



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 252 of 2012

AUGUSTINE N. THUO.....PLAINTIFF

VERSUS

JAMES MAINA THUITA &.....1ST DEFENDANT

EMBAKASI RACHING CO. LIMITED.....2ND DEFENDANT

RULING:

1. The Applicant herein **Augustine Ngotho Thuo** has brought this Notice of Motion dated 21/1/2013 for orders that an Injunction do issue restraining the Defendants by themselves or their agents from entering, trespassing, Occupying, possessing, selling, leasing, transferring, alienating or in any other way dealing with property namely **Plot No. F 630** situate at Ruai Nairobi within Embakasi Ranching Company Ltd pending the hearing of this suit and for costs of the Application.
2. The Application was premised on the grounds stated on the face of the Application and by the Supporting Affidavit of Applicant, **Augustine Ngotho Thuo**. The Applicant deponed that in 1976, he purchased **Plot No. F630** in Ruai, Nairobi from the 2nd Defendant and paid in full purchase price by instalments and was finally issued with the allotment letter dated 25/1/1984 which certified that he was the lawful owner of the said plot.
3. That the 2nd Defendant was supposed to process and issue a Title Deed for the said plot in favour of the Plaintiff within a reasonable time and / or to furnish the plaintiff with the necessary transfer documents duly signed in favour of the plaintiff together with other necessary consents and / or documents to facilitate the transfer and registration of the said plot. The Plaintiff now avers that the 2nd Defendant has refused to either process the Title Deed in favour of the plaintiff and / or to furnish the plaintiff with the transfer document duly executed for the purpose of effecting a transfer in favour of the plaintiff.
4. The Plaintiff further stated that he recently discovered that 2nd Defendant intends to illegally and fraudulently re-allocate the said property to the 1st defendant without the Plaintiffs' knowledge, consent or approval. In that regard, the 1st Defendant has trespassed and destroyed 20 posts of the perimeter fence put up by the plaintiff and 1st Defendant intends to illegally and unlawfully occupy the Plaintiffs' land the subject of this case. That the action of 1st and 2nd Defendants are illegal, fraudulent and malicious and it constitute a breach of the contract for sale/ and or **Certificate of Allotment** dated 21st January, 1984. The Plaintiff is therefore apprehensive that unless the order sought herein are granted, the Defendants are likely to alienate the subject property in favour of a third party and / or continue with the action of trespass and Plaintiff will suffer substantial loss and damage.

5. The 1st Defendant opposed the Plaintiff/ Applicant Notice of motion. He averred that he is a stranger to the Plaintiffs' averments. That 1st Defendant is a bonafide shareholder of Embakasi Ranching Co.Ltd under Certificate **No. 882 JM II**. He further deponed that he purchased the shares from one **Eliud Karanja Kigotho** on or about 1995 at a consideration of **Kshs. 264,000/=** as per **JMT 2**. 1st Defendant averred that he paid all the payments required by the 2nd Defendants and he was issued with a **Share Certificate No. 822** and was allocated the four mentioned plots as per anneture **JMT4**.

6. The 1st Defendant further alleged that after he was allocated his four plots he fenced them and that is contrary to the Plaintiff claim that he had fenced his plot. That 1st defendant has continued to enjoy quiet and peaceful possession of his four stated plots until sometimes in March, 2012 when Plaintiff invaded a portion of the plot and fenced it after dumping cotton soil thereon plot **No. 105/1070**. That 1st Defendant referred the matter to the area Chief who in turn referred them to the 2nd Defendant offices but the Plaintiff refused to attend and opted to file this suit. The 1st Defendant therefore averred that he is the bonafide allottee of plots **No. 105/1070, 1071, 1072, and 1073** as per annexes **JMT 7 & 8**. The 1st Defendant confirmed that he has already obtained the transfer of his four plots from the 2nd Defendant and has also paid for the title documents at the land's office as evident by annexures **JMT 9 & 10** which are copies of the receipts.

7. The 1st Defendant also alleged that the Applicants/ Plaintiffs' Share Certificate does not indicate who, where or how the plaintiff was allocated his plot and he does not have the Beacon Certificate. Further, the Plaintiff pleadings are full of controversies and contradictions and the plaintiff has not established a **prima facie case** against the 1st Defendant with a probability of success nor has he been able to show that he stands to suffer irreparable loss and damage if the orders sought are not granted. The 1st Defendant therefore prayed for the plaintiffs' application to be dismissed with costs.

