



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 494 OF 2013

SUSAN NJOKI NJUGUNA.....PLAINTIFF

VERSUS

JUJA CONSTITUENCY DEVELOPMENT FUND COMMITTEE....1ST DEFENDANT

THE OFFICE OF INSPECTOR GENERAL OF POLICE.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 22nd April 2013 in which the Plaintiff/Applicant seeks for orders of injunction restraining the Defendants/Respondents from entering, remaining, transferring, selling, charging or further dealing in any manner whatsoever with the property known as RUIRU/KIU BLOCK 2(GITHUNGURI)/4979 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application. The Plaintiff/Applicant also seeks for orders that the 1st and 2nd Defendant be evicted out of the suit property and for orders allowing the Plaintiff/Applicant to enter and demolish all the illegal structures constructed on the suit property. The Plaintiff/Applicant also seeks for costs of this Application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Susan Njoki Njuguna, sworn on 22nd April 2013 in which she averred that she is the registered proprietor of the suit property. She produced a copy of her title deed. She further averred that she bought the suit property from Anne Waithira Kariuki and Hellen Gathoni Mwihiya with funds borrowed from the Bank repayment whereof was secured by a charge over the suit property. She confirmed that before purchasing the suit property, she conducted due diligence through her advocates by applying to the 3rd Defendant for a Certificate of official search which was issued. She also confirmed that she paid the necessary stamp duty fees and also applied for consent to charge. She further averred that she has always known the suit property to be private property and that at no time during the said purchase was she ever informed by the 3rd Respondent that the suit property is public land. She further

averred that on or about 9th October 2012, she was shocked to learn that the 1st Respondent had fraudulently entered her land and began constructing illegal structures which she later learnt to be an Administration Police Post for the benefit of the 2nd Respondent. She further disclosed that she paid the 1st Respondent a visit to complain about the said trespass and that on 10th and 22nd October 2012, she wrote to the District Officer, Githurai Division and to the District Commissioner Ruiru complaining about the said trespass but that she was not assisted at all. She further averred that she has suffered substantial loss and damage by reason of the aforesaid entry and construction.

The Application is contested. The 1st Defendant filed the Replying Affidavit of Kenneth Kamau, the Manager thereof, sworn on 10th July 2013 in which he averred that the 1st Respondent does not claim ownership of the suit property nor did it construct illegal structures thereon as alleged. He further averred that the role of the 1st Respondent was to fund the building of an Administration Police Post was requested by the community in the area. He averred further that the project was to be developed in a public land set aside by the community for the construction of a police post. He further averred that a survey map provided to the 1st Respondent shows that the police post was falling within a public land area which did not have a title deed. He further averred that the project was approved by the Ministry of Works and that the project was completed, final dues were paid and the project was handed over to the area community. He further averred that the 1st Respondent did not receive any complaint during the construction of the project. He further stated that the Plaintiff should have included the Director of Survey as a party to enable him to shed light on the location of the suit property.

The Application is further contested by the 2nd, 3rd and 4th Defendants who filed their Grounds of Opposition dated 15th July 2013 in which they stated as follows:

1. That the suit property was earmarked as Administration and that it was community land.
2. That the Application is frivolous, vexatious, lacks merit and is an abuse of the court process.
3. That they were not transferring, selling, assigning, conveying or having any dealings with the suit property.
4. That it was not their idea to construct an administration police post on the suit property but it was the community's initiative.
5. That no administration police officers had as yet been assigned to the police post.
6. That they cannot comment on issues of ownership of the suit property since they did not acquire it.

The Plaintiff and 1st Defendant filed their written submissions and list of authorities all of which have been read and considered 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 the document of title produced by her in support of her claim of ownership of the suit property. The Plaintiff/Applicant has produced to this court a copy of her title deed to the suit property. Where title to land is concerned, the law is clear as to the duty of a court where a title document is produced.

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

As a preliminary point, it is noteworthy that none of the Defendant/Respondents have disputed the title deed issued to the Plaintiff/Applicant on any of the grounds cited above. Accordingly, based on these legal provisions, this court is duty bound to take the produced title deed to the suit property as prima facie evidence that the person named as proprietor to be the absolute and indefeasible owner thereof. Hence, I do find that the Plaintiff/Applicant has established a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? Land is unique and no one parcel can be equated in value to another. The value of the suit property can be ascertained. However, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application in terms of prayers nos. 3, 4, 5 and 6. The other prayers are declined as the same are final in nature which is not appropriate at this interlocutory stage of these proceedings. Costs shall be in the cause.

SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF JUNE 2014.

MARY M. GITUMBI

JUDGE