



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 514 OF 2012

VICTOR MOSE BIRUNDU.PLAINTIFF

VERSUS

PETER MANYURU..... 1ST DEFENDANT

NATION SOCIAL SECURITY FUND.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 15th August 2012 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant from interfering with the Plaintiff's use, occupation and possession of land parcel No. 02391/1 Tassia III Estate Nairobi (hereinafter referred to as the "suit property) pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for costs of this Application to be provided for.

The Application is premised upon the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Victor Mose Birundu, sworn on 15th August 2012 in which he averred that he was a member of Kwa Ndege Self Help Group and he was allocated the suit property. He further averred that upon making payment to that organization, he was show the suit property and allowed to develop it which he did. He further averred that built a home on the suit property in the year 2004. He then stated that on diverse dates in the year 2004, the 2nd Defendant placed a number of advertisements in the newspapers notifying members of the public and in particular plot owners of Tassia II and III that the land they are occupying is owned by the 2nd Defendant. He further disclosed that an amicable settlement was arrived at with the 2nd Defendant agreeing to enter into tenant purchase scheme with plot owners in Tassia II and III to enable them purchase the plots from it. He further disclosed that for this purpose, he made several visits to the 2nd Defendant for the suit property to be registered but this was not done. He also confirmed having written severally to the 2nd Defendant all of which were not responded to. He further disclosed that on 14th June 2012 he was summoned to the Chief's Office Embakasi where the 1st Defendant had complained of encroachment by him and that they were referred to the 2nd Defendant for determination of the dispute. He further disclosed that the 2nd Defendant wrote a letter dated 9th July 2012 informing him that the suit property was not available for sale since I had been sold to the 1st Defendant. He prayed to be allowed to register with the 2nd Defendant and enter into a tenant purchase scheme for the suit property to belong to him.

The Application is contested. The 1st Defendant, Peter Manyuru, filed his Replying Affidavit sworn on 18th September 2012 in which he averred that it is not in dispute that the suit property was owned by the 2nd Defendant/Respondent. He further averred that at no time did the Plaintiff/Applicant state that they purchased the suit property from the 2nd Defendant and how Kwa Ndege Self Help Group came to acquire rights to dispose off the suit property to the Plaintiff/Applicant. He further stated that as the Kwa Ndege Self Help Group had no ownership rights over the suit property, they could not have sold it to the Plaintiff. He further averred that the Plaintiff did not indicate when he purchased the suit property and did not attach any documents of ownership. Further, he conceded that the Plaintiff has constructed a house on the suit property which he described as an eye sore and which has greatly diminished the value of the suit property. He further stated that the Plaintiff/Applicant had conceded that he is not the true owner of the suit property as the same belonged to the 2nd Defendant before he purchased it. He contended that the Plaintiff/Applicant was a trespasser on the suit property. He further stated that the Plaintiff admits that the 2nd Defendant never registered him nor was he allowed to join the Tenant Purchase Scheme. He further stated that the Plaintiff/Applicant did not show that he purchased the suit property by depositing any payment with the 2nd Defendant. He further stated categorically that he is the bona fide purchaser of the suit property having purchased the same from the 2nd Defendant for valuable consideration. He annexed copies of his receipts for payment to the 2nd Defendant. He stated further that the 2nd Defendant had assured him that he is registered as the owner of the suit property having fully paid up for the same.

The Application is further contested. The 2nd Defendant filed the Replying Affidavit of Joseph N. Makimii, an employee of the 2nd Defendant working in its property department sworn on 15th October 2012 in which he averred that according to their records, the suit property belongs to the 1st Defendant, Mr. Peter Manyuru. He further averred that the Plaintiff/Applicant had asked the 2nd Defendant to register him as the owner of the suit property but that this could not be done as the suit property had been purchased by the 1st Defendant. He further stated that the Plaintiff/Applicant has never been introduced to them by Kwa Ndege Self Help Group for allocation and registration of the suit property. He further averred that this Application therefore has no basis and should be dismissed.

The 1st and 2nd Defendants filed their written submissions which have been read and considered in this ruling.

In deciding whether to grant the temporary injunction sought after by the Plaintiff, 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 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 admitted that the suit property belonged to the 2nd

Defendant and that he had sought to register with the 2nd Defendant and to be allowed to join the Tenant Purchase Scheme of the 2nd Defendant for the purpose of purchasing the suit property from the 2nd Defendant. The Plaintiff admitted that he was unsuccessful in obtaining the stated registration and that he was not allowed to enter the Tenant Purchase Scheme of the 2nd Defendant. The Plaintiff also disclosed that the 2nd Defendant's position is that the suit property was already purchased by the 1st Defendant and that it therefore belongs to the 1st Defendant. The Plaintiff's claim to be owner of the suit property therefore has no basis whatsoever as the Plaintiff has failed to demonstrate that he purchased it from the 2nd Defendant. Further, the Plaintiff has failed to produce any evidence of payment of any purchase price to anybody for the suit property. Overall, the Plaintiff's claim to the suit property only lies in the fact that he is in possession and has built a home thereon. As this is not a claim based on adverse possession, this fact is not sufficient to prove ownership. On that basis therefore, I find that the Plaintiff/Applicant has not established a *prima facie* case with probability of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants.

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

MARY M. GITUMBI

JUDGE