



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 534 OF 2013

BENSON MUTISO.....PLAINTIFF

VERSUS

LYDIA WAMBUI KIMEMIA.....1ST DEFENDANT

RAYMOND KABAYA.....2ND DEFENDANT

RULING

The Plaintiff filed an application dated 7/5/2013 seeking an order of injunction restraining the Defendants from trespassing, constructing on, wasting, damaging, alienating, selling, disposing or otherwise interfering with his quiet possession of Plot No. V 2322 (Embakasi Ranching) situate in Ruai pending the hearing and determination of the suit. The application is premised on grounds that the Defendants have trespassed on to Plot V 2322 (Embakasi Ranching) portion of L.R. 105/7984 belonging to Embakasi Ranching (*the suit property*). The Plaintiff avers that the Defendants have destroyed his fence and commenced construction thereon and further denied him access to his property despite the Embakasi Ranching Surveyor confirming that the property belongs to him. The Plaintiff avers that unless injunction orders are issued, he shall suffer irreparable loss as he will be denied peaceful and quiet possession and the Defendants shall continue to trespass and develop the property. The Plaintiff contends that the construction will leave the property damaged and wasted in a way that damages will not be an adequate remedy.

The application is supported by an affidavit sworn by the Plaintiff on 7/5/2013 wherein he deposed that he became an owner of the plot in 2007. It was his submission that it was not until 2012 when he noticed that the 1st Defendant had encroached on the property and instructed the 2nd Defendant and another to fence it off and commence construction. The Plaintiff deposed that he has since made a report at Ruai Police Station (OB No. 30/9/4/2012) regarding the trespass. It was the Plaintiff's disposition that in meeting held at Embakasi Ranching offices, he together with the 1st and 2nd Defendants and Embakasi Ranching Surveyor were in attendance where the Surveyor confirmed that the property on which the 1st Defendant was constructing belonged to him. The Plaintiff deposed further that the 1st Defendant declined to honor subsequent meetings whereas she remains adamant that she is the owner of the property whereas the Embakasi Ranching confirms that he is the owner thereof. The Plaintiff prayed that the orders sought be granted.

Defendant's Response

This application was opposed by the 1st Defendant who swore a Replying Affidavit on 26/5/2013. The 1st Defendant deposed that she is the *bona fide* owner of Plots Nos. P. 8972 and 9439 within Embakasi Ranching Company which she purchased on 6th August and 28th October 1998, respectively. She deposed that her plots are distinct from Plot V 2322 and that she has no knowledge of the said plot. The 1st Defendant deposed that upon purchase of the plots and complying with the Ranching Company's requirements, she was issued with non-membership certificates in respect of the two plots. She deposed that in 2002 and 2003, the company's surveyor pointed out the plots to her and placed beacons when after in 2004 she fenced off the property and planted identification plants around the fence. Subsequently, she constructed a semi-permanent *mabati* structure and foundation of a two-roomed house which was immediately occupied by one James Mbau Mwangi and subsequently Ezekiel Makau Mutiso.

The 1st Defendant stated that in 2006 she was informed that there were plans to issue title deeds to plot owners. She deposed that she surrendered her original share certificates to the company officials who promised to follow up on the issuance of titles on her behalf. The deponent stated the titles were not forthcoming and that she never got the original certificates either from the said officials prompting her to make a report at Kilimani Police Station (OB. 46/24/7/06) and obtained a Police Abstract to that effect. The 1st Defendant deposed that on 2/2/2013 she, received information from her neighbor that the Plaintiff accompanied by the company surveyor entered her plots and placed a fence after which the Plaintiff erected a fence around a portion of her two plots. Subsequently, she instructed her advocates to write a letter of demand to the Plaintiff to cease encroaching onto her plots and that there has been exchange of correspondence between the Plaintiff's advocates and her advocates over ownership of the plots.

In support of the response, the 1st Defendant annexed copies the non-member certificate of plot ownership in respect of the two plots; photographs showing the boundaries of her plots and the live fence planted along the fence, the temporary *mabati* structure, and foundation of a permanent house; Police Abstract dated 24/7/2006 showing loss of Share Certificates; receipt evidencing payment to the Ranching Company for purposes of a site visit; and correspondence between advocates on the subject of trespass.

