



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC NO. 13 OF 2012

JOSPHAT KIMIRI MWATHIPLAINTIFF/APPLICANT

VERSUS

COUNTY COUNCIL OF NAKURU.....1ST DEFENDANT/RESPONDENT

ROSEMARY MWANGI..... 2ND DEFENDANT/ RESPONDENT

RULING

1.The Plaintiff, **Josphat Kimiri Mwathi** filed the application before court dated 9th October, 2012 on 11th October, 2012 seeking the following orders among others:

1. **That Pending the hearing and determination of this suit the Honorable court be pleased to issue a temporary injunction restraining the defendants either by themselves, servants or agents from trespassing, entering, construction or interfering in any other way whatsoever with plot no. 416 L/D Residential Dundori.**
2. **Those costs of this application be borne by the defendants herein.**

2. The application is supported by the grounds on its face and in the supporting and further affidavits sworn by the Plaintiff on 10th October, 2012 and 7th January, 2013 respectively. He states that he is the owner of plot No. 416 L/D Residential Dundori (hereafter referred to as the suit property) having been issued with a letter of allotment dated 23rd March, 2004 and paid the requisite charges to the 1st Defendant. He took possession of the suit property and fenced it.

3. Around 2007, a **Mr. Richard Tuei**, made proprietary claims over the suit property. The issue was referred to the Town Planning Committee for arbitration where it was resolved that Mr Richard Tuei be allocated another plot being plot no. 482 and the Plaintiff retains the suit property.

4. After a while, the 2nd Respondent also started laying claim over the suit property based on a sale agreement between herself and Richard Tuei. This time round, the dispute was referred to the clerk of the 1st Respondent. The Clerk confirmed that following a full council meeting a decision was reached that the suit property belonged to the plaintiff.

5. On or about 6th October, 2012 the Plaintiff came across a letter addressed to him. He denies receipt of the said letter which in part stated that following an arbitration meeting, it was resolved that the original allottee of the suit property was Mr. Tuei who had thereafter transferred his interest over the suit property to the 2nd Respondent. The plaintiff denies knowledge of the arbitration meeting or receiving an invitation to present his case.

6. He further claims that the records held by the 1st Respondent showing the plaintiff as the owner of the suit property were deleted by officers of the 1st Respondent in collusion with the 2nd Respondent. According to him, their intention was to acquire the suit property fraudulently.
7. The 1st Respondent opposed the application by filing Grounds of Opposition dated 9th November, 2012. It states that the application and the entire suit is based on forged documents and is thus a nullity in law; that the Plaintiff has come to the court of equity with unclean hands and is guilty of misrepresentation and blatant lies; that the application is unmerited as the plaintiff has not demonstrated a *prima facie* case.
8. The 2nd Respondent in opposing the application swore a Replying Affidavit on 13th November, 2012. She claims that she is the rightful owner of the suit land having purchased the same in the year 2006 from Richard Tuei who was the original allottee of the said land.
9. On or about 2011, she was approached by **Ms. Gladys Wairimu**, the then councilor for Dundori ward who implored her to relinquish the proprietary rights over the suit land in favour of the plaintiff in consideration of another piece of land. The property was Plot no. 482 which the 2nd Respondent took possession and began to cultivate. However, the property was also subject to a dispute and the respondent reverted her claim over the suit property herein.
10. She denies colluding with the officials of the 1st Defendant in order to acquire the property illegally and avers that the suit property was subject to two arbitration processes, both of which held that she was the rightful owner.
11. The application was canvassed before me on 13th February, 2014. Counsels made oral submissions which elaborated the grounds of the application and affidavits filed.
12. **Mr. Mwangi**, the learned counsel for the applicant reiterated in his submission that the plaintiff is the owner of the suit land following an allotment by the 1st Respondent; that he paid the requisite allotment charges and took possession of the suit property. According to counsel, this shows that the Plaintiff has a *prima facie* case with a high chance of success. Counsel further submitted that the 2nd Respondent had an intention to dispose off the suit property; that she is an employee of the 1st Respondent and that she colluded with other officers to fraudulently acquire the suit land. Counsel therefore urged the court to grant the orders sought failing which the Plaintiff will suffer irreparable loss that cannot be compensated by damages.
13. **Mr. Kipkoech**, learned counsel for the 2nd Respondent submitted that the Plaintiff had not established a *prima facie* case. He stated that there exists two letters of allotment in respect to the suit land; that the 2nd Respondent had purchased the property from Richard Tuei who was the original allottee; that the arbitration committee resolved that the 2nd Respondent was the owner of the suit property. Therefore it was counsel's submission in response to allegation of fraud, that this could only be determined by adducing further evidence at full hearing of the case. He further stated that an injunction against the 1st Respondent cannot issue as the County Council of Nakuru does not exist.
14. **Mr. Mwangi**, learned counsel for the Plaintiff in his submission stated that the principle of *Nemo dat* applies to the 2nd Respondent and no prejudice will be occasioned against her if the orders sought are granted.
15. The principles of granting orders of injunction are well settled. Therefore I wish to refer and rely on the celebrated case of **Giella vs 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.”

16. Has the Plaintiff made out a *prima facie* case with a probability of success? In **Mr Rao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125** a *prima facie* case was described as:

“... 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.”

17. In the present case, I have carefully considered the facts deponed in the affidavit and the evidence annexed thereto tendered by the rival parties. It emerges from the material before the court that the plaintiff has a genuine and arguable case. This is proved by a copy of the letter of allotment produced in evidence. It shows that the Plaintiff was allotted the suit property on 23rd March, 2004. Further his claim over the suit property is not disputed by the 2nd Respondent who admits the matter has been subject to two arbitration processes. Even more fundamental is that the Plaintiff did claim possession of the suit property in 2005, a matter also admitted by the 2nd Respondent in her response. To my mind therefore, the Plaintiff has not only shown an arguable case but he has a genuine claim over the suit property.

18. On the other hand, the 2nd Respondent's claim is based on contract. She produced an agreement between the original allottee, Mr. Twei and herself and a copy of the letter of allotment in his favour. Further the 2nd Respondent exhibited extracts of arbitration proceedings in respect of the suit property. In my view the 2nd Respondent has also shown an equal claim over the suit land.

19. The issue as to whether any document was fraudulently obtained by either party will require further evidence and shall be canvassed during the full hearing. I am therefore of the view that the prayer of an interlocutory injunction can in the circumstances only be decided on a balance of convenience.

20. In this regard, I find that since the Plaintiff's occupation of the suit property is not disputed the balance of convenience tilts in his favour.

21. I therefore allow the application dated 9th October, 2012 and grant an injunction restraining the 2nd defendant either by herself, her servants or agents from trespassing, entering, constructing or interfering in any other way whatsoever with plot no. 416 L/D Residential Dundori pending the hearing and determination of this suit, or until further orders by this court. The plaintiff shall have the costs of the application.

Dated and Signed at Nakuru this 16Th day of April 2014.

L N WAITHAKA

JUDGE

PRESENT

Ms Kilach holding brief for Mr Kipkoech for 2nd Defendant

N/A for applicant.

CC: Emmanuel Maelo

L N WAITHAKA

JUDGE