



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 1288 OF 2014

HENRY MWANGI NUTHI..... PLAINTIFF

VERSUS

JOSEPH MWANGI RECHO.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 3rd October 2014 in which the Plaintiff/Applicant seeks for an order of temporary injunction restraining the Defendant/Respondent from entering, encroaching, dealing or in any other way interfering with the parcel of land known as Plot Nos. 498(1), (2) and (3) Kayole-Soweto Patanisho (hereinafter referred to as the “suit properties”) pending the hearing and determination of this suit. The Plaintiff/Applicant also seeks for costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant,

Henry Mwangi Nuthi, sworn on 3rd October 2014 in which he averred that after subdivision, he was allotted the suit properties and was issued with cards which he has been using to pay rates to the Nairobi County. He then stated that the Defendant is starting to interfere with his possession of the suit properties using orders obtained in ELC No. 1015 of 2012 which refer to Plot No. 523 and not the suit properties. He further stated that in enforcement of the said order, police officers are threatening his tenants with eviction, thereby causing a lot of anxiety to his tenants. He added that the two plots being Plot No. 498 is separate and distinct from Plot No. 523.

The Application is contested. The Defendant/Respondent, Joseph Mwangi Recho, filed his Replying Affidavit sworn on 27th October 2014 in which he averred that he is the Pastor at the African Mission of Holy Ghost Church Kenya situated on Plot No. 523 Soweto Patanisho Phase II and that he is not aware of the suit properties. He further averred that the Plaintiff/Applicant and other unknown people illegally occupied the church's Plot No. 523. He further averred that he obtained eviction orders against the trespassers in ELC No. 1015 of 2012. He further averred that before the eviction was carried out, a surveyor from the Nairobi City County came and identified the location of Plot No. 523 on the ground which he did. He further confirmed that the Soweto Kayole Police Officers also carried out investigations and confirmed the location of Plot No. 523 before carrying out the eviction exercise. He confirmed that the said Police commenced the eviction against the Plaintiff and other persons who had trespassed on the

church's land and that is when the Plaintiff rushed to court to file this suit. He concluded that the Plaintiff is on the wrong parcel of land and should pursue the individuals who sold it to him.

The issue that I am called upon to determine is whether or not to grant the Plaintiff/Applicant the temporary injunction that he seeks. In deciding whether to grant the temporary injunction, 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.”

Has the Plaintiff/Applicant 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.”

Has the Plaintiff/Applicant demonstrated that he has a “genuine and arguable” case and thus a prima facie case with high chances of success at the main trial? I have perused the documents relied upon by the Plaintiff/Applicant in his claim over the suit properties. In the first place, none of those documents reveal the physical location of the suit properties. Considering that the main dispute between the parties herein is the issue of the actual physical location of the suit properties as compared to Plot No. 523, this information is critical to this Application. The copy of a Beacon Certificate produced by the Plaintiff/Applicant does not provide this information. As matters stand right now at this interlocutory stage of the proceedings, I am not able to determine where the suit properties are located and how they relate to Plot No. 523 which the Defendant claims belongs to the African Mission of Holy Ghost Church Kenya. Even if the Plaintiff/Applicant had been able to prove the physical location of the suit properties, he still is not able to demonstrate his ownership thereof on the basis of the documents he has produced to this court. The payment cards issued by the Nairobi City County are not evidence of proprietorship and the same goes for copies of letters and correspondences issued by government institutions. That being the case, I find that the Plaintiff/Applicant has failed to establish a prima facie case with high chances of success at the main trial.

Since the Plaintiff has 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 Defendant/Respondent.

DELIVERED AND SIGNED IN NAIROBI THIS 19TH DAY OF JUNE 2015.

MARY M. GITUMBI

JUDGE