



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL MISC. NO. 1099 OF 2014

ELIZABAN NJOROGE KIURU..... 1ST PLAINTIFF

MARY WANGECHI NGARE2ND PLAINTIFF

VERSUS

FRANCIS GEMA WAITITU.....DEFENDANT

RULING

The plaintiffs by a plaint dated 7th August 2014 filed on 13th August 2014 claim to be the lawful allottee of plot NO. **3/155 Kayole Soweto** having been allocated the same in 1991. The plaintiffs claim that the Defendant during the months of June/July 2014 invaded the plot and demolished the plaintiffs semi permanent house. The plaintiffs by the plaint seeks a permanent injunction against the Defendant and a declaration that they are the lawful owners of plot NO. **3/155 Soweto-Ex Muoroto Resettlement Scheme**.

Simultaneously with the plaint the plaintiffs filed a Notice of Motion under the provisions of order 40 Rules 2, 3, 4, 7 and 10 of the Civil Procedure rules 2010 and section 3A of the Civil Procedure Rules and sought the following substantive order:-

“That an order of injunction do issue restraining the Defendant from entering, constructing, building, alienating and or in any other manner trespassing unto the plaintiff plot known as plot NO. 3/155 Kayole Soweto until the determination of the suit”.

The plaintiffs application is grounded on the grounds set out on the face of the application as follows:-

1. That the 1st Plaintiff/Applicant is the lawful proprietor of plot NO. **3/155** and has all ownership documents.
2. That the applicants have owned the said plot for the last 20 years.
3. That the plaintiffs have a prima facie case with high chances of success.

The application is further supported on the grounds set out in the supporting affidavit sworn on 7th August 2014 and 29th October 2014 by **Mary Wangechi Ngare** the 2nd Plaintiff respectively.

The Defendant in opposition to the plaintiffs application filed a replying affidavit sworn by **Francis Gema Waititu** the Defendant herein on 3rd September 2014.

The brief facts of the matter are that the 2nd applicant states she is the wife of the 1st Applicant who at the time of filing the suit had been held in prison custody at the Industrial Area Remand prison for 9 years on murder charges awaiting trial. The 2nd Applicant states plot NO. **3/155 EX-Muoroto Settlement Scheme** was allocated and is registered under her husband's name as per the letter of allotment dated 24/3/1991 marked "**EN1**". The 2nd Applicant avers that following the arrest of her husband the Defendant has attempted to evict her from the said plot where they had built and established their matrimonial home and lived for over 20 years with their children. The 2nd applicant states that in June/July 2014 the Defendant invaded the plot and demolished their semi permanent building with a view of ejecting them to pave way for the defendant to grab the plot and develop his own building.

The Defendant in response vide the replying affidavit the Defendant states he is the registered owner of plot NO. **3/155 Kayole Soweto** and that the council has vide the search dated 29th August 2014 marked "**FGW1**" confirmed that he is the registered owner. The Defendant claims to have purchased the said plot from one **Lydia Waithira** in 2013 after conducting a search at the Housing Department of the Council at Dandora offices which confirmed the plot belonged to **Moses Wainaina Mainge** deceased husband of **Lydia Waithira**. The Defendant states after purchasing the plot he was issued with ownership documents at the **Dandora City Council offices** including a letter of allotment dated 24/10/1991 marked "**FGW3**". The Defendant avers that at the time he purchased the plot there was a iron sheet structure erected on the property which he demolished in June 2014 as he set out to develop the plot.

The defendant denies that the plaintiffs were residing on the plot at the time he purchased the plot and states that he only came to meet the 2nd plaintiff on 12/6/2014 when he was summoned by the local chief. The Defendant further states the local Assistant Chief investigated the complaint by the 2nd plaintiff who failed to prove ownership of the subject plot resulting with the assistant Chief confirming that the defendant I was the lawful owner of the plot.

