



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 478 of 2012

FRANCIS OKELLO NDEGE.....PLAINTIFF/APPLICANT

VERSUS

ALEXANDER OCHWO ALELA.....DEFENANDANT/RESPONDENT

RULING

1. The plaintiff/applicant has filed a notice of motion dated 6/8/2012 under section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and order 40 Rules 1(a) 2 and 3 of the civil procedure rules and rule 3(1) & (2) of the High court practice and procedure rules, seeking the following orders;

i. Spent

ii. Spent

iii. That this Honourable Court be pleased to order and/or issue a temporary injunction restraining the defendant/respondent by himself, his servants, agents and/or employees or otherwise from entering, constructing, depositing construction materials, laying or digging foundation or taking any steps towards construction or otherwise interfering with plot number W 464 situated at Dandora phase 4 extension pending hearing and determination of this application.

iv. The office commanding police station, at Dandora to ensure compliance with the Court orders.

v. That in the interests of Justice it's only fair that this application be heard during the current vacation.

vi. That the costs of this application be borne by the defendant/respondent.

The application is based on the following grounds that;-

i. The plaintiff/applicant is the owner of plot number w 464 situated at Dandora phase 4 (four) extension.

ii. The plot, on which the defendant/respondent is currently constructing on, was acquired by the plaintiff herein from Francis O. Owaga on the 21st June 1997.(date which final payment in regards to the plot was made)

iii. The defendant/respondent has already dug foundation and built upon the said plot. The said building is in its final stages, the walls are well within the completion stage.

iv. The construction if allowed to proceed would effectively hinder and/or impede the plaintiff/applicant from accessing his own plot and thereby rewarding the defendant's illegal action.

v. The defendant/respondent actions are an attempt to grab a privately and individually owned plot unscrupulously and unless the defendant/resplendent is stopped from perpetuating illegal and unlawful construction on the said plot, then the plaintiff/applicant stands to suffer immense loss and will be exposed to great harm.

2. In a supporting affidavit of Francis Okello Ndege the applicant dated 3rd August 2012 he deposes as follows that he is the owner of plot number W 464 situated at Dandora phase 4 extension in Nairobi. That the said plot was allocated to him by virtue of being a member of the Nyumba Moja Women Group. That upon inspection by the Building Inspectors, on the 26th November 1996, the land surveyor issued him with a Beacon certificate of the said plot W 464. That the plot on which the defendant is constructing on has always been his property since 1997. He purchased the plot from a one Francis O. Owaga. That he has owned the said plot since 1997, however he has been unable to develop the plot due to financial constraints. His nature of work also impeded his efforts to develop the plot and he has been working outside the country for the last six years. That the defendant/respondent who is purporting to be the owner of the pot has deposited construction material at the said plot and has commenced with the construction of a permanent structure thereon. That the plot is his property and the defendant/respondent is making it impossible for him to access his legally acquired plot. That if the defendant/respondent is allowed to construct on the said plot it would have very serious repercussions on him by way of impeding access onto his own plot and in turn delay his intentions of building upon the plot.

3. In a replying affidavit of Alexander Ochwo Alela dated the 14th August 2012, the defendant deposes as follows; that by a sale agreement dated 19th July 2007, Thomas Mboya Indieka the first (1st) purchaser and him as the second (2nd) purchaser jointly purchased the suit property known as land reference no. 396 situate within block W. Dandora, Nairobi Area. That the property was sold to the 1st purchaser and himself by Susan Wambui Kinuthia who was a member of Nyumba Moja Women Group. That upon execution of the said plot of land, the said Nyumba Moja Women Group issued a duly amended official identification allotment letter to remove the previous vendor's name and substituted with his name and the 1st purchaser. That upon conducting a diligent search, it was apparent that the plaintiff's name does not appear in the register of Nyumba Moja Women Group. That on the face of said allocation letter (FONI) the plot number was altered from W414 to W464, yet neither numbers appear on his allocation letter (AOA2) which is genuine with regard to plot number W 396 in so far as the previous owner's name Susan Wambui Kinuthia appears on it. That the plaintiff's allotment certificate shows that the plaintiff was shown the plot on 26th November, 1996 while his allotment certificate shows that the plot was shown to the original owner much mealier on 12th September, 1996.

4. In a further affidavit of Francis Okello Ndege dated 23rd August 2012, he reiterates what he deposed in his supporting affidavit and deposes further that;the defendant admits not being the legal owner of plot number 464 but stipulates that he is the owner of plot number 396 and not plot number W 464. That the said plot number 464 was transferred to him by Sylvester A. Ochuka and the said sale was conducted by the project surveyor who had been assigned the duty to settle squatters of the Nyumba Moja Women Scheme Francis. O. Owaga. That the land surveyor has provided a map clearly indicating the position of plot number W 464. That the said beacon certificate is genuine and was issued by the City Council of Nairobi that the name of the land surveyor does appear on the said beacon certificate. That the allegations that the beacon certificate and the allocation letter in his possession are altered is a mere attempt to misdirect the Court, and the defendant should be estopped from alleging the same. That defendant/respondent herein has no claim over plot number W 464 as he claims to be the owner of plot number 396 and not 464.