Plaintiff's Response

The Plaintiff filed a supplementary affidavit sworn on 10/7/2013 in response to the Defendants' affidavit. The Plaintiff deposed that he purchased the plot from one Mary Wambui through her husband Godfrey Muhuri Muchiri on 5/2/2007. The Plaintiff deposed that the plot in dispute is one demarcated by a Map Borehole and that Plots No. P8972 and 9439 in the name of the 1st Defendant are not situate therein and therefore cannot be the plot in dispute. The Plaintiff reiterated that the Company's surveyor Jack Kamau confirmed to him that Plot V 2322 is the one situate in the area demarcated by the map borehole. The Plaintiff annexed a Non-Member Certificate of Mary Wambui No. 006714; Acknowledgement Note executed by Godfrey Muhuri Muchiri accepting Kshs. 150,000/- for the sale of Plot No. V 2322; and a Sketch Map

Defendants' Response

The 1st Defendant swore a Supplementary Affidavit on 26/7/2013 in response to the Plaintiff's Supplementary Affidavit. The 1st Defendant reiterated that she purchased her plots in 1998 and the Company's surveyor Jack Kamau identified the two plots to her in 2002. The 1st Defendant deposed that if indeed the Plaintiff purchased Plot V 2322 from the said Mary Wambui then he ought to have retained the non-purchase membership of 006714 and not acquired a new membership of 013534. Further that there is no document such as a sale agreement, to show that the sale took place and that the Acknowledgement Note is irregular as it does not bear a stamp whereas it is purported to have been signed before an advocate. Further on the non-member certificate of the Mary Wambui, the 1st Defendant deposed that it contains an alteration which is signed by the company surveyor and a witness but not signed by the allottee. The 1st Defendant deposed that the Plaintiff failed to carry out due diligence to

ascertain the physical location of Plot V2322 since at the time of the alleged sale she had already been in occupation of her plots for over 5 years.

The 1st Defendant deposed that if the company surveyor who identified her plots is the same one who identified the Plaintiff's plot on the same location, she cannot be blamed for any mistake, professional malpractice or misconduct of the surveyor. The 1st Defendant alleged that the Sketch Map annexed to the Plaintiff's Supplementary Affidavit said to be an excerpt of the map borehole, is a manufactured map by the Plaintiff in collusion with the Company Surveyor to misrepresent the true facts. The 1st Defendant stated that the Survey Map from the Survey of Kenya of Embakasi Ranching Company identifies plots by Parcel Numbers and not by Plot Numbers, the latter being inserted once the plot owner is shown the site. She deposed that the plot in dispute is marked 7984 and not V 2322 as inserted in the map availed by the Plaintiff.

Submissions

The application was canvassed by way of written submissions. Magut, Kirigo & Sang Advocates for the Plaintiff filed submissions dated 1/8/2013 and submitted that the Plaintiff has established a prima facie case with chances of success as he has demonstrated ownership of Plot V 2322. Counsel submitted that from the affidavit evidence, the Plaintiff had established that the plot in dispute is V 2322 belonging to the Plaintiff and not Plots P 8972 and 9439 registered in the name of the 1st Defendant. Counsel submitted further that the loss suffered by the Plaintiff may not adequately be compensated by way of damages, in the event the Plaintiff succeeds in the suit, in view of the permanent structures constructed on the disputed plot by the 1st Defendant. Counsel relied on the case of **Gitau v Savage & 4 others KLR (E&L) 1** where the Court of Appeal upheld the Superior Court's decision where the Respondents were proposing to put a construction of a permanent nature, damages would not be adequate. Counsel urged the Court to grant the injunction orders so as to prevent the ends of justice from being defeated by invoking Section 63(e) of the Civil Procedure Act submitting that it would be in the interest of justice that the suit property be preserved. Counsel submitted that it would be best to restrain further developments pending determination on the issue of ownership.

Irungu Mwangi & Ng'ang'a Advocates for the 1st Defendant filed submissions on 21/8/2013 wherein counsel reiterated that the documents in support of the Plaintiff's case were all manufactured to aid an ailing case. Thus, counsel submitted, the Plaintiff had failed to demonstrate that he has a prima facie case with chances of success to warrant the grant of injunction. It was counsel's submission that the Plaintiff initially intended to convince the Court that it obtained Plot V. 2322 by virtue of allocation by annexing an Allotment Card dated 30/3/2013 but later contradicted himself by stating that he purchased the plot in 2007, which purchase is not supported by any documentary evidence. Counsel submitted that the 1st Defendant had demonstrated that she has nothing to do with the Plot V 2322 and that the Plaintiff has no right of claim over Plots P 8972 and 9439. Counsel submitted that in the event that the Plaintiff colluded with the Company's surveyor to rename the 1st Defendant's, Plot P 8972 to Plot V 2322 then the same amounts to fraud on their part for which the Defendants cannot be blamed for. On whether the Plaintiff was likely to suffer irreparable loss, counsel submitted that the Plaintiff had never been in occupation of Plot 8972 fraudulently renamed as V 2322 as opposed to the 1st Defendant who has been in occupation and has carried out developments thereon.

Counsel submitted that the evidence this far adduced clearly shows that the Plaintiff's hands are tainted with illegality and dishonesty and therefore undeserving of the equitable remedy he seeks. Counsel relied on the cases of **Mavoloni Company Limited v Standard Chartered Estate Management Limited Civil Appl. No. 266/1997** and **Joseph Muchina Kamau v National Housing Corporation Ltd C.A. No. 171/1994**. Counsel submitted further that the balance of convenience heavily tilts in favour of the 1st Defendant who has clearly demonstrated how she acquired the plots, took possession and developed them. As regards the ends of justice, counsel submitted that an injunction cannot issue to restrain an event that has already taken place. It was counsel's submission that the 1st Defendant has already taken possession of her plots and thus it is only just that the Court declines to issue the prayers sought.