The 2nd plaintiff swore a supplementary affidavit in response to the Defendant's replying affidavit in which she refutes the facts as set out in the defendant's replying affidavit. The 2nd plaintiff stated the ownership documents exhibited by the Defendant are suspect and specifically points to annexure "**FGW3**" which the letter of allotment to the defendant dated 24th October 1991 yet the Defendant claims to have purchased the plot in the year 2013. How is that the defendant was issued a letter of allotment dated 1991 if he purchased the plot in 2013?. The 2nd plaintiff further points to the absence of any agreement of sale between the defendant and **Lydia Waithira** from whom he claims to have purchased the plot and the lack of any instrument of transfer to support the transaction as further evidence of the suspicious nature of the defendant's transaction. On the inquiry by the Assistant Chief the 2nd plaintiff claims the chief was not objective and was partisan during the deliberations in favour of the defendant and cannot be relied upon to prove the claim by the defendant.

The parties filed written submissions on the directions of the court to canvass the application. The plaintiffs submissions dated 1st December 2014 were filed on 11th December 2014 and the Defendant's submissions dated 14th January 2015 were filed on 15th January 2015. The submissions by both parties reiterate the facts as set out in the parties respective affidavits.

I have considered the pleadings including the affidavits and the annexures thereto and the parties submissions and the issue to determine is whether the plaintiffs have satisfied the threshold for the grant of a temporary injunction as established in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358**. The conditions for grant of injunction are now well settled and as set out in the **GIELLA** case (supra) are:-

- (i) An applicant must establish a prima facie case with a probability of success,

(ii) An applicant stands to suffer, irreparable harm or injury that cannot be compensated in damages,

(iii) If court is in doubt, it can determine the application on consideration of the balance of convenience.

In the present matter both the plaintiffs and the defendant claim ownership of the suit property. Each of the parties has produced what they claim supports their right to ownership. Each party disputes the documents of the other. The plaintiffs claim to have been in occupation and possession of the property since 1995 and indeed claim to have been residing on the plot as their residential home explaining their absence when the Defendant demolished their mabati structure to having moved out owing to water logging during the rains. It is not unusual during the rainy season for flooding to occur where the land is not properly drained. The Defendant admits having demolished a mabati structure on the plot in dispute. The plaintiffs state in the supplementary affidavit that in 2010 that **Lydia Waithera** the same person who is stated to have sold the plot to the defendant had complained to the Chief that the plaintiffs were occupying her plot and that dispute was not resolved. It is therefore rather surprising that she would offer the plot for sale when she was aware that the issue of ownership was yet to be resolved and that the plaintiffs were in possession and/or occupation of the plot.

On the basis of the facts and material placed before the court it is clear that the ownership of the suit property is in dispute and such dispute cannot be determined at this stage of the proceedings but at the trial where both parties will adduce evidence and call witnesses who will be liable to be cross-examined. While the plaintiffs have an arguable case the defendant also has a credible defence and the resolution of the case will turn on whose ownership documents are found at the trial to be the credible ones. Until that happens the court is of the view that the sensible and right thing to do is to preserve the suit property until the suit is heard and determined. Thus the order that commends itself to the court is that the parties be required to maintain and observe the obtaining status quo until the suit is heard and determined. This in my view is the sort of case where it is necessary to preserve the suit property until the suit is heard and determined such that the successful party at the trial does not become prejudiced in case the property is disposed off during the pendency of the trail and/or is dealt with in a prejudicial manner.

The upshot is that I order the parties to observe and maintain the present status quo where no party shall sell, transfer and/or carry out any further developments on the suit property until the suit is heard and determined. I further direct that the parties comply with order 11 of the Civil Procedure Rules on a priority basis at any rate within the next sixty (60) days of this ruling after which the parties should list the suit for pretrial directions.

The costs of the application will be in the cause.

Orders accordingly.

Ruling dated, signed and delivered this.....**19th**.....day of.....**June**.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the Defendant