



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 770 OF 2014

FRANCIS MUTURI NJUGUNA.....1ST PLAINTIFF

**JEMIMA NYAKIO (suing as the administrator of the estate of
WAIRIMU NJUGUNA GACHUKU(DECEASED)).....2ND PLAINTIFF**

VERSUS

LUCAS WANORA NDUNGU1ST DEFENDANT

JAMES GITHINJI WAMBUGU.....2ND DEFENDANT

STEPHEN WAINAINA NDUNGU.....3RD DEFENDANT

BONIFACE MUSEE.....4TH DEFENDANT

ANISIA MAITHA MWANIKI (as the chairman, secretary and

Treasurer of the management committee sector 1 Maili Saba

Siranga Mwengenyé Resettlement Scheme).....5TH DEFENDANT

RULING

The Notice of Motion before the court for determination is dated 13th June 2014 and is brought the Plaintiffs under section 3 and 3A of the Civil Procedure Act, Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules. The Plaintiffs have sought a temporary injunction to restrain the Defendants, their agents, servants or any other persons whether acting on their own or on the Defendants behalf from proceeding with the alienation, transfer, development or howsoever dealing with all that plot no. 280 (formerly no. 354) situate in Maili Saba area off Kangundo Road (herein after referred to as the suit property).

The application is premised on four grounds listed on the face of the application and is supported by the

2nd Plaintiff's affidavit sworn on 13th June 2013. The Plaintiffs have averred that they are children of the late Wairimu Njuguna Gachuku who passed away on 7th January 2008. They have stated that they were appointed as administrators of the estate of their late mother and have annexed as evidence a copy of a Grant of Letters of Administration Intestate issued in Nairobi Succession Cause No. 744 of 2012 on 17th September 2012.

The Plaintiffs case is that the deceased has been the legal owner of the suit property which measures 30 feet by 60 feet where she had constructed semi permanent structures consisting of single rooms for rental purposes. The Plaintiffs have stated that the deceased was allocated plot no. 354 and have exhibited a copy of an ownership certificate dated 27th March 2001 which was issued to the deceased by Mailisaba Settlement/Siranga(MSM)/ Mwengenyne Scheme in respect to plot no.354.

While stating that Mailisaba Settlement/Siranga(MSM)/Mwengenyne Scheme was formed in the year 2000 by the plot owners, the Plaintiffs have contended that the scheme was managed by a committee of about 40 people. According to the Plaintiffs, the scheme was subdivided into 4 sectors in the year 2004 and each sector had a management committee consisting of 8 members. It is the Plaintiffs averment that this development gave rise to new numbers and that the suit property was allocated number 280.

The Plaintiffs have contended that on 20th May 2014, the 2nd Defendant who is a son in law to the 1st Defendant delivered building materials and started digging up trenches for laying a foundation on the suit property without their knowledge and or consent. The Plaintiffs have annexed evidence of photographs and have stated that the Defendants have been progressing with the construction which the provincial administration has been unable to stop. It is alleged by the Plaintiffs that the police have aided and abetted the invasion by arresting representatives of the deceased and preferring trumped up charges against them.

While stating that majority of the representatives from the 3rd Defendant have confirmed that the deceased is the owner of the suit property, the Plaintiffs have contended that the suit property has never been sold or transferred to any other person. It is alleged that the only nexus the 1st and 2nd Defendants have in respect to the suit property is that the 1st Defendant's mother had been a tenant in one of the rental rooms on the suit property until her demise in the late 1990s.

According to the Plaintiffs, the 2nd Defendant's wife attempt to lay claim on the suit property in 2008 was waded off by the management committee who made a finding that ownership of the suit property lay with the deceased. Lastly, the Plaintiffs averred that if the orders sought are not given, the deceased's estate will suffer an irreparable loss and further, that orders issued at the conclusion of this suit will be rendered nugatory.

The application was opposed by the 1st Defendant who in a replying affidavit sworn on 19th June 2014 stated that plot no. 280 belonged to him. The 1st Defendant annexed as evidence a confirmation letter dated 3rd June 2008 from Mailisaba Settlement/Siranga (MSM)/Mwengenyne Scheme indicating that he was the registered owner of plot no. 280. The 1st Defendant also furnished a payment receipt dated 7th June 2008 issued to the 1st Defendant by Nairobi City Council in respect to account no. 280 Mailisaba sec. I.

The 1st Defendant stated that he had developed the plot by putting up rental houses, the 1st Defendant contended that the ownership certificate and beacon certificate annexed to the Plaintiff's affidavit did no relate to plot no. 280. It is the 1st Defendant's case that there was no relationship between the suit property and plot no. 280 and further, that no document was availed to prove that the said plots were related.

The 3rd Defendant filed a replying affidavit sworn on 19th June 2014 where he stated that he was the chairman of Mailisaba Settlement/Siranga. According to the 3rd Defendant, plot no. 280 was allocated to

the 1st Defendant by the scheme which gave him ownership documents. It is the 3rd Defendant's averment that the Plaintiffs' allegations on ownership of plot no, 280 were false and misleading.

Parties were directed to file written submissions and the Plaintiffs filed submissions dated 11th July 2014 where they reiterated the facts of their case and referred the court to the case of **Assanand -vs- Petit (no. 2) (1989) KLR 249** where the principles to be considered in granting interlocutory injunctions were restated by Harris, J. where he cited the case of **E.A. Industries Ltd -vs- Trufoods (1972) EA 420** which was the precursor to the case of **GIELLA -vs- Cassman Brown & Co. Ltd (1973) EA 358** which definitively laid down the principles. Counsel for the Plaintiffs submitted that the deceased was issued with an ownership certificate and a beacon certificate for plot no. 354 in the year 2001 after a proper survey of the plots in the settlement scheme. Further, it was argued that following the division of the scheme into four areas in the year 2004, new plot numbers were issued and that the suit property was allocated number 280.

