



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1264 OF 2013

FREDRICK KATHANZU KAVUTHI t/a

KANYUNI CONSTRUCTORS.....1ST PLAINTIFF/APPLICANT

JAMES KYALO t/a SECOND TRY

CONSTRUCTION COMPANY.....2ND PLAINTIFF/APPLICANT

VERSUS

AL-HAIEE INVESTMENTS LIMITED.....DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is two applications, the first one being the Plaintiffs' Notice of Motion dated 7th February 2014 (hereinafter referred to as the "First Application") and second one being the Defendant's Notice of Motion dated 20th February 2014 (hereinafter referred to as the "Second Application").

In the First Application, the Plaintiffs are seeking orders of temporary injunction restraining the Defendant from evicting or threatening to evict, harassing or in any way interfering with their peaceful possession of the parcel of land known as L.R. No. 209/12071/1 (hereinafter referred to as the "suit property") pending the hearing and determination of this suit. The First Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiffs sworn on 7th February 2014 in which they averred that on 22nd October 2013, they filed this suit by way of Originating Summons seeking orders that they be duly registered as the proprietors of the suit property in equal proportions having acquired the same by way of adverse possession. They further averred that upon filing suit, they made spirited attempts to serve the Defendant to no avail upon which they filed an application to serve them by way of substituted service. They averred that this application was allowed and they proceeded to serve the Defendant through an advertisement in the Daily Nation on 17th December 2013. They disclosed that on 9th January 2014, the Defendant entered an appearance. They further indicated that immediately thereafter, unknown individuals who later claimed to be representing the Defendant started threatening and intimidating them warning them of dire consequences if they do not leave the suit property. They further averred that on 6th February 2014, their site manager called them to inform them that rowdy youth armed with crude weapons had surrounded the suit property and were threatening them

to leave the property or be prepared to die. They stated that upon receiving this report they rushed to the County Commissioner's office where they reported the matter and were given two Administration Police Officers to accompany them. They further stated that upon their arrival, the rowdy youth retreated on seeing the Administration Police but promised to be back. They averred that they are fighting an invisible Defendant who cannot be traced but can strike at any given time which is the reason why they were seeking the assistance of this court.

In the Second Application, the Defendant is seeking orders to vary or set aside the interim orders issued in favour of the Plaintiffs on 7th February 2014, that prior to the hearing of the First Application an officer of the court be directed to visit the suit property to ascertain the true situation on the ground and submit a report to the court, that the Plaintiffs be ordered to furnish security for costs and expenses of the Defendant in the sum of Kshs. 2 million within such period of time as shall be ordered by the court and finally that the costs of this Second Application be borne by the Plaintiffs. The Second Application is premised on the grounds appearing on the face of it together with the Supporting Affidavits of Diamond Hasham Lalji sworn and filed in court on 12th February 2014 and Maurice Otieno Omuga sworn and filed in court on 20th February 2014. In his Supporting Affidavit, Diamond Hasham Lalji averred that he is a director of the Defendant which currently is the registered proprietor of the suit property situate along Mombasa Road. He averred further that the Defendant purchased the suit property in May 1994 from the original allottee by the name of Prime Inter-Africa Trading Company Limited. He annexed a copy of the Grant No. I.R. 61996 in support of that assertion. He further averred that prior to purchasing the suit property, he inspected the same and confirmed that it has a complete perimeter wall all around it with no one in occupation. He further averred that they could not decide what sort of investment to make on the suit property and that the same has remained in the same condition in which they purchased it to date. He confirmed that since purchasing the suit property, they have religiously paid the yearly outgoings being the land rent to the Ministry of Lands and the ground rates to the City Council of Nairobi. He annexed copies of various receipts in support of that assertion. He further stated that the Defendant has had renewable leases with Eng Kenya Ltd since the year 2008 which has been paying the Defendant rent on an annual basis for hosting their advertisement mast and bill boards. He further averred that the suit property is also guarded by a security firm known as Prowler Security Services Limited on a 24 hour basis to keep away hordes of conmen who have been attempting to defraud members of the public by purporting that they have authority to sell it. He further averred that it is the Plaintiffs who sent a large group of hirelings to the suit property with assistance of two Administration Police Officers from Mukuru AP Camp on 6th February 2014 in an attempt to forcefully occupy the suit property. He added that the hirelings outnumbered their security guards and set the sentry box on fire and started the slashing grass in the suit property. He further indicated that he sought the assistance of the police officers from Embakasi Police Station who repulsed the attackers and arrested their ring leader who was charged in court on 7th February 2014. He further highlighted the Plaintiffs' Supporting Affidavit to which they attached a copy of an official search on the suit property which clearly shows that the same is registered in the name of the Defendant and is charged to Trident Insurance Company Limited to secure a loan of Kshs. 70 million. He further stated that the First Application is based on falsehood concocted to mislead the court in granting the Plaintiffs injunctive orders after their initial attempt to invade the suit property was thwarted.

