



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. NO. 586 OF 2013

MOONGLOW ASSETS LIMITED.....PLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS.....1ST DEFENDANT

THE REGISTRAR OF TITLES.....2ND DEFENDANT

THE DIRECTOR OF SURVEYS.....3RD DEFENDANT

HEKIMA LAND SURVEYS LIMITED4TH DEFENDANT

SHAMJI KALYAN PINDORIA LIMITED5TH DEFENDANT

RULING

Coming before me for determination is the Notice of Motion dated 20th May 2013 in which the Plaintiff/Applicant is seeking for orders of a temporary injunction restraining the 5th Defendant from entering, trespassing or in any other manner dealing with the parcel of land known as L.R. No. 24573, Machakos (hereinafter referred to as the “Suit Property”) and that the 1st and 2nd Defendant be restrained from effecting any transfer in respect of the Suit Property pending the hearing and determination of this application and suit. The Plaintiff also seeks that costs of this application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Samuel Watuka Muindi, one of the Directors of the Plaintiff Company, sworn on 20th May 2013 in which he averred that sometime in 1994, the Plaintiff/Applicant was issued with a title by the 1st and 2nd Defendants for a parcel of land known as L.R. No. 19910 situated at Mavoko in Machakos County. He further averred that subsequently, the 3rd Defendant caused the area where Plaintiff’s parcel of land L.R. No. 19910 was located to be resurveyed causing an overlap. He further averred that as a consequence, the 3rd Defendant advised the Plaintiff to liaise with the 1st Defendant to formalize the matter which led to the Plaintiff surrendering the title deed to that parcel of land and that in 2007, a new grant to the Suit Property was issued to replace L.R. No. 19910. He further averred that in May 2013, before he could be issued with a title, he located the Suit Property on the ground with the assistance of a surveyor and found a perimeter wall being constructed thereon and upon inquiry was told that it was

owned by the 5th Defendant. He further stated that he did a search at Mavoko Municipal Council as it then was and managed to get a copy of the title which showed that indeed the 5th Defendant is the owner of the Suit Property. He suspected that the whole process after surrender of the title documents was a plan to dispossess the Plaintiff of the Suit Property. He further stated that the issuance of the title to the 5th Defendant was fraudulent and criminal.

The Application is contested. The 5th Defendant filed the Replying Affidavit of Jayesh Patel, a Director of the 5th Defendant, sworn on 3rd June 2013 in which he averred that on or about 6th June 2011, the 5th Defendant applied for and was allocated the Suit Property vide a Letter of Allotment dated 8th September 2011 subject to inter alia payment of stand premium of Kshs. 1.6 million and other charges. He further swore that on the same date, the 5th Defendant formally wrote to the Commissioner of Lands accepting all the conditions contained in the said Letter of allotment. He further stated that thereafter, the Commissioner of Lands processed and issued to him the title deed to the Suit Property and he immediately took possession of the land in September 2011. He further indicated that before commencing any developments thereon, he conducted due diligence to verify the authenticity of the title deed by writing to the Commissioner of Lands and Director of Surveys and that the responses he received were positive. He confirmed that the 5th Defendant then commenced construction of a perimeter wall. He further stated that the Deed Plan Number 184064 attached to the Plaintiff's title deed showed that the L.R. No. 19910 was irregular in shape and was bordered on one side by a river but the Suit Property is rectangular in shape and is not bordered by any river. He further contended that the two parcels of land, if traced using the coordinates show that they are located in different positions. He confirmed that they had already done this exercise on the ground with similar results. He further confirmed that even the Ministry of Lands by their letter dated 3rd September 2012 confirmed this position. He further pointed out that the Plaintiff did not produce a Deed of Surrender to prove that indeed the surrender of his title deed was done. He further stated that based on this finding, the 5th Defendant is the lawful and indefeasible owner of the Suit Property.

The Application finds support in the Replying Affidavit sworn by Henry Wambua, the Director of the 4th Defendant/Respondent, sworn on 17th June 2013 wherein he confirmed having been the one in charge of the resurveying exercise which resulted in L.R. No. 19910 being replaced with the Suit Property and he further confirmed that the Suit Property belongs to the Plaintiff. He also swore a Further Affidavit also dated 17th June 2013 in which he denied that the 5th Defendant was allocated the Suit Property by the 1st Defendant.

The 5th Defendant filed the Supplementary Affidavit of Jayesh Patel sworn on 9th July 2013 in which he denied any collusion with the 1st, 2nd and 3rd Defendants. He further contended that L.R. No. 19910 and the Suit Property are in different positions almost 1 ½ Km apart.

