



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 1527 OF 2013

SIMON ONYANGO OKUMU.....PLAINTIFF/APPLICANT

VERSUS

DANIEL WACHIRA.....DEFENDANT

COUNTY GOVERNMENT OF NAIROBI..... DEFENDANT

RULING

This is the Notice of Motion dated 17th December 2013 brought by the Plaintiff under Order 40 Rule 1, 2, 3 and 9, Order 51 Rule 1 and Order 8 of the Civil Procedure Rules. The Plaintiff is seeking an order to restrain the 1st Defendant from interfering with, selling, disposing, wasting or dealing in any manner whatsoever with property known as Plot Number P. 37 Kayole Commercial Zone, Block II Infills-Kayole Nairobi (herein after referred to as the suit property) either by himself or through his agents until the final determination of the suit herein.

The grounds upon which the application is premised are detailed in the Plaintiff's affidavit sworn on 17th December 2013 as well as a supplementary affidavit sworn on 28th January 2014. The Plaintiff's case is that he is the registered and beneficial owner of the suit property having been issued with an allotment letter dated 13th November 2003, whose copy has been exhibited. The Plaintiff has contended that he fully complied with the terms and conditions of the allotment letter by paying all the requisite rates and rent demanded by the 2nd Defendant. The Plaintiff has avers that on 12th November 2013, the 1st Defendant unlawfully invaded the suit property and began construction. It is the Plaintiff's averment that the Defendant's unlawful invasion is causing him irreparable loss and damage as he is unable to develop the suit property.

According to the Plaintiff, there is no evidence that the City Council of Nairobi allocated the suit property to the 1st Defendant who has not produced an authenticated beacon certificate. The Plaintiff has averred that he made a report for malicious damage to property at Kayole Police station in the year 2011, after the 1st Defendant's workers uprooted a foundation of a building.

The application is opposed by the 1st Defendant who filed grounds of opposition dated 21st January 2014, a replying affidavit sworn on the same date and a further replying affidavit sworn on 17th February 2014. The Defendant has averred that he is the registered and beneficial owner of the property known as Plot

Number P. 1 Kayole Commercial Zones Block 11 Infills and he has annexed as evidence a copy of an allotment letter issued to him as well as payment receipts as proof of his compliance with the terms and conditions of the allotment.

The Defendant has contended that he started construction of a building on his property in 2010 and that the same went uninterrupted until 2 shops of the ground floor were ready for occupation and the 1st Defendant states that he appointed a management agent vide a Agency Agreement dated 1st December 2013 to let out the shops and collect rent on his behalf. It is the Defendant's case that the property referred to by the Plaintiff was different from his property and further, that the Plaintiff's claim, if any, should be directed to the 2nd Defendant to identify for him his plot. The Defendant has averred that the Plaintiff's contention that his ownership documents are forgeries is unsubstantiated.

The application was canvassed by way of written submissions and the Plaintiff in submissions dated 8th May 2014 reiterated the facts as pleaded in the application and his affidavits and averred that the conditions for grant of an injunction were set down in the case of **Giella -vs- Cassman Brown (1975) EA 358**. Counsel stated that a prima facie case as defined in the case of **Mrao -vs- First American Bank Ltd & 2 others (2003) KLR 125** had been demonstrated. The Plaintiff submitted that he had shown how he acquired the suit property and further, that he had fully adhered to the terms and conditions stipulated in the allotment letter. Counsel averred that the 1st Defendant had not brought evidence in court to show who sold the property to him and further, that no authenticated beacon certificate issued to the Defendant had been produced.

In further submission, the Plaintiff stated that the 1st Defendant's unlawful invasion of the suit property was causing him irreparable harm and damage as he was not able to develop the suit property as he had planned. Counsel contended that the 1st Defendant was unlawfully restraining, prohibiting and hindering his ownership and possession of the suit property. It was submitted that it would be difficult for the Plaintiff to acquire a similar piece of land. Lastly, it was submitted that the balance of convenience tilts in favour of the Plaintiff who acquired the property more than a decade ago and who stood to lose despite having an actionable case against the Defendants.

The 1st Defendant in submissions dated 14th July 2014 argued that he and the Plaintiff were asserting ownership over two distinct properties namely Plot P. 37 Kayole Commercial Zone, Block II Infills and Plot P. 1 37 Kayole Commercial Zone, Block II Infills. Counsel submitted that whereas the Defendant's plot was allocated to him on 12th January 2002, the Plaintiff's is alleged to have been allocated on 13th November 2003.

