



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 925 OF 2014
ABDULLAH SEBIT & 30TH OTHERS

(RESIDENTS OF Salama Estate, Karanja Road, Phase 1...PLAINTIFFS

VERSUS

AMBER OSMAN.....1ST DEFENDANT

CHIEF REGISTRAR OF LANDS.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 14th July 2014 in which the Plaintiffs/Applicants seek for the following orders:

1. Spent.
2. That leave be granted to the Applicants to commence a representative suit on behalf of 30 residents of Salama Estate, Karanja Road Phase I, Nairobi.
3. That pending the inter-partes hearing of this Application, the Defendants/Respondents be restrained by a temporary injunction from entering into and/or remaining upon the parcel of land identified as Nairobi Block 61/50 previously known as L.R. No. 11239/50 Salama Estate, Karanja Road, Phase I Nairobi (hereinafter referred to as the “suit property”).
4. That pending the hearing and determination of the suit, the Defendants/Respondents be restrained by order of injunction from entering into and remaining up on the suit property.
5. That the OCS Kilimani Police Station do supervise the execution of the order to ensure compliance.
6. That the costs of this Application be awarded to the Plaintiffs.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Abdallah Sebit, one of the Plaintiffs, filed on 14th July 2014 in which he averred that he together with the other Plaintiffs purchased houses from the National Housing Corporation in Salama

Estate, Karanja Road Phase I, Nairobi. He further averred that there was an understanding with the National Housing Corporation that the suit property be earmarked for use as a children's playground. He further stated that the cost of the suit property was factored into the purchase price of each individual house in Salama Estate. He then stated that to their utter shock and dismay, sometimes in April 2014, the 1st Defendant/Respondent pulled down a fence put up by the residents on the suit property and began to dig trenches thereon in preparation for construction. He further stated that upon their enquiry, they came to learn that the 2nd Defendant/Respondent issued to the 1st Defendant/Respondent with a title deed over the suit property on 24th February 1989 without any regard to the rights of the Plaintiffs. They annexed a copy of the Certificate of Lease dated 2nd September 2010 in respect of the suit property bearing the name Asminah Osman Schaffler. He added that this was illegal and unlawful and against the rules of natural justice as the Plaintiffs are the rightful owners of the suit property having jointly paid for it.

The Application is contested. The 1st Defendant, Amber Osman, filed his Replying Affidavit sworn on 12th August 2014 in which he averred that he holds a Power of Attorney to represent Asminah Osman Schaffler, who is the registered proprietor of the suit property. He annexed a copy of the Power of Attorney as well as a copy of the Lease. He asserted that the said Asminah Osman Schaffler is the rightful owner of the suit property and that the Plaintiffs had not tendered any evidence to dispute that fact. He further averred that the Applicant has not filed papers to show that he represents 30 others who are neither named nor their authorization demonstrated. He added that the title held by Asminah Osman Schaffler cannot be impeached except on the ground of having been obtained through fraud, a fact that has not been proved by the Plaintiffs. He further indicated that all allegations that the Plaintiffs have beneficial ownership of the suit property remain untrue and unsubstantiated.

In response thereto, the Plaintiffs filed the Supplementary Affidavit sworn by Abdalla Sebit on 16th September 2014 in which he averred that they would demonstrate that the title held by the 1st Defendant/Respondent was fraudulently issued to him by the 2nd Defendant/Respondent. Further, he insisted that the suit property is a public utility plot.

Two issues emerge for my determination, the first being whether this is a representative suit and the second being whether to grant the Plaintiffs a temporary injunction pending the hearing and determination of this Application and suit.

To the first issue, the instructive law is **Order 1 Rule 8(1) of the Civil Procedure Rules, 2010** which provides as follows:

“Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders continued by or against any one or more of them as representing all or as representing all except one or more of them.”

The Plaintiff has brought this suit on his own behalf and on behalf of 30 other plaintiffs. The legal provision cited above clearly permits for this to be done where numerous persons have the same interest. The Plaintiffs are all claiming an interest in the suit property. No leave of court is required to commence a representative suit. Accordingly, I find that the suit is properly instituted.

The other issue that I must determine is whether I should grant the Plaintiffs/Applicants the orders of temporary injunction which they seek. In deciding whether to grant the temporary injunction sought after by the Plaintiffs/Applicants, 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.”

Have the Plaintiffs/Applicants 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.”

Have the Plaintiffs/Applicants demonstrated that they have a genuine and arguable case? The thrust of the Plaintiffs’ case is that they are the rightful owners of the suit property which is a playground for children. On the other hand, the Plaintiffs also contend that the suit property is a public utility plot. They state that they paid for the suit property in the purchase price they paid for the houses they bought from National Housing Corporation. However, no evidence has been supplied by the Plaintiffs to support their claim of ownership over the suit property. In fact, the Plaintiffs produced a copy of the Certificate of Title in which the said Asminah Osman Schaffler is named as the registered proprietor of the suit property. On the other hand, the 1st Defendant asserted that he represents Asminah Osman Schaffler, who is the registered proprietor of the suit property. In support of his assertion, he produced to this court the Power of Attorney held by him as well as a copy of the Lease in respect of the suit property. The Plaintiffs have, however, discounted this title document on the ground that it was obtained through fraud. 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.”

This provision requires the court to take the produced Certificate of Lease as prima facie evidence of ownership unless it is challenged, inter alia, on the ground of fraud or misrepresentation to which the person is proved to be a party. While the Plaintiffs/Applicants have alleged that there was fraud in the issuance of the Certificate of Lease, no evidence in support has been tendered and further, the said Asminah Osman Schaffler has not been shown to have been a party to any such fraud. On that account, I find that the Plaintiffs/Applicants have failed to establish a genuine and arguable case and by extension a prima facie case with high chances of success at the main trial.

Since the Plaintiffs have 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...”

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants/Respondents.

DELIVERED AND SIGNED IN NAIROBI THIS 13TH DAY OF MARCH 2015.

MARY M. GITUMBI

JUDGE