



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 379 OF 2014

DAVID WAWERU GATHONI..... PLAINTIFF

(Suing as a legal representative of the estate of Hannah Gathoni wanjama –deceased)

VERSUS

JOSEPH KIPKEMOI RUTO.....
DEFENDANT

RULING

The plaintiff by a Notice of Motion application dated 27th March 2014 seeks an order of temporary injunction restraining the defendant by himself his servants and/or agents or any other person under his authority from continuing to construct a permanent structure or from entering into, remaining into the plaintiff's deceased mother's plot NO. **A54 Embakasi Utawala estate phase III** till this suit is heard and finalized. The plaintiff founds his application on the following grounds.

- a. The plaintiff stands to suffer irreparable damages by reason of the defendants trespass into his mother's plot NO. **A54 Embakasi Utawala estate phase III** as it is the only inheritance at his disposal.
- b. The defendant is not the rightful owner of the plot the subject of the suit.

Additionally the plaintiff relies on the affidavit he has sworn in support dated 27th March 2014. In the supporting affidavit the plaintiff depones that her late mother, **Hannah Gathoni Wanjama** was allocated plot NO. **A54 Embakasi Utawala estate phase III** by **Mathare Kwarahuka witeithie Uteithio** and annexes a copy of share certificate marked "**DWG2**". The plaintiff depones that he and his sister **Peris Wanjiru Gathoni** were the only beneficiaries of her late mother. The plaintiff further depones that the Defendant has unlawfully invaded the said plot and commenced developments as per the photographs annexed and marked "**DWG4**" and despite being requested to vacate the Defendant has refused and neglected to do so and persists in continuing with the Development. The plaintiff avers that the said **Mathare Kwarahuka, Witeithie Uteithio** have confirmed the subject plot belongs to my deceased mother as per the copy of letter dated 22/1/2014 annexed and marked "**DWG6**".

The Defendant filed a replying affidavit dated 11th April 2014 in opposition to the plaintiff's application. The Defendant depones that he is the legal owner of plot NO. **A54 Embakasi Utawala estate phase III** which he claims was sold to him by **Mathare Kwarahuka Witeithie Uteithio Investment** through a

deceased former director one **Samson Mburu Huho** on or about 28th February 1990. The defendant states that he purchased plots A54 and A55 and took possession and he has remained in possession since being issued with the certificates of allocation. Annexed are copies of the allotment certificates held by the Defendant marked “**JKR 1(a) & (b)**” dated 28th February 1990.

The Defendant deposes that he in December 2011 paid the City Council of Nairobi its dues as per the survey fees, stand premium rates and ground rent receipts annexed and marked “**JKR 2(a) & (b)**”. The Defendant denies invading the plaintiffs plot as alleged and states that it is the plaintiff who in 2011 when the Defendant had commenced development of plot **A54** who started laying claim to the plot without any justification. The Defendant states the certificate of allotment that the plaintiff basis his claim upon has been altered and indicates the plaintiff’s mother to have been allocated a different plot and was later altered to show the plot as **A54** from **A 19** (see annexure “**DWG2**”). The Defendant further contests the authenticity of the letter issued to the plaintiff by the Directors of **Mathare Kwarahuka Witeithie Uteithio** dated 22/1/2014 confirming the deceased mother to be the rightful owner of plot A54 and further points to the receipt for survey fees for plot NO. **A54** issued to the plaintiff by **Ngei Two Kugeria Co. Ltd** on 30/9/2009 to illustrate the inconsistency of the plaintiff’s claim.

The parties filed written submissions to ventilate their respective positions. The plaintiff filed his submissions together with a supplementary affidavit by the plaintiff sworn on 24th April 2014 where he annexes a letter by a director of **Mathare witeithie Uteithio** denouncing the letters of allotment issued to the defendant stating the same are not genuine although the same letter is stamped with the stamp of “**Ngei Two Kugeria Company Ltd**” who it is not explained who they are. The plaintiffs submissions are to the effect that the documents of ownership exhibited by the Defendant are not genuine. Likewise the thrust of the Defendants submissions is that the plaintiff’s exhibited documents of ownership are not genuine. The Defendant submits that he has been in possession of both plot **NOs A54 and A55** since 1990 when he purchased them fenced and commenced development in 2011. The Defendant points to the alteration in the plaintiffs certificate of allotment and the different companies that appear to be involved in the allocation to the plaintiff of the suit land to demonstrate the inconsistency in the plaintiff’s claim. In the premises the Defendant submits that the plaintiff has not demonstrated a prima facie case with a probability of success and/or that he stands to suffer irreparable damage that cannot be compensated in damages unless the injunction is granted.

The court has reviewed and considered the rival submissions by the parties and makes the following observations:-

- i. That the Defendant holds two certificates of allocation of plot **NOs A54 and A55** and is in possession of the two plots where he commenced construction in 2011.
- ii. The deceased mother held a certificate of allocation of plot **NO.22** which indicates the plot allotted was **A.19** but subsequently altered to plot **NO. A54**. This alteration is not countersigned and/or explained.
- iii. The Defendant has paid to the City Council of Nairobi the survey fees, stand premium fees and land rent fees for the two plots **A54 and A55** as per the annexed payment receipts.
- iv. The plaintiff paid survey fees to a company by the name **Ngei Two Kugeria Co. Ltd** whose relationship with the allocating company has not been explained.
- v. That although the directors of **Mathare Kwarahuka Witeithi Uteithio** have allegedly written letters confirming plot **A54** was allocated to the plaintiff’s deceased mother none of the directors has sworn an affidavit which in view of the inconsistencies pointed out by the defendant as to the signatures appearing and the unexplained company, **Ngei Two Kugeria Company Ltd** are of little probative value.

Having regard to all the circumstances and material placed before the court I am not satisfied the plaintiff has demonstrated a prima facie case with a probability of success. Both the plaintiff and the Defendant each have documents of ownership which they rely on to stake claim to plot **NO. A54**. The Defendants allocation as per his documents was earlier in time being 28th February 1990 as opposed to the plaintiff’s mother’s allocation on 27th July 1992. The alteration of the plaintiff’s mother’s plot from **A19** to **A54**

without any counter-signing casts doubt to its authenticity. It is instructive that the alteration was by hand while all the other details were type written. Who made the alteration and when? No answer to this query has been provided.

In the circumstances I hold the view that the plaintiff has not demonstrated a prima facie case with any probability of success and has not satisfied the conditions for grant of an interlocutory injunction as enunciated in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358**. The plaintiff has not demonstrated he stands to suffer irreparable damage if the injunction is not granted. The plaintiff has since 1992 not taken possession of the suit property. The plaintiff can be compensated the value of the subject property in case he is successful at the trial. The balance of convenience in the circumstances of this case would tilt in favour of the Defendant who is in possession and has effected developments on the property.

The upshot is that I find no merit in the Notice of Motion dated 27th March 2014 and the same is ordered dismissed with costs to the Defendant.

Ruling dated, signed and delivered at Nairobi this **30th** day of **January**, 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant