



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO. 689 OF 2012

TERESIAH NYAMBURA KARERA.....PLAINTIFF

VERSUS

PAULINE NYANGUTHIE MUTAHI.....DEFENDANT

RULING

The matter coming up for determination is the Plaintiff/Applicant's Notice of Motion application dated **9th October, 2012** brought under **Section 40 Rules, 1,2&3 of the Civil Procedure Rules, Sections 1 A & B and Section 3A of the Civil procedure Act** and all other enabling provisions of Law seeking for these Orders.

- a. *That pending the hearing and determination of the main suit herein, an Order of injunction do issue to stop and restrain the Defendant /Respondent whether acting by herself or through her agents, servants and /or workers and /or anybody claiming any right or interest to the land through the Defendant from trespassing into, constructing and/or continuing with the construction of any house building or anything upon the land and generally from getting into and trespassing upon the Plaintiffs plot **LR No. 27627/54**, represented by Beacon certificate situated in Utawala area in the City of Nairobi.*
- b. *That Officer Commanding Police Division (OCPD) Embakasi, be ordered to ensure compliance with the orders herein.*
- c. *That cost of this application be borne by the Respondent in any event.*

The application is premised on the grounds stated on the face of the application and on the annexed affidavit of **Teresiah Nyambura Karera** . These grounds are:-

- i. *The Plaintiff is the lawful owner of Plot No. **LR 276227/54** having acquired it for valuable consideration and preserved the same to date.*
- ii. *The Respondent has without any colour of right trespassed onto the plaintiff's property and has commenced construction thereupon.*
- iii. *The Plaintiff acquired the suit property legally and for valuable consideration and stands to suffer irreparably if the Defendant/Respondent is not stopped from illegally and criminally taking this*

valuable parcel for land.

iv. *That is in the interest of justice and fairness that the orders sought herein be granted to preserve the property until the full determination of the case.*

The Plaintiff/Applicant **Teresiah Nyambura Karera**, in her supporting affidavit averred that she is the registered owner of Plot **No. 27627/54** situated in Utawala area in the City of Nairobi. Further that the suit plot was previously allocated to her father who later transferred it to her during the year 2006. She also averred that on 9th August, 2010, she was issued with the plots Beacon Certificate by **Robert Muturi Kariu** who carried out the survey work. She also stated that sometimes in September, 2010, she received information that the Defendant had trespassed into her plot and had started construction and she informed one **G.M Muhoro** who had allocated the plot to her father. It was her contention that **G.M Muhoro** on 10th September, 2010 wrote to the Defendant and informed her plot **LR No. 27627/54** belonged to the applicant and the Defendant was to vacate immediately.

Therefore the Defendant stopped further trespass and construction on the plot. Again sometimes in February, 2012, the applicant received information that the Defendant had trespassed on her plot and she further reported the matter to **G.M Muhoro** who wrote to the Defendant on 1st February, 2012 demanding that she stops further trespass. It was her further contention that the Defendant, her servants and/or agents aforesaid actions are flagrant trespass and violation of her rights as proprietor of the suit property. That further excavation and intended temporary structures will cause irreparable and irredeemable damage and waste to the said property. She contended that it is only just and equitable that the Defendant /Respondent be evicted from the suit premises.

The application herein is opposed. The Defendant /Respondent, **Pauline Nyanguthie Mutahi**, filed a Replying Affidavit and averred that she purchased the suit property **LR No. 27627/96** from **Susan Wanjiku Isaac** on 4th May 2010, as per the annexed sale agreement. Therefore that the applicant cannot seek to bar her from developing, utilizing or even alienating her property.

Further one **Josephat Mwangi Njau** filed a supplementary Affidavit in support of the Plaintiff's Notice of Motion and averred that he is the Chairman of **Kandara Development Company Ltd** and the Company keeps records of all plot owners of **LR No. 27627** previously owned by the Company. Further that the said land was sub-divided in the year 2006 into 118 parcels which are now owned by members of the company. He further averred that according to the records held by the Company, **Teresia Nyambura Karera** is the owner of parcels of land **LR No 27627/54** whereas **Pauline Nyanguthie Mutahi** is the owner of Plot No. **LR No. 27627/96**. Further that the plot being developed by **Pauline Nyanguthie Mutahi**, is **LR No. 27627/54**, Nairobi which according to the records belongs to **Teresia Nyambura Karera**. It was his further contention that the two Plots are located in different places according to the survey map. He also contended that they have written to the Defendant through their advocate **G.M Muhoro** asking her to remove herself from plot No LR No. 26627/54 to enable the applicant to develop it. However, the Defendant is still occupying the suit plot despite being informed that it does not belong to her.

Parties herein consented to canvass this Notice of Motion through written submissions. The parties accordingly filed the said written submissions which I have now carefully considered. I have also considered the pleadings generally, and the annexures thereto and the relevant laws and I make the following findings:-

There is no doubt that both the Plaintiff and the Defendant owns plots at Utawala area within the large area owned by **Kandara Development Company Ltd**. It is evident that the Plaintiff herein owns Plot **No. 27627/54** whereas the Defendants' plot is **No LR No. 27627/96**. The applicant has alleged that the Defendant herein has encroached on her suit plot and started to develop on the same. However, the Defendant has denied that allegation. From the Defendant's denial, the Plaintiff/applicant has come to this Court seeking for injunctive Order. This is an equitable remedy which is granted at the discretion of the Court. However, such discretion must be exercised judicially. See **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”.

In considering whether to grant or not to grant the Orders sought herein. I will rely on the laid down principles that have been stated in various judicial pronouncements. In the **East African Developments Vs Hyundai Motors Kenya Ltd , Civil Appeal No. 194 of 2000 (2004) LLR 61, 21 ,** the Court of Appeal held that;

“What was before the learned Judge was an application for equitable remedy of injunction and the conditions are first an applicant must show a prima facie case with 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 a award of damages, Thirdly if the court is in doubt, it will decide an application on the balance of convenience” See Giella Vs cassman Brown Co.Ltd (1973) EA 358.

The applicant herein needed to establish the above stated principles. Has the applicant demonstrated that she has a prima-facie case with probability of success?.

Prima facie case is to be adjudged on the evidence adduced and it means more that an arguable case that the evidence must show an infringement of right and the probability of success of the applicants case at trial. See **Mrao Vs First American bank ltd & Others (2003) KLR 125.**

The applicant herein has demonstrated that she is the owner of **LR No. 27627/54** . She was issued with a Beacon Certificate **TNK1** . Further , her averments have been supported by **Josephat Mwangi Njau** , the Chairman of Kandara Development Company which has kept records of the plot owners of LR No. 27627. He confirmed that the suit plot belongs to the Plaintiff and the Defendant herein own plot **No. 27627/96** which she bought from one **Susanah W.I Chege** as per the sale agreement attached to her Replying Affidavit. There is no doubt that there are two different plots. The said **Josephat Mwangi Njau** attached two survey maps which showed where each of the plot lies. The Defendant does not claim that she owns **Plot No. 27627/54** she admitted her Plot No is **27627/96** . However from the allegations made by plaintiff’s and her witness, the Defendant is developing on Plaintiffs plot she has not denied that allegation. The court finds if indeed the Defendant is building on the Plaintiffs plot, then plaintiff has established that she has a prima facie case with probability of success.

On the second issue, if the Defendant is allowed to continue constructing on the suit plot, the substratum of the same will change. In case the matter would be decided in favour of the Plaintiff herein, then there would be no plot for her to recover and she will definitely suffer loss that cannot be compensated by an award of damages.

The Official who keeps records of the plot owners herein has confirmed that the suit land belongs to the Plaintiff, if I am to decide on a balance of convenience, the same will tilt in favour of the Plaintiff herein.

Having now considered the pleadings in totality, the annexures thereto and the written submissions, the Court finds that the Plaintiff /Applicant Notice of Motion dated 9th October, 2012 is merited. The same is allowed in terms of prayers No. **c** and **d** therein and costs of the application shall be borne by the Respondent.

It is so ordered.

Dated, Signed and delivered this **21st day of November 2014**

L. GACHERU

JUDGE

In the Presence of:-

Mr Muhia for the Plaintiff/ Applicant

M/s Chelagat holding brief for Maina the 1st Defendant/Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE

21/11/2014