



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 771 of 2012

ANNE WANGUI GACHERU.....PLAINTIFF

-VERSUS-

TERESIA KITHENJI alias WAMUTHONI.....1ST DEFENDANT

ANNA WAMBUA.....2ND DEFENDANT

RULING

The plaintiff has brought the Notice of Motion application dated 30th October, 2012 seeking inter alia the following orders:-

1. That there be an interim injunction restraining the defendants, their agents, and/or servants from trespassing Plot No. C5 Kariobangi South KCC Commercial by carrying on any developments therein, alienating or in any other manner whatsoever trespassing on the same until further orders of this Honourable court.
2. That there be an injunction restraining the defendants, their agents and/or servants from trespassing on the suit premises by carrying on any developments therein, entering the same placing any construction materials therein alienating or in any other manner whatsoever interfering with the plaintiff's quiet and peaceful possession and determination of this suit.
3. That here be a mandatory injunction directing the defendants to remove any implements, tools and/or materials from the suit property and in default thereof the plaintiff be at liberty to remove the same at the defendants costs.
4. That the costs of the application be borne by the defendants.

The plaintiff has sworn a supporting affidavit dated 30th October, in support of the application. The supporting affidavit explains how the plaintiff got allocated the plot he describes as Plot No. C5 vide an allotment letter dated 8th January, 2002. The plaintiff states she has paid and continues to pay the appropriate out goings to the City Council of Nairobi.

According to the plaintiff trouble started in September, 2012 when she wanted to commence development and was denied access by the defendants who on their part had commenced construction on the plot claiming they owned the plot. Attempts at resolving the dispute administratively failed necessitating this suit.

The defendants oppose the application by the plaintiff and the 2nd defendant has filed a replying affidavit on behalf of herself and the 1st Defendant setting out the defendant's grounds for opposing the application.

Briefly the defendants claim to be in occupation and possession of plot Nos. 6 and 7 in KCC Village squatter settlement scheme and not plot No. C5 that the plaintiff claims. The defendants state that plot No. 6 was allocated to Daniel Kiarie a son of the 1st Defendant and plot No. 7 was allocated to John Kahugu Kamau husband to the 2nd defendant. The defendants have annexed copies of allotment letters to the replying affidavit and deny that they have anything to do with the plot described as C5 by the plaintiff. The defendants claim that it is the plaintiff or the plaintiff's agents who have constantly interfered with the defendant's occupation and use of their plots as unknown persons always pull down the defendants fence/wall whenever they erect one.

The parties respective counsel have filed written submissions but regrettably the submission and the pleadings fall short of identifying the various plots on the ground. The court has for instant reviewed the plaintiff's allocation letter showing the plot as C5 and the allotment letters relied upon by the defendants for plot Nos. 6 and 7 but there is no survey evidence to demonstrate where these plots are located on the ground. The letters of allotment exhibited by the defendants do not for instance have the prefix C6 and C7 as the plaintiff's C5 and there is therefore the question whether or not the plots are at the same location or not.

Evidence of a survey plan would have demonstrated the location of the plots in relation to each other.

Each of the parties claim to have been allocated the plots by the City Council of Nairobi and each of the parties pay the requisite dues to the council but it is unclear whether these plots have been surveyed and clearly delineated on any survey map. If they have been surveyed this evidence has not been availed.

Having regard to all the pleadings and the material tendered by the plaintiff I am not able to hold that the plaintiff has established a prima facie case with a probability of success to entitle the court to grant an injunctive relief as sought. In view of the assertion by the defendants that other persons other than themselves are the allottees of Plot Nos. 6 and 7 that the defendants occupy there is the question whether or not these persons would not be the appropriate parties to the suit. However the decision that the court has to make on the application does not turn on joinder or misjoinder of parties to the suit as I have expressed the view that the plaintiff has failed to establish that she has a prima facie case.

In the premises it is my finding and holding that the plaintiff has not demonstrated that she has a prima facie case with probability of success and therefore I need not consider the other conditions a party needs to satisfy before a court can grant an injunction in their favour namely that a party is likely to suffer irreparable loss damages unless the injunction is granted and/or that the balance of convenience tilts in favour of the party seeking the injunctive relief.

The plaintiffs Application dated 30th October, 2012 lacks any merit and the same is dismissed with costs to the defendants. The interim order granted in this matter stands discharged.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant