



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

ENVIRONMENTAL & LAND CASE 756 OF 2012

JAMES KIMANI HORERIAPLAINTIFF/APPLICANT

VERSUS

JOHN MWANGO WERU.....1ST DEFENDANT/1ST RESPONDENT

THE TOWN CLERK CITY COUNCIL OF NAIROBI.....2ND DEFENDANT/2ND RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 25th October, 2012 wherein the following orders are sought:

1) Spent

2) That this Honourable Court be pleased to issue an Injunction restraining the Defendants by themselves, their agents and/or servants from interfering with the ownership, carrying out construction works thereon or in any way remaining on, occupying and/or interfering with the Plaintiff's Commercial **Plot No. 85 Kariobangi Light Industries (the "Suit Property")** and/or any part thereof until the final determination of this suit.

3) That costs of this application be paid by the Defendants jointly and/or severally in any event.

The Plaintiff/Applicant relies on his supporting affidavit sworn on 25th October, 2012.

2. In a nutshell, the Plaintiff/Applicant's case is that he purchased **Plot No. 85 Kariobangi Light Industries (the "Suit Property")** from one Zakayo Makumi by an agreement dated 19th April, 1985 and the letter of Allotment was duly endorsed by the 2nd Defendant/Respondent with the transfer in his favour. He further contends that in December, 2011 the 1st Defendant/1st Respondent encroached on the suit property, illegally fenced it off with iron sheets and commenced construction thereon.

He contends that he reported the said encroachment to the 1st Defendant who claimed that the suit property was **Plot No. 87** and not **Plot No. 85** and that the suit property belonged to him. The Plaintiff/Applicant further contends that he reported the encroachment on the suit property to the Chief and the 2nd Defendant and both issued notices to the 1st Defendant to cease the encroachment all of which fell on deaf ears.

3. The motion is contested. The 1st Defendant has filed a Replying Affidavit sworn on 7th November,

2012. In it, he contends that he is the duly registered owner of **Plot No. 87 Kariobangi Light Industries** which he claims is in fact the suit property. He contended that he purchased the Plot on 23rd June, 2011 and has documents to support his ownership claim issued by the 2nd Defendant. He further contends that the Plaintiff's claim is for **Plot No. 85** and not **Plot No. 87** which belongs to him. He contends that he is building his commercial building on **Plot No. 87** and not **Plot No. 85**. He contends that upon purchase of **Plot No. 87**, a survey or of the 2nd Defendant named Nicodemus Oguto had come to the ground and pointed out the beacons showing where his **Plot No. 87** is and subsequently issued him with a Beacon Certificate. He further averred that the Beacon Certificate issued to him by the Chief Land Surveyor of the 2nd Defendant and that there is nothing like **Plot No. 85** on the ground where he is constructing. He also averred that he has been paying the required statutory dues to the 2nd Defendant.

4. I have heard the rival arguments. At the heart of the suit is a dispute over ownership of the suit property. 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 reliefs 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 by damages and thirdly, if in doubt, the Court must assess the balance of convenience.

5. I have to delve into the respective documents of title by the disputants to determine superiority of the claims. Looking at the documents of ownership produced by the Plaintiff, they seem to point to the fact that he is the bona fide owner of **Plot No. 85 Kariobangi Light Industries**. He has indeed produced an agreement for sale evidencing the transfer of **Plot No. 85** from one Zakayo Makumi to himself. The 2nd Defendant also admits that **Plot No. 85** belongs to the Plaintiff. What remains unclear and unadduced is evidence pointing to the fact that the Plot currently under possession and construction by the 1st Defendant is in fact Plot No. 85 to which the Plaintiff lays claim. The drawings of the physical location of **Plot No. 85** adduced by the Plaintiff cannot be relied on in evidence as they do not indicate their origin or who drew them.

6. On his part, the 1st Defendant has also adduced evidence pointing to his ownership of **Plot. No. 87**. He has produced a letter from the 2nd Defendant acknowledging his ownership of **Plot No. 87**.

He has also adduced evidence to show that he has been paying statutory dues in respect of **Plot No. 87** to the 2nd Defendant. He has given a historical background on the transactions undertaken in respect of Plot No. 87. The approval of building plan issued by the 2nd Defendant and produced by the 1st Defendant as evidence relates to **Plot No. 87**. Even the beacon certificate issued by the 2nd Defendant and produced in evidence by the 21st Defendant relates to **Plot No. 87**. In addition, the 1st Defendant has attached photos of the constructed building standing on what he alleges to be **Plot No. 87**.

7. As is now clear, both the Plaintiff and the 1st Defendant lay claim on the suit property but each claim that the suit property bears their Plot Number.

8. After consideration of this, I am left in a position whereupon I am at this stage unable to convincingly determine whether the suit property is **Plot No. 85 or 87**. This being the case, I find that the Plaintiff has not established a prima facie case as required in the **GIELLA VS CASSMAN BROWN CASE** cited earlier.

9. In this regard therefore, the application dated 25th October, 2013 is hereby dismissed. No. Order as to costs.

SIGNED AND DELIVERED ON THE 22ND DAY OF FEBRUARY 2013.

MARY M. GITUMBI

JUDGE