



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ENVIRONMENT AND LAND DIVISION
ELC NO. 1152 OF 2013

JOHN KURIA NGUGIPLAINTIFF

=VERSUS=

EMBAKASI RANCHING COMPANY LTD.....DEFENDANT

RULING

There are two Notices of Motion application for determination herein. The 1st Notice of Motion is by the Plaintiff/Applicant herein **John Kuria Ngugi** dated **26th September, 2013**. The application is against the Defendant herein **Embakasi Ranching Co. Ltd** and is brought under **Sections 1A, 1B, 3A** of the **Civil Procedure Rules** , **Article 40** of the Constitution of Kenya and all other enabling provisions of the law seeking for Orders that;

- i. *The Respondent either through its Directors, agents, employees, assigns or any person authorized by the Respondent to act on its behalf be restrained forthwith by a temporary injunction from interfering in any way with the Plaintiff's quiet possession of the property known as P2971 (C522) and the ongoing construction on the said property pending the hearing and determination of this suit.*
- ii. *That cost of this application be provided.*

The 2nd Notice of Motion is the one dated 22nd October, 2013 brought under **Order 1 Rule 6 10(2) 14,40 Rules 1,2,3,(3)** of the **Civil Procedure Rules and Section 1A, and 1B of the Civil procedure Act** seeking for Orders that;

- a. *Leave be granted to the applicant **Thomas Mutaki Mulwa** to be joined as an interested party in this suit.*
- b. *That the Plaintiff be restrained by a temporary injunction through himself his agents , servants , relatives , assigns and/or any other from continuing with construction of a house on Plot No. **C522 (6682) V 421**, at Ruai within Embakassi Ranching Company Ltd or alienating , selling , wasting , damaging disposing off or in any other way interfering with the interested party occupation , possession and or use of the said plot pending the hearing and determination of this application and or further orders of the Court.*

- c. *That a temporary injunction do issue to restrain the Defendant by itself , its Directors , servants , agents or whomsoever from alienating , selling , allotting , wasting , damaging , disposing , or in any other way interfering with the interested parties peaceful occupation possession and use of plot No. C522 (6682) V 4211, pending the hearing and determination of this application and or further Order of this Court.*

The Court directed that the two **Notices of Motion** be canvassed together and thus this Ruling. In the Notice of Motion dated 26th September, 2013, the Plaintiff/Applicant relied on the grounds stated on the face of the application and annexed affidavit of **John Kuria Ngugi** . These grounds are;

- a. *The applicant is the owner of the property known and Plot No. 2971 (C 522) located in Ruai within Embakasi in Nairobi County pursuant to a certificate No. 2162 issued by the Respondent to the applicant.*
- b. *That Plot No. 2971 (C 522) originally belonged to one **Stanley Macharia Chege**, who sold it to the applicant.*
- c. *The Respondent has alleged the plot belongs to him and the applicant has disputed that allegation and has continued with the developments for poultry farming. The Respondent has further threatened to send goons to the property to demolish the houses.*
- d. *The applicant is apprehensive that the Respondent will indeed send the said goons to his property to bring down his investment occasioning him untold suffering.*
- e. *That the applicant has come to court to protect his constitutional right to protection of property and it is for the interest of justice that the Orders sought should be granted.*
- f. *Further, that the applicant has had uninterrupted possession of the plot from the year 2009 and if the Order sought are granted, the Respondent will not suffer any prejudice at all.*

In his affidavit , the applicant, **John Kuria Ngugi** averred that he bought the suit plot from one **Stanley Macharia Chege** for **Kshs.600,000/=** and he was handed over documents of ownership . He further averred that before entering into the sale agreement, he had visited the Respondent's office and inquired as to whom was the owner of the plot and upon perusal of the records held by the Respondent, he established that the plot belonged to the said **Stanley Macharia Chege**. Further that, upon payment, he and the said **Stanley Macharia Chege**, proceeded to the Respondent's offices, and a transfer of the plot from the said seller to himself was formally done in their records. It was his contention that on **25th May, 2009**, he paid **kshs.10,000/=** to the Respondent being payment for Beacons replacement , which was done by a surveyor chosen and appointed by the Respondent itself. He was thereafter shown his plot and he took up possession since that time. He also contended that he commenced development on the property by first clearing the plot and construction of the site in the year 2012 .However on 18th September, 2013 , some three people visited him and claimed that the plot belongs to one of them which claims he re refuted . Further that he was summoned to the offices of the Respondent on **19th September 2013** and he gave copies of his documents. Again on **24th September 2013**, he visited the offices of the Respondent and he was informed that the plot belongs to someone else. The officials of the Respondent even threatened to

have goons to vandalize his property. He urged the court to grant the Orders sought.

