



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 992 OF 2013

JOHN DANIEL MUIYUROPLAINTIFF

VERSUS

NICODEMUS MIGIRO..... DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 14th August 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction to issue restraining the Defendant/Respondent from entering, selling, transferring, trespassing, alienating and or developing any further the parcel of land known as Plot No. A1 617 Kayole Infills (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit. The Plaintiff also seeks for costs of this Application to be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, John Daniel Muiyuro, sworn on 14th August 2013 in which he averred that in the year 1994 he was allocated the suit property by the Nairobi City Council (as it then was). He produced a copy of his Letter of Allotment dated 18th January 1994. He further averred that since the said allocation, he paid the requisite fees and has been faithfully paying the rates thereof to the Nairobi City Council (as it then was). He further stated that he was issued with a Beacon Certificate in respect of the suit property in the year 2008 and that since the year 1994 he has been in peaceful possession thereof. He averred further that on 2nd August 2013, the Defendant without any justifiable cause has trespassed the suit property and commenced construction thereon. He produced photos marked “JDM5” to show the construction being carried out by the Defendant on the suit property. He also stated that he raised a complaint over the illegal construction to the Director of Housing Development Department of the then Nairobi City Council but that no action was taken to stop it.

The Application is contested. The Defendant/Respondent, Nicodemus Migiro, filed his Replying Affidavit sworn on 29th August 2013 in which he averred that on 26th April 2012, he together with his brother James Omboga Migiro bought the parcel of land known as Plot. No. A1 615 Kayole Bidii Jua Kali from one Mercy Wangari Mwangi. He produced a copy of the Sale Agreement dated 26th April 2012 evidencing this. He further averred that before buying that parcel of land, he conducted a search at the Nairobi City Council as it then was and established that the said Mercy Wangari Mwangi was the owner

thereof. He further averred that the said vendor produced to them her Plot Formalization Card for the said parcel a copy of which he produced. He confirmed having paid the necessary transfer fees to the Nairobi City Council after which he started developing the land. He further stated that the plot he owns is quite distinct from the suit property.

In response thereto, the Plaintiff filed his Further Affidavit sworn on 9th September 2013 in which he averred that the Defendant had no claim on the suit property but to Plot No. A1 615 Kayole Bidii Jua Kali which is a separate and distinct parcel of land. He further stated that he has been allotted the suit property which he has occupied and developed. He further stated that the suit property is situated in Kayole Infills while the Defendant's plot is located in Kayole Bidii Jua Kali. He further stated that the Defendant had failed to produce his allotment letter and beacon certificate.

In response to that, the Defendant filed his Further Replying Affidavit sworn on 16th September 2013 in which he averred that that Kayole Infill and Bidii Jua Kali were name of two groups allocating land in the area and were recognized by the Nairobi City Council. He further averred that the Plaintiff/Applicant has never been in occupation of Plot No. A1 615 Kayole Bidii Jua Kali. He further stated that the Plaintiff/Applicant does not know where his plot is located.

Both the Plaintiff/Applicant and Defendant/Respondent filed their written submissions.

The issue I am required to determine is whether to grant the Plaintiff/Applicant the temporary injunction he seeks. 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.”

To establish a prima facie case, the Plaintiff/Applicant must have shown that he has an interest in the suit property which has apparently been infringed by the Defendant as to call for an explanation or rebuttal. Looking at the facts of this case, the Plaintiff has asserted that he is the owner of the suit property. To support his assertion, he has produced to this court a Letter of Allotment dated 18th January 1994 along with a Beacon Certificate, both issued by the Nairobi City Council as it then was. Further, the Plaintiff/Applicant produced to this court various receipts showing the payments he has been making to the Nairobi County Government in respect to the suit property. The Defendant opposed the Plaintiff's assertions claiming that the parcel of land the Plaintiff claims belongs to him and his brother. However, the Defendant claims Plot No. A1 615 Kayole Bidii Jua Kali which he asserts is separate and distinct from the suit property which the Plaintiff claims. It appears that both parties claim the same parcel of land. In support of his claim of ownership, the Defendant produced a copy of a Plot Formalization Certificate in respect of Plot No. A1 615 Kayole Bidii Jua Kali in the name of one Mercy Wangari Mwangi who he claims sold the parcel of land to him. At this stage, it is not possible to verify whether or not the parties are claiming different plots or the same parcel of land. However, at this interlocutory stage, I am satisfied that the Plaintiff/Applicant has a superior claim over the suit property than the Defendant and has therefore established a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff? 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**.

The third condition that must be satisfied is that when in doubt, a court is directed to determine in whose favour the balance of convenience tilts. The court is not in doubt.

Arising from the foregoing, I hereby allow this Application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2014.

MARY M. GITUMBI

JUDGE