



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 58 OF 2013

JEPHITHA MBAKA MURAGE..... PLAINTIFF

VERSUS

ANN MUTHONI MUGO.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion application dated 9th January 2012, brought under Section 63 (e) and 3A of the Civil Procedure Act, Order 40 Rule 1 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya 2010. It seeks for the following orders:-

1. Spent.
2. That pending hearing and determination of this application this Honourable Court be pleased to grant the Plaintiff/Applicant a temporary injunction restraining the Defendant by herself, her agents and/or Servants from further trespassing onto and constructing on the Plaintiff's Plot No. A18 Kahawa West Phase II, Nairobi (hereinafter referred to as the "Suit Property").
3. That this Honourable Court be pleased to grant the Plaintiff/Applicant an injunction restraining the Defendant by herself, her agents and/or servants from further trespassing onto and constructing on the Suit Property pending the hearing and determination of the Suit.
4. That costs of this Application be provided for.

The application is premised upon the grounds appearing on the face of the application and the Supporting Affidavit of JEPHITHA MBAKA MURAGE sworn on 9th January 2013, in which he averred that he is the owner of the Suit Property through allotment by the City Council of Nairobi. A copy of the Allotment Letter dated 21/9/01 was produced. He further swore that on 23/7/07, the City Council of Nairobi signed a Lease Agreement with him in respect of the Suit Property. He produced a copy of the Lease Agreement. He further averred that he has paid all the dues to the City Council of Nairobi as required. He further stated that upon visiting the Suit Property on 7/1/2012, he found to his great surprise someone having dug foundation trenches and stockpiled building materials on the Suit Property. He further indicated that upon making enquiries, he was advised that the person responsible for the construction work at the Suit Property was the Defendant. He further stated that he immediately wrote a complaint letter to the City Council of Nairobi whereby he was advised to proceed to Court. He further swore that he had not sold the Suit Property to the Defendant neither had he consented to or authorized the said construction on the Suit Property.

The Application is contested. The Defendant filed her Replying Affidavit sworn on 16/1/13 in which she stated that she was the *bona fide* owner of the Suit Property having bought it from one JAMES MAINA MUIKIA on 25/11/11. She attached a copy of an Allotment Letter dated 27/10/92 in the name of KENNETH MWANGI. She further stated that JAMES MAINA MUIKIA had been allocated the Suit Property by the Council on 27/10/92. She swore that since the date of purchase, she has been in

possession of the Suit Property and was also paying ground rent and other Council dues without fail. She further indicated that the Council approved her building plans on the Suit Property on 15/3/12 and that she was in the process of erecting a building thereon. She indicated further that she has already invested a considerable amount of money totaling Ksh. 1 million to develop the Suit Property and she will suffer irreparable loss if the orders sought are granted.

Both Counsels for the Plaintiff/Applicant and the Defendant/Respondent filed their written submission which have been read and taken into consideration 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 case 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 established a *prima facie case* with a probability of success? Looking at the facts of this case and the evidence adduced by way of affidavit, it appears that the Plaintiff/Applicant has shown that he is indeed an allottee of the Suit Property and has produced a letter of Allotment in his name issued by the City Council of Nairobi. He has, in addition, produced a Lease Agreement between him and the City Council of Nairobi in respect of the Suit Property. To rival this, the Defendant/Respondent has produced a copy of Letter of Allotment in the name of KENNETH MWANGI issued by the City Council of Nairobi and dated 27/10/92 in respect of the Suit Property. She claims that the said KENNETH MWANGI sold the Suit Property to JAMES MAINA MUIKIA, who in turn sold to her the Suit Property on 25/11/11. She does not produce any documents in evidence proving the two transfers of the Suit Property. She does not have any documentary proof of her ownership of the Suit Property sufficient to the oust the Plaintiff/Applicant’s superior claim to the Suit Property. It emerges clearly to me that the Plaintiff has established a *prima facie case* with a high probability of success.

Will the Plaintiff/Applicant suffer irreparable injury which would not adequately be compensated with an award of damages? To that I state that land is unique and no one parcel can be equated in value to another. The value of the Suit Property can be ascertained and there is a valid argument that damages are available. However, I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **J. M. Gichanga Vs. Co-operative Bank of Kenya Ltd [2003] eKLR**.

In whose favour does the balance of convenience tilt? I rule that the Plaintiff/Applicant having established his legal right in respect of the Suit Property on a *prima facie* basis, the balance of convenience lies in his favour.

Overall, I am satisfied that the Plaintiff/Applicant has met the conditions for the grant of a temporary injunction. Accordingly, I hereby allow this application. No order as to costs.

SIGNED AND DELIVERED AT NAIROBI

ON THE 28TH DAY OF JUNE 2013.

MARY M. GITUMBI

JUDGE