It is the Plaintiffs' submission that the confirmation letter was a recent development which was mooted by members of the scheme to allow individuals to transfer their plots since the beacon certificate and ownership certificates were not transferable. While submitting that the 1st Defendant's confirmation letter had been signed by his wife who was a tenant who had tried to lay claim over the suit property, the Defendants argued that the authenticity of the serial number given to the plot (no. 001) was in doubt.

In further submission, the Plaintiffs contended that the Defendants did not have root of title documents over the suit property which is the beacon and ownership certificates. Counsel argued that the 1st Defendant's documents allegedly from the former City Council of Nairobi were suspicious since the area was not in the records of former City Council's records. Further, it was submitted that the payment receipt produced by the 1st Defendant was doubtful since the only payment chargeable would have been rates and not ground rent.

While submitting that the documents produced by the Defendants were all dated after January 2008, Counsel contended that the 1st Defendant's claim over the suit property arose after the demise of Wairimu Njuguna who was the owner of the suit property. It was submitted that the 3rd Defendant's replying affidavit did not furnish minutes of the meetings that allocated land to the 1st Defendant. It was also argued that since the purpose of the scheme was to streamline the management of plots, the scheme did not have capacity to issue plots.

The Plaintiffs made reference to a letter dated 10th April 2008 and submitted that the committee was unequivocal that the deceased's family owned the land. Further, the Plaintiffs contended that if the conservatory orders were not granted, the construction would resume unabated thereby causing irreparable damage to the Plaintiffs. Lastly, it was submitted that the balance of convenience lies in favour of the court granting orders to preserve the suit property.

The Defendants filed submissions dated 25th July 2014 where they relied on the case of **Alkan -vs- Muchoki(1984)KLR 353** to argue that the conditions for the grant of an interlocutory injunction are the probability of success; irreparable harm which cannot be adequately compensated for by damages ; and if in doubt, then the court can determine the matter on a balance of convenience. Counsel argued that plot no. 280 was not the same as plot no. 354 and that save for alleging that plot no. 280 was formerly plot no. 354, the Plaintiffs did not provide any tangible evidence to prove their allegations. It is the Defendants' submission that no prima facie case with probability of success has been demonstrated.

It was submitted for the Defendants that no evidence was adduced to prove that plot no. 280 was owned by the late Wairimu Njuguna Gachuku. Counsel averred that the 1st Defendant had furnished documents to prove ownership of plot no. 280. Further, it was argued that whereas the death certificate and letters of administration bears the name Wairimu Njuguna Gachugu, the ownership certificate and the beacon certificate bears the name Wairimu Njuguna Gachuku who are two different individuals.

In further submission, Counsel averred that the Plaintiffs had not demonstrated that they would suffer irreparable harm if the orders sought were not granted. It was contended that considering the circumstances of this case, the balance of convenience was not in favour of the Plaintiffs.

While submitting that the 1st Defendant had proved ownership of plot no. 280 through documentary evidence, Counsel stated that the 1st Defendant's ownership had been confirmed by the replying affidavit of the 3rd Defendant who was the chairman of the resettlement scheme. Lastly, the Defendants argued that since the Plaintiffs had not demonstrated the non existence of plot no. 354 whose documents they still possessed, the orders sought would injunct two plots being plot no. 280 and plot no. 354.

The issue to be determined is whether the Plaintiffs have fulfilled the conditions for the grant of a temporary injunction as stated in **Giella -vs-Cassman Brown & Co Ltd, (1973) EA 358**. 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 Court of Appeal defined what a prima facie case is in the case of **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125** where **Bosire JJA** in defining what would constitute a prima facie case stated:-

“I would say that in civil cases it is a case in 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 this case, the Plaintiffs have alleged that plot no. 354 belonged to Wairimu Njuguna Gachuku (deceased). They availed to the court an ownership certificate dated 27th March 2001 which was issued to the deceased by Mailisaba Settlement/Siranga(MSM)/ Mwengenyee Scheme in respect to plot no. 354. The Plaintiffs laid claim to plot no. 280 and argued that this was formerly plot no. 354. No evidence to prove that plot no. 354 was later changed and numbered 280 was adduced. The beacon certificate produced by the Plaintiffs as prove of ownership refers to plot no. 484 which is different from the suit property.

In my view, the Plaintiffs have not proved that plot no. 354 which they claim belonged to their late mother is now plot no. 280 which the 1st Defendant has laid claim over.

Further, it was submitted that the letters of administration and death certificate issued in respect to Wairimu Njuguna Gachuku while the certificate of ownership of plot no. 354 was issued to Wairimu Njuguna Gachugu and that these were two different individuals. These allegations were not rebutted by the Plaintiffs. No prima facie case has been established by the Plaintiffs and the court need not consider the other principles for the grant of interlocutory injunction. The Court of Appeal in the case of **Kenya Commercial Finance Company Ltd –vs- Afraha Education Society (2001)1 E.A. 86** held that the principles apply sequentially so that the second principle can only be addressed if the first one is satisfied and when the court is in doubt, then the third principle can be considered.

In the premises I find and hold the plaintiffs Notice of Motion dated 13th June 2014 lacks any merit and I order the same dismissed with costs to the Defendant.

Ruling dated, signed and delivered this 24th day of **October**, 2014.

J. M. MUTUNGI

JUDGE

In the presence:

..... For the Plaintiffs

..... For the Defendants