



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC NO 335 OF 2012

MICHEAL KAMAU..... PLAINTIFF

VERSUS –

CITY COUNCIL OF NAIROBI1ST DEFENDANT

WOMEN FIGHTING AIDS IN KENYA (WOFAK)2ND DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 12th June 2012. The plaintiff prays for injunction to restrain the defendants from alienating or dealing with the plaintiff's property known as plot no A1 – 193 Kayole, Nairobi. The motion is brought under order 40 of the Civil Procedure Rules 2010. It is largely predicated on the deposition of Michael Kamau sworn on 11th June 2012.
2. In a synopsis, the plaintiff's case is that he is the lawful and *bona fide* allottee of the property. He avers that the 2nd defendant, without any colour of right, has entered the property and constructed some structures. This has prejudiced the plaintiff's rights to ownership and quiet possession.
3. The 1st defendant did not file a reply to the motion. It has however filed a statement of defence to the action. The 2nd defendant contests the motion. In a nutshell, the 2nd defendant claims to be the lawful purchaser of the property for valuable consideration paid to one Francis Kariuki on 9th January 2008. The 2nd defendant took up possession, amalgamated the plot with four others, paid rates and other outgoings and constructed on the disputed property. It claims to have been in uninterrupted possession for 4 years. All those matters are detailed at length in a replying affidavit sworn by Dorothy Onyango, a director of the 2nd defendant. The 2nd defendant submitted that the application is thus overtaken by events and is without merit.
4. I have heard the rival arguments. At the heart of the suit is a dispute over ownership of the suit land. The disputants have laid claim to it. The determination of the legal owner is the true province of the trial court on tested evidence. However, I must at this stage, on a preponderance of the evidence available, determine whether the plaintiff has a *prima facie* case. When a litigant approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not

compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has miscondacted himself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80. See also the Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

5. I have to delve into the respective documents submitted by the disputants to determine priority of ownership or superiority of the claims. I do so with trepidation because, at this stage, I am not fully seized of all the evidence. See Col. (Rtd) James Peter Gichuhi and another Vs Kahawa Sukari Ltd and 3 others Nairobi, High Court ELC No 705 of 2011 [2012] e KLR.

6. The plaintiff's claim dates back to 26th August 1985. On that date he was invited by the 1st defendant City Council for an interview following his application for a plot in the council's Kayole project. From the document marked "MK 2", he was allocated plot number A1 – 193. That was on 6th December 1985. There were a number of conditions precedent including payment of a sum of Kshs 1,100 to the council to be paid on or before February 1986 and a monthly charge of Kshs 120 effective January 1986. The document marked "MK 3" shows that the plaintiff paid the sum of Kshs 1,100 within the stated period. There are also receipts marked "MK 6" for monthly rent. Some were paid late and in arrears. In the statement of defence of the 1st defendant dated 30th July 2012, the council states that the plaintiff was "permanently in default of payment" of the monthly rents. The City council did not file a replying affidavit. The pleading in the statement of defence does not constitute evidence. It is at variance with the evidence supplied by the plaintiff. The truth can only be unraveled fully by the trial court upon tested evidence. The council pleads that in the year 2007, it repossessed the plot for want of payment of rent and allotted it to "other deserving residents of Nairobi". It is quite telling that it does not state to who and when the re-allocation was made. I will leave it at that to avoid embarrassing the trial court.

7. The 2nd defendant has produced a sale agreement dated 9th January 2008. The vendor was Francis Wambugu Kariuki to the 2nd defendant for Kshs 350,000. I have looked at the document marked Do – 1 (a). The 2nd defendant says it is a plot card. But it is a loan book for "plot A1 – 193 repossessed Kayole". There are no documents annexed detailing the circumstances or consideration for the allotment to Francis Kariuki. It is also not lost on me that the City Council claims to have repossessed the property only in the year 2007. That was nearly 22 years since the original allotment to the plaintiff. My attention however has been drawn to the published minutes of the City Council's housing development committee dated 12th July 2007. At minute number 9, the disputed plot A1 – 193 was repossessed for arrears totalling 9,040. The plaintiff disputes it. The City Council has opted not to shed further light. The question whether there were such arrears and whether the Council was entitled to repossess the plot and re-allocate it can only be determined by the trial court. None of the parties has progressed their allotment to a full lease.

8. From a legal standpoint, a letter of allotment is not a title to property. It is a transient and often conditional right or offer to take the property. See Wreck Motor Enterprises Vs. Commissioner of Lands and others Nairobi Civil Appeal 71 of 1997 (unreported), Jaj Super Power Cash & Carry Limited Vs Nairobi City Council and others Nairobi, Civil Appeal 111 of 2002, Court of Appeal, (unreported). I also note in passing that exhibit "Do – 2 b" by the 2nd defendant shows that a search by one Leaneka Omara on 5th December 2007 stated that the disputed plot was owned by yet another party named as John W. Makewa. There are thus a number of gaps to be filled at the trial.

9. The 2nd defendant is in possession and has constructed on the property. But that by itself does not solve the question of title to the property. The 2nd defendant urged the point that the plaintiff's claim is overtaken by events and that damages would be a suitable recompense. Since the plaintiff's claim of title is first in time, and the 2nd defendant's claim to title is disputed, the interests of justice demand that the *status quo ante* be maintained pending the hearing of the suit. That is the letter and spirit of article 159 of the constitution as read together with sections 1A and 1B of the Civil Procedure Act. In the end, I have

formed a clear opinion that the plaintiff has established a *prima facie* case for grant of interlocutory prohibitive injunction.

10. Even if I were to be wrong in that finding, in a land matter such as this one, and considering the beneficial interest claimed by the plaintiff, damages would not be an adequate remedy. Damages are not always an adequate remedy where there is breach of a legal right. See *Aikman Vs Muchoki* [1984] KLR 353, *Joseph Siro Mosioma Vs Housing Finance Company of Kenya and others* Nairobi, High Court case No 265 of 2007 [2008] e KLR, *James Njoroge Kamau Vs Francis Njuguna and another* Nairobi, High Court civil case 8 of 2011 (unreported).

11. For all the above reasons I order as follows;

- a. **THAT** an injunction shall issue restraining the defendants jointly and severally and whether by themselves or their agents or howsoever from alienating, reallocating, selling or in any other manner interfering with the plaintiff's ownership of Plot Number A1 – 193 Kayole until the hearing and determination of this suit.
- b. **THAT** the main suit shall be determined within 1 year in default of which the order of injunction shall lapse.
- c. **THAT** costs shall abide the final judgment.

DATED and DELIVERED at NAIROBI this 18th day of January 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Amollo for Mr. Macharia for the Plaintiff

No appearance for the 1st Defendant

Mr. Odhiambo for the 2nd Defendant.