On the Notice of Motion dated **22nd October 2013**, the intended interested party relied on the grounds stated on the face of the application and also on the annexed affidavit of **Thomas Mutaki Mulwa**, the applicant. It was alleged that;

- i. *That the applicant is an allottee and rightful owner of Plot No. C 522 (6682) V 4211, at Ruai within Embakasi Ranching Co.Ltd . Further that the court in its various Orders in case No. ELC No. 385 of 2009 Thomas M Mulwa Vs Embakassi Ranching Co.Ltd, declared the applicant as the owner and put into possession the applicant on the above stated plot to the exclusion of all other persons and or bodies.*
- ii. *Again, that the Plaintiff's plot is not P 2911- C 522 as he claims but Plot No. P 297 – (C 996) as it appears in the Defendant map and documents in his possession and as issued by the Defendant.*
- iii. *Further that in September 2013 the plaintiff trespassed on the interested party's parcel of land and started putting up a chicken house, despite the interested party objection.*
- iv. *That temporary injunction to restrain the Plaintiff from further construction, entering, working on, or erecting any structure thereon is necessary to forestall further damage to the interested party's plot.*

In his supporting affidavit, the interested party averred that Plot No. **C522 (6682) V 4211**, is his plot having been allocated to him by the Defendant after Judgment of the Court in **ELC No. 385 of 2009** and he was put into possession and he fenced off the same. He further averred that it is his constitutional right to protect his ownership and possession of the Plot which the Plaintiff claims to have been allocated by the Defendant to another party who sold to him. He further stated that from the Plaintiff's documents ,plot No.

P 2971 is not **C 522** but **No. C 996** as indicated in the map of the area of the Defendant. He contended that he went to the said plot on 17th September, 2013 and was shocked to find someone having started to construct a house on the plot and the Plaintiff declared the plot was his. He reported the matter to the Defendant and when the Plaintiff was requested to stop the construction, he refused. Applicant reiterated that Plot **No. P 2971 – C 522** belongs to him and Plot **No. P 29791–(C996)** belongs to the Plaintiff. He urged the Court to protect his constitutional right to ownership of property by granting the Orders sought.

The Defendant herein filed a Replying Affidavit and averred that the suit property is Plot **No. (C522)** which according to the Defendant's plot allocation record is owned by one **Thomas Mutaki Mulwa**, the interested party. He further averred that after examining the Plaintiff's application, he confirms that his plot is **No. C 996**. To him, the ownership of **(C522)** was a settled matter through **ELC No. 358 of 2009** . He therefore contended that the Plaintiff herein is encroaching on **Thomas M Mulwa's** plot and his prayers should not be granted.

The Plaintiff /Applicant filed a supplementary Affidavit and denied that Plot **No. C22** is owned by **Thomas Mutaki Mulwa** as he has not told the Court when he was allocated the said plot . Further that no certificate of ownership was produced in support of the assertion that the Plot belongs to **Thomas Mutaki Mulwa**. Moreover , the Respondent has not denied issuing him with certificate **No. 2162** certifying that **P 2971/C522** which belongs to him. He further refuted Respondent's claims that his plot was No. C 996 as he has no documentary evidence that he was allocated the said plot. Again, he denied that the issue of plot **No. C 522** is already settled matters vide **ELC No. 385 of 2009** as he was not party to the aforesaid suit. Further, the Decree was by consent and the Court did not get an opportunity to interrogate the issues and render a Judgment. It was his contention that the Decree issued did not include his plot . He also averred that before he purchased the suit property, he had seen it and was aware of where it was and it cannot be replaced with another of lesser value.

The Director of the Defendant Company, **Godfrey Muhuri Muchiri**, filed a further affidavit and

reiterated the contents of the Replying Affidavit sworn on **12th November, 2013**. He further reiterated that the suit property plot No. C522 is owned by **Thomas Mutaki Mulwa**. Further, that the said **Thomas Mutaki Mulwa** has a High Court Decree in **ELC No. 385 of 2009**, confirming him the absolute owner of the said property. He further acknowledged that the Plaintiffs documents of ownership are genuine but indicated that his plot is a different one from the suit property. It was his contention that as an allocating authority the Defendant is competent to tell the Court who between the Plaintiff and interested party is the bonafide owner of the disputed plot. Further that the plaintiff was informed that the property does not belong to him but he defiantly proceeded to undertake construction work when he was well aware that the suit property belonged to **Thomas Mutaki Mulwa**.

The parties herein consented to canvass both Notices of Motion by way of written submissions. I have now carefully considered the two Notices of Motion, the written submissions and the relevant laws and I make the following findings:-

There is no doubt that the Plaintiff herein **John Kuria Ngugi** and the interested party **Thomas Mutaki Mulwa** both own a plot at Embakasi Ranching Company Ltd. From the available documents it is evident that the plaintiff herein bought the suit plot from one **Stanley Macharia Chege**, who allegedly handed to him various documents among them Provisional letter of allotment dated 28th November, 1982. However, it was not clear how the interested party acquired his plot but from a Decree attached to his application, the said interested party has more than one plot in Embakasi area.

It is also not in doubt that the Plaintiff herein was called by the Defendant Company and informed that the suit plot belongs to somebody else. He was also shown plot No. **C996** and informed that was his plot instead of

C 522. However, the Plaintiff herein has alleged that the plot he bought from **Stanley Macharia Chege** is plot No. **C 522** and not **C 996**. The question of who owns plot **No.C 522** would have to be determined by the Court after examining available evidence. The issue of ownership of that suit plot cannot be determined through affidavit evidence.