Further it was submitted that whereas the 1st Defendant had indicated that his plot was marked out for him by a surveyor from the 2nd Defendant, the Plaintiff did not indicate that his plot was pointed out to him or its boundaries demarcated. It is the Defendant's submission that the Plaintiff has not established any nexus between his alleged plot and that of the 1st Defendant or that the acts of trespass complained of were being committed on his alleged plot.

While submitting that the Plaintiff's plot was different from the 1st Defendant's plot, Counsel argued that the allegation that the Defendant's documents of ownership were a forgery was unsubstantiated. It was submitted that if the Defendant had forged documents purporting to be those of the 2nd Defendant, the 2nd Defendant would have denied the same. Counsel contended that no cause of action with a probability of success had been disclosed against the 1st Defendant.

In further submission, the Defendant stated that the application which was brought 2 years after the alleged trespass had been caught up by latches. It was submitted that the applicant had been indolent and that equity aids the vigilant and not the indolent. Counsel averred that the Plaintiff had approached the court with unclean hands and was guilty of misrepresentation and concealment of material facts and was therefore not entitled to the remedy sought. The court was referred by the 1st Defendant to the case of **Nyutu & 3 others -vs- Gatheru & 2 others HCCC No. 3258 of 1990** and **Abdukader -vs- Mohamed**

Hasham Bakarani & anor (2014)eKLR where the court stated that the power of the court to grant the equitable remedy of injunction is discretionary and the court has unfettered discretion but which must however be exercised judicially. **Mary Kasango, J** in the case of **Abdulkader –vs- Mohammed Hsham Bakarani & Another (Supra)** quoted with approval the court of Appeal holding in the case of **Charter House Investment Ltd –vs- Simon K. Sang & 3 others – Eldoret Civil Appeal NO. 315 of 2010 (2010)e KLR** where the court stated:-

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties”.

Counsel submitted that the 1st Defendant was in possession and occupation of a plot which was distinct from the Plaintiffs and which he had exhibited evidence of ownership. It was submitted that the balance of convenience tilted in favour of the 1st Defendant who had undertaken development of his plot. Lastly, the 1st Defendant referred the court to the case of **Shadrack Mbalanya -vs- John Atingo Amayi (2014) eKLR** where the court applying the principle of the balance of convenience based on the occupancy of the respondent of the disputed plot declined to grant an injunction.

The issue to be determined is whether the Plaintiff has fulfilled the conditions for the grant of a temporary injunction as enunciated in **Giella -vs-Cassman Brown & Co Ltd (1973) EA 358**. The Plaintiff has laid claim to plot number **P. 37 Kayole** Commercial Zone, Block II Infills-Kayole. He is seeking restraining orders against the 1st Defendant who has maintained that his Plot Number P. 1 Kayole Commercial Zones Block 11 Infills is different from the Plaintiff's plot. Both parties have exhibited allotment letters for their respective plots and have averred that they fully complied with the conditions for allotment. The plaintiff has sought the remedy of injunction against the 1st Defendant. The court can only exercise its discretion in favour of the plaintiff if it is satisfied that the Plaintiff/Applicant has shown that the facts, materials and circumstances of his warrant the court's discretion to be so exercised. In the present case I am not satisfied that the plaintiff has established that the plot on which the 1st Defendant has constructed is plot number **P.37 Kayole** Commercial Zone which he claims, it could as well be plot Number **P. 1 Kayole** Commercial Zone which the 1st Defendant claims. In my view the plaintiff has not established he has a prima facie case with a probability of success against the Defendant. There is doubt as development on plot **P.37 Kayole** or plot **P.1 Kayole** which he claims belongs to him.

The balance of convenience at any rate would be in favour of the 1st Defendant who has invested on the property he claims to be his by putting up what he states are two shops which fact is not denied or disputed by the plaintiff. The plaintiff it would appear is also caught up by the doctrine of laches as the 1st Defendant has already constructed on the disputed property. The lack of any response from the 2nd Defendant who were the allocating authority has not helped matters as one would have expected them to clarify who the rightful owner of the disputed property is between the disputants.

In the premises I decline to grant the order of the injunction sought by the plaintiff in the notice of motion but given the attendant circumstances of this matter the order that commends itself is one preserving the subject matter. I accordingly order and direct that the parties observe and maintain the existing status quo where the 1st Defendant remains in possession and does not effect any further construction until the suit is heard and determined. The parties are directed to expedite compliance with order 11 of the Civil Procedure Rules 2010 and the matter is ordered to be fixed for a pretrial conference on 25/1/2015 for pre-trial directions.

Ruling dated, signed and delivered at Nairobi this 20th day of **November** 2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... for the Plaintiff

..... for the Defendants