



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 505 OF 2014

BENJAMIN NYAATA OBINCHU..... PLAINTIFF

VERSUS

STEPHEN KINYUA..... DEFENDANT

RULING

The Application

The application before the court is a Notice of Motion dated 28th April 2014 filed by the Plaintiff, seeking the following orders:

1. That pending the inter parties hearing of this suit, an interim injunction do issue restraining the Defendant whether by itself or through its servants and or agents, from damaging, wasting, alienating, selling, altering, demolishing, interfering or transferring with Plot No. 45 at Kayole Shopping Centre (Extension), Nairobi (hereinafter referred to as “the suit property”) until the hearing and final determination of this suit or as the Court may order.
2. That the General Inspector of Police, the Provincial Commissioner of Police, the Officer Commanding Police Division and in conjunction, with the Kayole Police Station to enforce this order.

The grounds as stated in the said application and Supporting Affidavit, Further Affidavit and Further Supplementary Affidavit sworn on 25th April 2014, 15th May 2014, and 17th February 2015 respectively are that the Plaintiff is the owner of the suit property, having purchased the same from one Eric Otieno Owanga who was the original allottee, by way of a sale agreement dated 2nd day of June, 2007. The Plaintiff attached a copy of the said sale agreement.

The Plaintiff stated that he started constructing on the suit property on October 2013 and built a perimeter wall around the plot and laid a foundation concrete. However, that on the 25th October 2013, 3rd December, 2013 and 11th April, 2014, the Defendant without provocation or justification moved to the suit property and demolished the perimeter wall and is removing the materials from site. The Plaintiff annexed photographs of the alleged damage occasioned by the Defendant.

The Plaintiff further explained the processes he undertook to formalize the allocation of the suit property to himself, and he attached copies of receipts issued to him for payments he made to the Housing Department of Nairobi City Council as allotment fees, Ground Rent, and Special Permission fee. He also attached a copy of his allotment letter.

The Response

The Defendant opposed the Plaintiff's application in a replying affidavit and further affidavit he swore on 8th May 2014 and 7th July 2014 respectively. He stated that he was not aware of a parcel of land known as plot No. 45 at Kayole Shopping Centre (Extension), in Nairobi, and has never interfered with the same in any manner whatsoever. He further averred that he is the owner of the parcels of land known as Plots No. B-22 and C-45 Kayole Shopping Centre Extension, and that the same were allocated to him by the then Nairobi City Council on 17/7/2003.

The Defendant annexed copies of his allotment letters both dated 7/7/2003 and the survey plan. He also stated that he was provided with a conclusive Part Development Plan for the Kayole Shopping Centre Extension off Kangundo Road dated June, 2001 which he attached, and on which his plots B22 and C45 are highlighted. The Defendant averred his building plan covering the two plots was approved by the City Council on 12/3/2010, and that after an application for the amalgamation of the plots he commenced construction by laying a foundation, and has also been paying ground rent and rates for the plots. He annexed copies of the building plan, the application for approval and a bundle of payment receipts.

According to the Defendant, he visited the site of the two plots on 3/12/2013 and found that someone had started constructing walls on the foundation which he had laid, and that part of the said walls thereon had been brought down with bricks laying all over, but part of it was still standing. Further, that he was arrested by the police and taken to Kayole Police Station and was released after he produced documents to prove his ownership of the said plots.

Further, that on 14/2/2014 he applied to the County Director, Housing and Community Development, Nairobi City Council for confirmation of ownership of parcels of land known as Plot Nos. B22 and C45 (amalgamated) at Kayole Shopping Centre, and that a Statement of Account was issued to him and on 14/4/2014 the County Director, Housing & Community Development wrote to him confirming that he was the owner of parcels of land known as Plots Nos. B22 and C45 (amalgamated) situated at Kayole Shopping Centre. He annexed copies of the said statement of account and the said letters dated 14/2/2014 and 14/4/2014 respectively.