In his Supporting Affidavit, Maurice Otieno Omuga averred that he is an advocate of the High Court of Kenya having the conduct of this suit on behalf of the Defendant. He confirmed that the Plaintiffs' Advocates' process server served him with a sealed court order on 10th February 2014. He further swore that at the date of service of the court order, neither of the Plaintiffs or their employees, servants or agents had a physical presence on the suit property and they have never at any given time previously occupied the suit property. He further stated that he was informed by the Defendant's Security Manager, one Mr. Abdullatiff Abeid Oywer, that on the night of 11th February 2014 at about 11.40 pm, a large group of men armed with crude weapons forced their way into the suit property through the demolished parts of the perimeter wall and the gate which by that time did not have a shutter and overpowered him together with the other security guards from Prowler Security Services who were on duty that night. He further averred that Mr. Oywer informed him of having called the Embakasi Police Station and the OCS responded to their distress call and send police officers who managed to apprehend five intruders after the rest fled and escaped under the cover of darkness. He confirmed that the five intruders were arraigned at the Makadara

Law Courts on 13th February 2014. He annexed a copy of the charge sheet. He further averred that this is the second time the Plaintiffs hired a gang of thugs to invade the suit property, the first such incident having taken place the previous week on 6th February 2014, during which incident their ring leader was one Stanlaus Kyalo Ndi, who was arrested and arraigned in court. He further averred that the Plaintiffs who have never occupied the suit property, intentionally misled the court into granting them the conservatory orders of 7th February 2014, which they are now trying to use and enter into the suit property contrary to the spirit and intent of the same. He further stated that he has personally visited the suit property and can confirm that the Plaintiffs have never occupied the suit property either before or currently and have never had any property on it. He requested the court to send an emissary to the suit property to confirm this position. He added that he believed that the Plaintiffs are mere idlers and busy bodies with no known means of meeting costs of the suit and will keep filing frivolous and vexatious applications because they have nothing of substance to lose even if orders for payment of costs are made against them eventually.

Both the Plaintiffs and the Defendant filed their written submissions.

The main issue I am called upon to determine is whether or not to grant the Plaintiffs an order of temporary injunction restraining the Defendant from evicting or threatening to evict, harassing or in any way interfering with their peaceful possession of the suit property. I will then determine whether to order the Plaintiffs to furnish security for costs and expenses of the Defendant in the sum of Kshs. 2 million as requested by the Defendant.

In deciding whether or not 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.”

Have the Plaintiffs 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.”

From these precedents, it is obvious that the Plaintiffs are obliged to demonstrate, at this interlocutory stage, that they have a right over the suit property which is in danger of being infringed by the Defendant and which is deserving of protection by way of a temporary injunction pending the hearing and determination of this suit. Have the Plaintiffs been successful in doing this? The Plaintiffs claim to be entitled to the suit property on the basis of the doctrine of adverse possession. They claim to be in occupation of the suit property and are threatened with eviction therefrom by the Defendant. However, the Defendant insists that it is the one in possession of the suit property which is guarded around the clock by security guards from Prowler Security Services Limited. Further to that, the Defendant has submitted that the Plaintiffs have never been in occupation of the suit property and in fact sought to gain possession by force on two occasions, firstly on 6th February 2014 when they were repulsed by police officers and a second time on 11th February 2014, this time armed with a court order from this court. I should state at this juncture that at this stage of the proceedings, I am not making any definitive findings in the matter. To that effect, I rely on the decision in **Airland Tours & Travels Ltd versus National Industrial**

Credit Bank Milimani High Court Civil Case No. 1234 of 2002 where the court held as follows:

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

With this in mind, based on the information supplied in the First and Second Application and the documentary evidence produced before this court, I am not convinced that the Plaintiffs are in actual occupation of the suit property. I have formed the impression that the Plaintiffs have in the contrary, tried to take over physical possession of the suit property from the Defendant forcefully. I have also been convinced by the Defendant, albeit on a prima facie basis, that they are the ones in physical possession of the suit property which is guarded by a contracted security firm on a 24 hour basis. To this extent therefore, I have no difficulty in finding that the Plaintiffs are not in possession of the suit property and have not demonstrated any rights of ownership over the suit property. I do not therefore perceive any danger of their being evicted out of the suit property as it appears that they are not in physical occupation of it anyway. To that extent, I find that the Plaintiffs have not established that they have a prima facie case with high chances of success at the main suit.

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 the First Application with costs to the Defendant.

The dismissal of the First Application means that the Second Application has been allowed partially. I decline to order the furnishing of security for costs herein. The Defendant shall have the costs for the Second Application.

DELIVERED AND SIGNED IN NAIROBI THIS 30TH DAY OF OCTOBER 2015.

MARY M. GITUMBI

JUDGE