5. In a further replying affidavit filed by the defendant he reiterates that plot W464 does not exist as he has been informed by the officials of Nyumba Moja Scheme. That he has also been informed that Francis

o. Owaga and Sylvester .A. Ohuka are not members of the said group. That the sale agreement between the surveyor on behalf of Sylvester Ochuka and the plaintiff is illegal as advised by his advocate and that the purported beacon , certificate of map are not contemplated documents within the law.

6. There is also the affidavit of Francis O. Owaga dated the 21st August 2102 who depones that in October 1996 on behalf of City Council he was the project surveyor who was assigned the duty to settle squatters of Nyumba Moja Women Group. That on the 10th of October 1996 he sold plot no. 464 from Nyumba Moja Women on behalf of Sylvester Ochuka to Francis Okello Ndege and he issued a beacon certificate. That on the 26th October 1996 as the project surveyor he issued the beacon certificate to Francis Okello Ndege. That no title deed in respect of the said plot has been issued to date.

7. Parties filed written submissions. I have carefully read them. The plaintiff in his submissions claims that he is the bona fide owner of the plot no W464 at Dandora Phase 5 having bought the plot from Sylvester Ochuka. That the defendant who alleges to be the owner of plot no. 396 has not attached any title document to the said plot. That he has the affidavit of the surveyor to support his claims and therefore he has established a prima facie case with a high probability of success. That if the defendant is allowed to continue with the construction he will be denied access to enjoy what is rightfully his and this will cause him irreparable harm. To support his argument that a party's right cannot be trampled on with impunity at the pain of one's ability to pay damages the applicant cited the case of **Agnes Wanjiku Kamweti vs. Thamia Investment and 2 others HCCC 227 of 2009**. The applicant further submitted the balance of convenience tilts in his favour as he is the bona fide owner. The applicant also relied on the case of **Samuel Mbugua Gachuhi vs. City Council of Nairobi and 2 others HCCC 1595 of 2002**.

8. The respondent submits that the suit property is not known as plot W464 but is known as plot 396 Block W. That the plaintiff has not shown that he has a prima facie case as the identity and existence of Sylvester Ochuka is doubtful and the surveyors bona fides are suspect as he lacks capacity to sale the property having failed to attach a document giving him such authority. That the beacon certificate and deed plan are not authentic for non compliance with sections 21,32, 41 and 47 of the Survey Act Cap. 299. That the suit is fatally defective, null and void ab inito for non compliance with order 5 rule 1 (5) of the CPR, as there was no summons filed with the plaint or the amended plaint. That the amended plaint is also defective and the suit null and void ab inito for failure to comply with the provisions of order 8 rule 7 (1) of the CPR. That the plaintiff who claims to have bought the plot for Kshs. 45000/ , can easily recover the said sum as compensation in lieu of property he intended to purchase. On a balance of convenience counsel argues that the defendant is in possession and is constructing. That it does not tilt in the plaintiff's favor as he bought the plot from a ghost seller and that the injunction will affect other interested parties. That the court will be acting in vain if an order of injunction is granted adversely against parties when have not been joined to the suit.

9. I have considered all the facts tendered by the parties in their affidavits and their submissions. Counsel for the plaintiff has raised the issue that the plaintiff suit is fatally defective for failure to comply with the provisions order 5 (1). I do note that the original plaint dated 6/8/12 was not filed with a summons. Subsequently on the 24/8/12 the plaintiff filed amended plaint which is endorsed with a date the 24/8/12. There are copies of the summons in the court file not signed by the DR and a witness statement of the plaintiff. What counsel for the defendant has raised are technicalities. Article 159 2(b) of the Constitution provides that justice shall be administered without due regard to procedural technicalities.

10. On the application before me, the applicant seeks a injunction against the defendant. He claims that he is the owner of plot W464 and that the defendant is constructing in his plot. The defendant claims that his plot is No.396 that the plaintiff plot does not exist nor is the plaintiff a member of Nyumba Moja Women Group. For an applicant to be granted an injunction he must show that he has a prima facie case with a probability of success, that he will suffer irreparable loss which cannot be easily compensated and if the court is in doubt it will decide the case on a balance of convenience (**see Geilla vs. Cassman Brown E. A.1973**). There are issues that arise in this case, as follows does plot no W464 exist. Is plot no 396 and W464 the same plot. The affidavit of Francis Owaga who claims to be the project survey does not address this issue. There are issues raised on the beacon certificate and the surveyor done. I note

further that none of the parties tendered any affidavit from any of the officials of Nyumba Moja to clarify this issue. Could it therefore be that the defendant is building on the plaintiff plot. Another issue raised is whether the plaintiff documents are genuine, again as a Court without evidence from the officials am unable to decide whether what has attached are genuine documents. The defendant is in possession, he has been constructing, and the annexed photographs clearly show that. The construction appears to be at an advance stage; however this court has to decide who owns this plot. Thus I find that the only suitable order is to order the parties to maintain the status quo. None of them will do anything on the property that would prejudice it there shall be no construction, no transfer or sell. Parties in this matter shall comply with the provisions of order 11of the Civil Procedure Act within 30 days and fix the suit for hearing. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 22nd February 2013

R. OUGO
JUDGE

In the presence of:-

.....**PLAINTIFF**

.....**DEFENDANT**

.....**COURT CLERK**