The Issues and Determination

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel filed submissions dated 17th February 2015 while the Defendants' counsel filed submissions dated 3rd November 2014. I have read and carefully considered the pleadings filed and submissions made by the parties herein. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary orders of injunction.

I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore address is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** 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.”

The Plaintiff in his submissions argued that he had attached all the documents which he acquired from the Nairobi City Council, and the receipts in support of the payments he made after the allotment of the suit property to him in 2007. He alleged that the Defendant on the other hand had not shown how he got his land. Further, that he stands to suffer irreparable harm having lost the benefit of the construction on the

property allegedly destroyed by the Defendant. Lastly, that having been on the said plot since 2007 and constructed on the same, the balance of convenience was in his favour.

The Defendant on the other hand submitted that the Plaintiff had not established a *prima facie* case as his claim to ownership of the suit property has been rebutted by other cogent evidence. The Defendant relied on the decision in **Royal Media Services vs Telecoms Ltd & Another, Nairobi HCCC 13 of 2000** that where there is a conflict of evidence with regard to the suit property, the Court should not issue injunctions but leave the matter for trial. The Defendant also submitted that the Applicant has not suffered any irreparable harm as construction on the suit property had barely began, and the foundation thereon was constructed by the Defendant.

The Court notes that the Plaintiff in the Plaint filed herein dated 25th April 2014 and filed on 28th April 2014 is seeking an injunction against the Defendant on account of his ownership of the suit property. The Plaintiff brought evidence of a sale agreement entered into with respect to the property, a letter of allocation by the Nairobi City Council issued to him with respect to the property, receipts of payments he made to the Nairobi City Council for the property, and a proposed subdivision plan showing the location of the suit property.

The Court has noted in this regard that while the sale agreement with the original allottee which the Plaintiff claims is the basis of his allotment of the suit property is dated 2nd June 2006, the Plaintiff's letter of allotment is dated 17th July 2003, before the said sale agreement was entered. The receipts relied on by the Plaintiff are also dated 27th June 2007. Lastly, the Plaintiff did not bring any evidence to show the original allottee's entitlement to the suit property, and the sub-division plan he relies on is also not approved. To this extent the Court cannot affirmatively state that the Plaintiff has shown a *prima facie* case, despite the evidence brought of his entitlement to the suit property.

The Defendant has also brought evidence of his letters of allotment of the plots known as B-22 and C-45 which are also dated 17th July 2003, and various receipts issued to him in February and March 2010 for the said properties. He also brought evidence of a part development plan dated June 2001 showing the location of the said plots, which part development plan was not approved. His claim is that his plots are on the same location as the Plaintiff's plot and that he is the legal owner of the same.

It is therefore evident that this is a case of double allocation of the same parcel of land to both the Plaintiff and Defendant, and it is only the allocating authority that can shed light as to who is the legitimate owner of the said property. The Court notes in this regard that the allocating authority which was the Nairobi City Council or its successor is not a party to this suit, and did not file any pleadings on the ownership of the suit property. The Court will therefore have to decide the Plaintiff's application on the basis of the balance of convenience, as evidence of the ownership of the suit property has been brought by both the Plaintiff and Defendant.

The Court has in this respect taken regard of the fact that the Plaintiff had started constructing on the suit property, and it is not contested that his building materials are on the site. To this extent the balance of convenience tilts in his favour in so far as possession of the suit property is concerned.

The Court accordingly orders as follows:

1. That pending the hearing and determination of the suit filed herein and/or until further orders, the *status quo* to be maintained as regards the parcels of land known as plot 45 and/or Plot C-45 and plot B-22 at Kayole Shopping Centre (Extension), Nairobi shall be as follows:
 - a. Neither the Plaintiff nor the Defendant or their servants, agents or employees shall undertake any further excavation, construction, development, wastage and/or demolition on the said plots.
 - b. The Defendant shall not interfere with the Plaintiff's occupation and possession of the said plots.
2. The Costs of the Plaintiff's Notice of Motion dated 28th April 2014 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 22nd day of April, 2015.

P. NYAMWEYA

JUDGE