However, counsel submitted, an order to maintain the status quo is amenable as the 1st Defendant has no intention of disposing off the plots.

Determination

The Plaintiff and 1st Defendant claim ownership of a plot situated on the same physical location but has different description. The Plaintiff avers that he is the owner of Plot V 2322 having purchased it in 5/2/2007 whereas the 1st Defendant avers to be the *bona fide* owner of two plots P 8972 and P 9439 adjacent to each other, having purchased the same on 23/9/1998 and 1/9/1999, respectively. The plot in dispute is one the Plaintiff refers to it as V 2322 and the 1st Defendant refers to it as P 8972. Both parties maintain that Embakasi Ranching Company's Surveyor, one Jack Kamau pointed out to each of them the physical location of their plots. The 1st Defendant is in possession and has commenced construction of the disputed plot and hence the application by the Plaintiff for orders of injunction to restrain the 1st Defendant from further development pending the determination of the suit. In determining an application for orders of injunction, the Court is guided by the principles enunciated in **Giella –V- Cassman Brown Co. Ltd (1973) EA 358** that:

“First, an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be 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 a balance of convenience”

The first issue to be determined is whether the Plaintiff has established a prima facie case with chances of success. To prove ownership of Plot V 2322, the Plaintiff annexed to his supporting affidavit copies of a Non-Membership Certificate of Plot Ownership No. 013534 dated 6/10/2008 and a Certificate of Allocation of Plot V 2322 dated 30/3/2003. In the Supplementary Affidavit, the Plaintiff annexed a Shareholder Certificate No. 0374 of Mary Wambui dated 1/4/2003 and with a Non-Member Certificate No. 006714 together with an acknowledgement note executed by Godfrey Muhuri Muchiri on behalf of Mary Wambui acknowledging receipt of purchase price. It was the Plaintiff submission that he purchased the property from a previous owner Mary Wambui. In response to this submission and annexures in support, the 1st Defendant averred that the Plaintiff's evidence was suspect as he initially intended it to appear that he was an original allottee of the plot but subsequently availed documents to show that he acquired the same vide purchase. The 1st Defendant also stated that despite the Plaintiff purchasing the plot from a previous owner, he was issued with a different certificate of non-membership whereas logically, he would inherit the previous owner's share certificate. Moreover, that there is no sale agreement to show that there was indeed a sale transaction between Mary Wambui and the Plaintiff. The 1st Defendant contended that in view of these anomalies, there is collusion between the Plaintiff and the Surveyor to defraud her of one of her plots.

I have perused the documents availed by the Plaintiff in consideration to the 1st Defendant's submission. The evidence produced by the Plaintiff at this stage as to ownership of the disputed plot has been highly contested and contradicted by evidence produced by the 1st Defendant, and it is therefore my finding that the Plaintiff has not established a *prima facie* case. Notably, however, both parties claim to have been shown the physical location of the property by the Embakasi Ranching Company's Surveyor, who is not a party to these proceedings. Consequently, the Court cannot make determination as to the ownership of the disputed plot at this juncture. The averments made by both parties as to ownership of the disputed plot and the allegation of fraud made by the 1st Defendant are matters that can only be determined with finality after examination of the evidence at full trial. *The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions.* See the case of **Mbuthia v Jimba Credit Finance Corporation & another (1988) KLR**

Notwithstanding that the Plaintiff has not met the threshold of a prima facie case it is evident that the ownership of the disputed plot is a matter to be determined at the hearing. Thus, it is only just and

reasonable that the suit plot be preserved pending the determination of the suit. The Plaintiff urged the Court, rightly so, to exercise its discretion under Section 63 of the Civil Procedure Rules to make such order interlocutory orders as may be just and convenient to prevent the ends of justice from being defeated. It is therefore my considered view that an order to preserve the property is called for.

In the circumstances, I enter an order of status quo pending the hearing and determination of the suit. The effect of the order shall be to restrain the Defendant from carrying out further developments, temporary or permanent, and also from disposing off the same. The Plaintiff on his part shall not enter into and interfere with the suit plot pending determination of the suit. So as to ensure that there is just and expedient disposal of this suit, I hereby direct that both parties shall comply with the provisions of Order 11 and the Plaintiff shall set down the matter for hearing and prosecute the same within 6 months from the date of this ruling, failing which, the status quo order herein shall be vacated. Costs of this application shall be in the cause.

Dated, signed and delivered this 31st day of March 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the Defendants

.....Court Clerk

L.N. GACHERU

JUDGE