



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. NO. 1003 OF 2013

MARY MUKAMI KARIITHI.....PLAINTIFF

VERSUS

DENTOPAK AGENCIES LIMITED.....1ST DEFENDANT

CLLR. JOSEPHAT KIRAGU WAICHAHI.....2ND DEFENDANT

NAIROBI CITY COUNCIL.....3RD DEFENDANT

RULING

Before me for determination of the Notice of Motion dated 19th July 2013 in which the Plaintiff/Applicant seeks for orders restraining the Defendants/Respondents from selling or interfering in any manner with the parcel of land known as Land Reference No. 209/7260/189, formerly known as ES 9 Eastleigh Sewerage Depot (hereinafter referred to as the “Suit Property”) pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks that the costs of this Application be provided for.

The Application is supported by the grounds on the face of it together with the Supporting Affidavit of the Plaintiff, Mary Mukami Kariithi, sworn on 19th July 2013 in which she averred that she purchased the Suit Property on 18th May 2005 from one Monica Gathoni Karanja, who was the original allottee thereof vide a letter of allotment dated 13th December 1995, a copy of which she produced. She further averred that she paid Kshs. 40,000/- in respect to the Suit Property being Stand Premium after which she was issued with a beacon certificate and clearance certificate. She further stated that after the Deed Plan was drawn and ready for registration, the original Deed Plan mysteriously disappeared while in the custody of the surveyor of the then City Council of Nairobi. She then stated that subsequently, some individuals trespassed on the Suit Property leading her to file **CMCC No. 1796 of 2009** which later stalled following a ruling by the honorable magistrate that that court lacked jurisdiction to hear and determine the suit. She further stated that the 3rd Defendant approved her building plans for the Suit Property but that when she visited the Suit Property with her architect, they were chased by unknown people under the watch of the 2nd Defendant/Respondent. She further stated that the Defendants/Respondents continued occupation on the Suit Property amounts to trespass.

The Application is contested. The 3rd Respondent filed the Replying Affidavit of its Acting Director of City Planning, Rose K. Muema, sworn on 4th September 2013 in which she averred that in the late 1990s, some developers moved in and tried to grab land known as L.R. No. 209/7260, which parcel was formerly City Council of Nairobi Eastleigh Sewerage Depot. She stated that that attempt was thwarted by the Council and stated further that the grabbers had pieces of land bearing the series ES. She further stated that on 5th June 2009, the Council approved alienation of part of the land and approved allocation of 58 plots duly surveyed. She further disclosed that the 1st Defendant is the owner of one of those plots and has received the full approval of the Council to construct. She further stated that the property in question is Plot No. 19 Section III Eastleigh Nairobi which is L.R. No. 209/7260/182. She further stated that on 19th July 2012, a directive was issued stipulating that plots bearing the L.R. No. 209/7260 bearing the ES series were not recognized and any transactions involving the same is a nullity. She further stated that after consultation between the Director of Legal Affairs, Director of City Planning, Chief Valuer and the Director of Investigation and Information Analysis, it was concluded that plots with the ES series do not exist and that a letter to that effect was forwarded to the Plaintiff/Applicant's counsel. She further stated that the letter of allotment is an offer which is subject to acceptance of the condition therein and that payment made 10 years after the allocation is a nullity. She further stated that the endorsed transfer of the Suit Property to the Plaintiff/Applicant is not signed or dated by any officer of the 3rd Defendant.

The Application is further contested by the 2nd Defendant who filed his Replying Affidavit sworn on 4th September 2013 wherein he averred that the 3rd Defendant is the original allottee from the Government of Kenya of all that piece of land known as Land Reference No. 209/7260 Eastleigh in the City of Nairobi and that that parcel of land was originally the 3rd Defendant's Water and Sewerage Depot prior to the said Depot being transferred to Ruai station and the Eastleigh Depot was decommissioned. He further stated that the plot was subsequently subdivided into 58 plots and allotted to individuals and residents of Nairobi. He further stated that on 9th October 2008, the 1st Defendant purchased Plot No. 19 bearing Land Reference No. 209/7260/182 from one Charles Kanyi Wambugu who was the original allottee thereof. He further stated that the plot being claimed by the Plaintiff is the Suit Property and that the Plaintiff should sue whoever holds it if indeed she is entitled to the same and not the 1st and 2nd Defendants. He further denied having attempted to register the Suit Property as alleged by the Plaintiff and stated that he does not have such powers as registration of land is a legal process undertaken by the relevant lands department.

In response thereto, the Plaintiff, Mary Mukami Kariithi, filed her Further Affidavit sworn on 9th September 2013 in which she averred that the 3rd Respondent had acknowledged the existence of the Suit Property as part of L.R. No. 209/7260. She further stated that the 2nd Defendant through his various companies sold the Suit Property together with other plots to third parties. She further stated that the 2nd Defendant had in the past unlawfully attempted to register the Suit Property in favour of the 1st Defendant, a company where he is a director. She further deposed that after allocating them all the plots, the 3rd Defendant submitted part development plan containing the ES series to the Director of Survey for approval and that the PDP was approved and a survey map drawn and issued.

The Plaintiff and 3rd Defendant filed their written submissions which have been read and taken into consideration in this ruling.

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.”

Looking at the facts of this case, the Plaintiff has based her claims of ownership over the Suit Property on a letter of allotment issued by the 3rd Defendant which is in the name of one Monica Gathoni Karanja. She has relied on a Sale Agreement entered into between herself and the said Monica Gathoni Karanja. Her claim has been attacked by the Defendant/Respondents on two fronts. Firstly, there is the question whether the Suit Property and the Plot No. 19 which the 1st Defendant claims are different parcels or one and the same plot. That issue has not been determined and remains an issue to be determined at the trial court after all the relevant evidence has been adduced. The second attack of the Plaintiff/Applicant’s case has been by the 3rd Respondent which has indicated that the Suit Property is not in existence as there was impropriety in the allocation of the same. Being the custodian of all the information regarding ownership of land within its area of jurisdiction and being empowered to allocate land, this declaration seriously brings the authenticity of the Plaintiff/Applicant’s claims to doubt. In light of that, this court finds that the Plaintiff/Applicant has not shown that she has a prima facie case with high chances of success at the main trial. With that finding, I see no need to further interrogate whether the other two conditions in the **Giella** case have been met.

Accordingly, I hereby dismiss this Application. Costs shall be in the cause.

It is so ordered.

SIGNED AND DELIVERED IN NAIROBI THE 28th DAY OF February, 2014

MARY M. GITUMBI

JUDGE