It is also not in doubt that the Plaintiff herein has put up a chicken house on the suit plot. It is also not in doubt that the court did issue an Order of maintaining **Status Quo** meaning that **“no party herein was to have any dealing with the suit plot until the instant Notices of Motion have been determined”**.

The Plaintiff and interested party have both sought for injunctive Orders against the Defendant and each other. These are equitable remedies which are granted at the discretion of the Court. However the said discretion must be exercised judicially. See the case of **CMC Motors Group Ltd & Another Vs Evans Kageche Boru, Civil Appeal No. 295 of 2001**, where the Court held that;

“In granting the injunctory reliefs, the superior Court was exercising equitable jurisdiction which is discretionary and the Court of Appeal can only interfere with the judicial discretion of the learned Judge, if it is satisfied that the learned Judge did not exercise his discretion judicially”.

The applicants herein have both sought for equitable Order of injunction, I will be guided by the laid down principles on issuance of injunction while deciding the two applications. In the case of **Kibutiri Vs Kenya Shell, Nairobi, High Court, Civil Case No. 3398/1980 (1981) LR 390** the court held that:-

“ The conditions for granting of a temporary injunction in East Africa are well known and these are; First an applicant must show 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 the balance of convenience”

Each of the applicants herein needed to establish that he had met the laid down principles for grant of the injunctive Orders. See **Giella Vs Cassman Brown & Co.Ltd 1973 EA 358**.

The applicants needed to establish that they have a prima facie case with probability of success. In the case of Mrao Ltd Vs First American Bank of Kenya and 2 others (2003) KLR 125, the Court described prima facie case as

“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

The Plaintiff/Applicant herein alleged that he bought the suit plot from one **Stanley Macharia Chege** who had been allocated plot **No. P 2971**. There is a sale agreement attached to the Plaint to confirm that indeed Plaintiff bought this parcel of land from the said **Stanley Macharia Chege** for **Kshs. 600,000/-** on **17th July 2008**. It is also evident that the Plaintiff paid for the **beacons replacements** and it is indicated that it was for plot **No.P 2971(C522)**. On the part of the Interested Party, it is evident that there is an Order of the Court issued by ‘**consent**’ and it provides that Plot **No. C 522** be exclusively allocated to the said Interested Party by the Defendant. It is evident that the said consent that provided that Plot No. C 522 be exclusively allocated to the interested party was between the Interested Party herein and the Defendant. The Plaintiff herein was not a party to that suit and consent. I have also noted that the Defendant has submitted that the suit plot belongs to the interested party and Plaintiff’s plot is different from the said suit plot. The issues raised herein by the parties can only be determined after calling evidence and interrogating the same through cross –examination. I therefore find that I cannot hold with certainty whether the suit plot belongs to the Plaintiff or the Interested Party. The custodian of the record who is the Defendant tends to side with the Interested Party, however Plaintiff can hear none of that. From the available evidence, the Court finds that the Plaintiff has not established that he has a prima facie case with probability of success.

On the party of the Interested Party, though he has a ‘**Consent Order**’ which provided that he should be allocated exclusively plot **No. (C 522)** the Plaintiff herein was not a party to that Consent. The said **Consent Order** can therefore be challenged by the Plaintiff and the Interested Party cannot submit that the said Consent Order gave him exclusive ownership of the suit plot. The Court do find that the Interested Party has also not established that he has a prima facie case with probability of success.

On the second aspect of irreparable loss, it is evident that the two applicants herein are in Court fighting over possession and ownership of the suit plot. This aspect can only be determined through calling of evidence and interrogating the same as the Court had earlier stated. However, if any of the party herein is allowed to deal with the land as they so wish , then there is a danger of the suit plot being sold out build on, changing the substratum of the same or the value all together . Then if such scenario happens, the purpose of the whole suit will be rendered nugatory. It is evident that one of the reasons why an injunction is required is to maintain status quo among litigating parties. See **Noor Mohammed Jan Mohammed Vs Kassamali VN**

(1953) EA8.

The Court finds that as the purpose of injunction is to preserve matters in **Status Quo** until the question to be investigated in the main suit can be finally disposed off, the best available option herein is to maintain the **Status Quo** . If the Plaintiff has built some development on the suit plot, they should remain so with no further development therein. The Court find that in this matter the parties herein should maintain the **Status Quo** prevailing, **no party herein should have any further dealings on the suit plot** . The Plaintiff should not develop any further on the suit plot and the Interested Party should also have no dealings on the suit land until the matter is heard and determined. The parties to ensure that this matter is set down for hearing expeditiously so that the underlying issues can be resolved with finality.

The Notices of Motion succeeds only to the extent of ordering **no further dealings on the suit plot by any of the parties herein**. The cost of the two Notices of Motion shall be in the cause.

It is so ordered.

Dated, Signed and delivered this *27th day of November, 2014*

L. GACHERU

JUDGE

In the Presence of:-

Mr njomo holding for Mr Kamotho for Plaintiff/Applicant

None attendance for Defendant/Respondent

Mr Nzuva for Interested party/Applicant

Kamau: Court Clerk

L. GACHERU

JUDGE