHI who runs an agrovet business thereon.
16. The Defendant says that the Plaintiff has not achieved the threshold for grant of Injunctive orders as enunciated by the case of *GIELLA VERSUS CASSMAN BROWN*. He says that he has a building on the disputed plot and has been paying rates on a yearly basis. He takes issue with the fact that the Plaintiff paid rates through a one-off-payment twenty years after he was allegedly allocated the suit plot.
17. I have considered the pleadings the submissions and the authorities cited by the parties.
18. The authorities proffered by the parties are good law in their circumstances. No one shoe size fits all when it comes to cases. Every case has its own peculiarities. The facts and circumstances of the Nairobi HCCC NO. 1676 of 1999, proffered by the defendant, are not congruent with those ones in this case. *Giella Versus Cassman Brown* is, of course, a good guidance regarding how courts should approach the methodology of granting or not granting Injunctive orders.
19. It is not controverted that the defendant has got a building on the suit plot. It is also not controverted that he has rented out his plot to a business woman who has conducted a business thereon for many years. The defendant has demonstrated that he has been paying rates to the County Council of Isiolo on a yearly and regular basis. This when juxtaposed with the plaintiff's one-off-payment of Kshs. 149,000

twenty years after he was allegedly allocated the suit plot persuades me to believe the defendant.

20. The Physical Planner's report sanctioned by this Court unequivocally states that PDP NO. ISL/117/98 as presented by the defendant is the only plan reflecting the position on the ground. It was forwarded to Court vide a letter dated 09/10/2013.

21. I need not reinvent the wheel. The Court of Appeal in *Mbuthia Versus Jumba Credit Corporation* [1988] KLR 1 eruditely elucidated the desirable approach in granting or not granting injunctive orders. Justice Platt, JA, opined as follows:-

“ The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court Judge in this case had gone far beyond his proper duties and made final findings of facts on disputed affidavits.”

22. I find that the weight of the propositions proffered by the defendant outweighs that one of the weight of the plaintiff's propositions. In the circumstances, I dismiss this application.

23. Costs shall be in the cause.

It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 19TH DAY OF DECEMBER, 2016 IN THE PRESENCE OF:-

C:A Daniel

Nyauchi for the Defendant

Manasses Kariuki h/b Miss Kiome for the Plaintiff

P.M.NJOROGE

JUDGE