



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 462 OF 2011

NAFTALI RUTHI KINYUA.....PLAINTIFF

VERSUS

PATRICK THUITA GACHURE..... 1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING

Coming up before me for determination is a Notice of Motion application dated 5/9/10 brought under Section 63(c) and (e), Order 40 rule 1, 2, 4 and 10 Order 51 Rule 1 of the civil Procedure Rules, 2010 and Section 52 of the ITPA (now repealed) and all other enabling provisions of law. It seeks the following orders.

- 1) Spent
- 2) That pending *Interpartes* hearing and determination of this application, this Honourable Court be pleased to grant a temporary injunction restraining the 1st Defendant whether by himself, servants, agents, employees or anyone claiming through him or on his behalf from doing the following acts or any of them that is to say from further trespassing on, encroaching, invading, occupying, developing, leasing, letting, selling or completing by conveyance or transfer of any sale or otherwise howsoever interfering with the Plaintiff's ownership of Title to and/or interest in the said land known as Land Reference No. 8285/1522 (Plot Number 133 Kariobangi Light Industries) (hereinafter referred to as "the Suit Property")
- 3) That pending *Interpartes* hearing and determination of this application, this Honourable Court be pleased to grant a temporary injunction restraining the 2nd Defendant whether by itself, servants, agents or employees from accepting payment from the 1st Defendant in relation to the Suit Property, selling, leasing, letting, facilitating the processing of title documents in favour of the 1st Defendant, transferring or otherwise howsoever interfering with the Plaintiff's ownership of, title and and/or interest in the Suit Property.
- 4) That prayers 2 and 3 above be granted pending hearing and determination of this suit.
- 5) That this honourable court be pleased to compel the 1st Defendant whether by himself, servants, agents or employees to remove the fence erected around the Suit Property.
- 6) That an order be made under Section 52 of the Indian Transfer Property Act (Amendment) Act 1959

that during the pendency of this suit all further registration or change of registration in the ownership leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in the Suit Property with any land registry, government department and all other registering authorities be prohibited.

7) That costs of this application be borne by the Defendants.

The application is premised upon the grounds appearing on the face of the application as well as the Supporting Affidavit of Naftali Ruthi Kinyua in which he stated that he is the proprietor of the Suit Property, having purchased the same in 1980 from one Peter Muthaura who had been allotted the Suit Property by the 2nd Defendant. He stated that he entered into a Sale Agreement with the said Peter Muthaura dated 17/1/80 and that he paid the purchase price in full. He further stated that he took the document to the 2nd Defendant in order to be registered as the owner of the Suit Property.

He said the 2nd Defendant calculated the stand premium and land rent payable which he duly settled and continued to do so until 2003. He further stated that in 2007, he visited the 2nd Defendant and renewed his application of issuance of a Title document. He said the 2nd Defendant computed the land rent and stand premium payable and informed him. He said he paid Ksh. 25,000/- as well as survey fees of Ksh. 15,000/- and conveyance fees of Ksh. 15,000/-. He said that he was also issued with the Deed Plan dated 9/8/11 in which the Suit Property was indicated as Land Reference Number 8285/1522. He further stated that as he awaited processing of the Title documents, he reliably learnt that the 1st Defendant had encroached on the Suit Property and purported to put up a fence of corrugated iron sheets on the front side of the Suit Property and had commenced digging up trenches in readiness for construction. He further averred that he reported the matter to the Area Chief who summoned the 1st Defendant and himself to produce their documents in support of their claim in ownership of the Suit Property. He stated that he complied. He further swore that the Area Chief also wrote to the Chief Valuer of the 2nd Defendant seeking information on the ownership of the Suit Property. That letter elicited no response. He further averred that the 1st Defendant wrote to the said Chief through his Advocates Rumba Kinuthia & Co. Advocates demanding that the Chief desist from denying the 1st Defendant's constitutional right to own and develop property. He further stated that the 2nd Defendant vide its letter of 16/12/08 confirmed that he was the owner of the Suit Property.

He further stated that he instructed his advocates on record to write to the 1st Defendant through his advocates and the Chief Valuer of the 2nd Defendant demanding that the 1st Defendant refrains from trespassing on the Suit Property or dealing with it in any manner as well as seeking information on the alleged ownership of the Suit Property by the 1st Defendant which letter was not favoured with a response. He further swore that he is now apprehensive that unless restrained by an order of this court, the Defendants will deprive him of the ownership, use and enjoyment of the Suit Property.