8. The Applicant filed a Further Affidavit and stated that the 1st Defendant's Replying Affidavit was full of falsehoods, inconsistencies and outright lies, meant to mislead the court. The Applicant stated that he is the original purchaser of the land at Embakasi Ranching Co. Ltd and he is one of the earlier shareholders and was allocated and shown his plot on the ground the 1st Defendant is claiming now. That the Court should call for the Original Survey Plan from the 2nd Defendant who gave the Plaintiff the **Provisional Letter of Allotment** on 28/11/1982. Plaintiff further averred that the assertion by 1st Defendant that he bought the plot from **Eliud Karanja Kigotho** was unfounded and baseless in view that no sale agreement was attached which is a mandatory requirement for any sale of land and furthermore, Plaintiff did not attach any instrument of transfer from the said **Eliud Karanja Kigotho** nor any receipt for payment of transfer fees. That the plaintiff had fenced the plot since 1983 and the 1st Defendant uprooted the said fence on 28/3/2012. He reiterated that 1st Defendant is not the bonafide owner of the said plot since he has not produced any documents on how he acquired it. The Plaintiff has **Provisional Letter** having been allocated the plot in 1982 and Share **Certificate No. 4233** dated 1/10/1972 and also paid for the bonus plot thereafter. The Plaintiff therefore prayed to Court to grant the prayers sought by him.

9. The Court has considered the Notice of Motion dated 21/1/2013 and the pleadings in totality. The Court has also considered the annexures attached to the pleadings. The issue for determination is whether the Applicant herein has met the threshold Law in the case of **Giella vs. Cassman Brown Ltd 1973 (EA)** which established the Principles to be considered in granting of the injunctive orders. The Applicant seeks to injunct the defendants from dealing in any way with plot **No. F 630** situate at Ruai; Nairobi within Embakasi Ranching Company Ltd.

10. The respondent filed his Replying Affidavit on 8/4/2013 but failed to turn up in Court for the opposition of the application on 24/4/2013. The Applicant told the Court that the application was not opposed and that he has established a prima facie case with probability of success.

He further submitted in Court that the Defendant has interfered with the boundaries and that though the Defendant alleged that he bought the land, there was no sale agreement or instruments of transfer

attached. Applicant confirmed that he will suffer irreparable loss if the said land is sold out as he is an old man who is now retired. That the balance of convenience would tilt in his favour as he has documents to support ownership of the land. Applicant also disputed the Respondent's documents of ownership. Applicant relied on the case of **Giella Vs. Cassman Brown & Co Ltd 1973 (EA 358)** to support his case. The Applicant herein told the Court that he purchased the plot in question (*F 630 situate in Ruai*) in 1984. He attached documents to that effect. Applicant further alleged that 2nd Defendant re – allocated the said plot to 1st Defendant without the applicant's knowledge. The Respondent on his part alleges that he is the bonafide owner of the plot in question and he purchased the plot from one **Eliud Karanja** . It is worthy to note that since each of the party herein claims ownership of the plot, then such a dispute can be resolved after hearing of the main suit.

However, the Plaintiff has attached several receipts dated as far back as 1976 to show that he had paid some amounts for purchase of shares at Embakasi Ranching Company Ltd. The Applicant has been an original purchaser of shares from Embakasi Ranching Company. The Respondent allegedly bought his shares from **one Eliud Karanja Kigotho in 1995**. By that time the Applicant had already purchased his shares.

The Applicant has therefore demonstrated that he has a prima facie case with Probability of Success. The fact that the Respondent is claiming ownership of the same suggests that Respondent can sell or dispose off the suit land. If that happens then, the Applicant will suffer irreparable loss which cannot be compensated by way of damages.

Having considered the instant application and the pleadings generally, the Court finds that this is a case that requires maintenance of **Status Quo** and prevention of any dealing until the suit is heard and determined.

For the above reasons, the Court allows the applicant's application in terms of Prayer No. 2 .

Costs of this Application to the Applicant.

Dated, signed and delivered this 17th day of May, 2013

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff/Respondent

.....For the 1st Defendant

.....For the 2nd Defendant

.....Court Clerk

L.N. GACHERU

JUDGE