The Application is further contested by the 1st Defendant, who filed the Replying Affidavit of M.K. Cheboiwo, the Director of Legal Affairs and Enforcement in the National Land Commission, sworn on 3rd February 2014, wherein he stated that Land Reference Nos. 19910 and 62313 were allocated to the Plaintiff for a term of 99 years from 17th May 1994. He further stated that in the year 1999, it was discovered that there was a co-ordinate problem in the survey of Land Reference No. 19910 resulting in overlaps of Land Reference Nos. 20337, 20338 and 26715 with Land Reference No. 19910. He further stated that due to the aforesaid overlap, Land Reference No. 19910 was relocated to the adjacent but uncommitted/unalienated Suit Property. He further stated that the Suit Property was therefore allocated to the Plaintiff as an alternative plot due to the anomaly with the co-ordinates during survey. He further stated that subsequent to that the Commissioner of Lands requested for the Deed Plan for the Suit Property from the Director of Surveys who released Deed Plan No. 278975 for the Suit Property. He further stated that the Commissioner of Lands then processed a grant in favor of the Plaintiff but their file disappeared and the Suit Property was allocated to the 5th Defendant. He then stated that the allocation of the Suit Property to the 5th Defendant was unlawful as the land had been allocated to the Plaintiff as an alternative plot. He further confirmed that upon making this discovery, the National Land Commission

revoked the grant to the 5th Defendant under section 14 of the National Land Commission Act No. 5 of 2012. E further confirmed that before the National Land Commission embarked on the process of revocation, notices were issued under section 14(8) but the 5th Defendant failed to honor the notices.

In further response to the Application, the 3rd Defendant filed the Replying Affidavit of Peter F. Njoroge, a Senior Land Surveyor in the office of the Director of Survey, sworn on 3rd February 2014 in which he averred that sometimes in May 1994, a deed plan No. 184064 was issued for L.R. No. 19910 derived from survey plan F/R No. 247/63, among other plots. He further stated that other surveys were subsequently carried out which overlapped into L.R. No. 19910 and that the essence of all those surveys was to share out L.R. No. 19910. He further stated that in a bid to correct that mistake, other surveys were carried out as a result of which L.R. No. 19910 was corrected by relocation done by survey represented as F/R 289/32 which relocation was approved by the Commissioner of Lands. He further averred that deed plan No. 278975 was released on 17th September 2007 to the Commissioner of Lands and has never been issued to anyone and that any other purporting to emanate from their office is a forgery.

The Plaintiff and the 1st, 2nd, 3rd and 5th Defendants filed their written submissions which have been read and taken into account 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.”

In determining whether the Plaintiff/Applicant has established a prima facie case, I must consider whether he has shown that he has any proprietary rights over the Suit Property. Evidently, from the above narration, it emerges quite clearly that the Plaintiff was indeed the registered proprietor of L.R. No. 19910 in respect of which it held a valid title deed. However, the Plaintiff surrendered that title deed to the Ministry of Lands arising from a need to resurvey the land to solve an issue of incorrect co-ordinates on L.R. No. 19910. It is also indicated that the resurveying process resulted in L.R. No. 19910 being shared out into other plots and it became necessary to seek for alternative land to compensate the Plaintiff for the loss of L.R. No. 19910. It emerges that the Suit Property, which had not been alienated at that time, was identified as a suitable alternative plot for the Plaintiff to replace L.R. No. 19910. This position is supported by the various government authorities who have filed replying affidavits in support of the Plaintiff’s Application. On the other hand, the 5th Defendant/Respondent did exhibit its title deed to the Suit Property, which title deed has now been revoked by the National Land Commission. I am informed that the 5th Defendant has filed judicial review proceedings to challenge the said revocation. At this interlocutory stage of the proceedings, I do note that though the various government institutions support the Plaintiff’s claim to the Suit Property, the Plaintiff does not as yet hold any title deed to the Suit Property. Hence, its claim over the Suit Property remains just that, a claim which will be conclusively decided upon at the conclusion of this suit. I do note that the 5th Defendant was in the process of

constructing a perimeter fence around the Suit Property necessitating the Plaintiff to file this Application. Overall, I strongly hold the view that this suit should be set down for hearing for a final determination to be made. In the meantime however, I find that neither of the parties has established a prima facie case with a probability of success at the main trial.

Having made this finding, I see no need to further interrogate whether the other conditions set out in the **Giella** Case cited above have been met. Accordingly, I hereby dismiss this application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 28th DAY OF February, 2014

MARY M. GITUMBI

JUDGE