The Application is contested. The 1st Defendant filed his Replying Affidavit dated 17/1/12 in which he stated that the Plaintiff had misrepresented material facts and the record ought to be put straight. He swore that he was the lawful owner of the Suit Property as he bought it from one Samuel Onyango Osovo as an innocent purchaser for value without notice. He further stated that he entered into a Sale Agreement with the said Samuel Onyango Osovo who had been allotted the Suit Property by the 2nd Defendant and was advised to pay premium and ground rent which he did. He produced letters to that effect from the 2nd Defendant. He also produced copies of the payment receipts. He further stated that he moved into the Suit Property and commenced fencing using corrugated iron sheets in readiness for development and that this was done with authority from the 2nd defendant.

Further, the 2nd Defendant filed its Grounds of Opposition dated 14/11/12 in which it stated as follows:

1) That the orders sought by the Applicant do not properly lie within the jurisdiction of the Honourable

Court and the proper avenue available to him would lie in proceedings in the nature of Judicial Review.

- 2) That the 2nd Defendant is statutorily mandated to undertake and oversee appropriate allocation of all un-alienated land situated within the local limits of its jurisdiction and that it has always acted so in its capacity as the beneficial owner of such land.
- 3) That the application is based on the wrong assumption that proprietorship over allotted land can be proved merely by way of remitted rates and/or rent, whereas in fact the same can only be verified upon perfection of the title and verification thereof together with other related relevant documents.
- 4) That in the circumstances, the entire suit and application as presented and filed have failed to establish such a title and are therefore frivolous, speculative, untenable, procedurally bad in law and otherwise fatally defective and are, in essence, an abuse of the due process of the Honourable court deserving to be dismissed with costs.

The Plaintiff and the 2nd Defendants all filed their written submissions which have been read and considered by this court.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set in the case of **Giella v Cassman Brown [1973] EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a *prima facie* case with a probability of success? In the case of **Mrao v First American Bank of Kenya and Two Others [2003] KLR 125**, a *prima facie* case was described as:-

“ a prima facie case in a civil application includes but is not confined to a genuine and arguable case”. It is a case which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter “.

Has the Plaintiff/Applicant made out, a *prima facie* case with a probability of Success? The answer to this question relies heavily on whether or not the Plaintiff/applicant has proved his ownership over the Suit Property. Going by the evidence supplied by way of affidavit, the Plaintiff/Applicant sought to establish he is the lawful owner of the Suit Property indicating that he purchased, the Suit Property from one Peter Muthaura. In support of that claim, he produced a copy of the Sale agreement between the two and an affidavit sworn by the said Peter Muthaura. He also produced correspondence from the 2nd Defendant indicating that he was the owner of the Suit Property as per the records of the 2nd Defendant. He did not produce copies of any letter of Allotment from the 2nd Defendant or Title document. On the part of the 1st Defendant, he also fronted a similar claim to ownership of the Suit Property claiming he bought the Suit Property from one Samuel Onyango Osovo. Just like the Plaintiff, he produced the Sale Agreement entered into between the two and copies of correspondence from the 2nd Defendant confirming his ownership of the Suit Property. This clearly demonstrates that the claim to ownership over the Suit Property on the part of the Plaintiff and the 1st Defendant are almost equal and cannot be conclusively determined at this interlocutory stage of this Suit.

The 2nd Defendant who might have assisted in determining whose claim prevails merely raised a ground of opposition to the effect, inter alia, that proprietorship over the allotted land cannot be proved by way of proof of remitted rates and/or rent and that the same can only be verified upon perfection of Title. Clearly,

neither the Plaintiff nor the 1st Defendant were able to demonstrate their ownership on the Suit Property through perfected Title. The burden of proof having been on the Plaintiff who is the applicant for injunctive orders in this case, this court finds that he does not have a “genuine and arguable case” and has therefore not established a prima facie case with a probability of success.

The first condition in the *Giella* case having not been met, this court does not see any reason to further interrogate whether the remaining two conditions have been met.

Accordingly, in view of the foregoing, this court hereby dismisses the application. No order as to costs.

SIGNED AND DELIVERED AT NAIROBI ON THE 17TH DAY OF MAY 2013.

MARY M. GITUMBI

JUDGE